U.S. Department of Labor

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Issue Date: 23 January 2006

Case No.: 2006-CAA-2

In the Matter of:

EDWARD A. SLAVIN, JR.,
Complainant

vs.

DONALD BREN SCHOOL OF ENVIRONMENTAL SCIENCE AND MANAGEMENT AT THE UNIVERSITY OF CALIFORNIA, SANTA BARBARA,

and

DEAN DENNIS J. AIGNER,
Respondents.

RECOMMENDED DECISION AND ORDER
MOTION TO DISMISS

PROCEDURAL BACKGROUND

This matter arises from a complaint filed with the Occupational Safety & Health Administration (OSHA), on or about 5 May 05, by Edward A. Slavin, Jr. (Complainant) against of the University of California at Santa Barbara (UCSB) Bren School of Environmental Science and Management and Dean Dennis J. Aigner (Respondents). Complainant's initial letter alleges Respondents failed to consider him for a faculty position in Political Science that they were seeking to fill and for which he was qualified, because of his previous environmental protection activities against institutions which provided funding to the school and in retaliation for a previous whistleblower complaint against them.[1] OSHA issued a report of investigation on or about 21 Sep 05. The report recommended that the complaint be denied.

[1] That case was referred to formal hearing and eventually dismissed during pre-hearing motions. *Slavin v. UCSB et al.* 2005-CAA-11 (Jan 19 2006).

On or about 22 Oct 05, Complainant requested an open hearing and incorporated by reference two discovery requests from his prior whistleblower case. On or about 31 Oct 05, an order was issued setting the hearing for 20 Feb 06 and establishing a pretrial schedule.

On or about 23 Nov 05, Complainant filed a formal complaint, which added John M. Melack as an additional respondent and incorporated by reference his prior complaint and all attachments.[2]

The previous complaint was based on the employee protection provisions of the Clean Air Act (CAA),[3] the Comprehensive Environmental Response Compensation and Liability Act (CERCLA),[4] the Federal Water Pollution Control Act (FWPCA),[5] the Safe Drinking Water Act (SDWA),[6] the Solid Waste Disposal Act (SWDA),[7] the Toxic Substances Control Act (TSCA),[8] and the applicable regulations.[9] It alleged that the UCSB's Bren School of Environmental Science and Management, with Dean Dennis J. Aigner, worked for and received funds from the Department of Energy (DOE), the Environmental Protection Agency (EPA), and Southern California Edison (SCE).

It further stated that Complainant had a history of investigating those institutions, reporting wrongdoing by them, and advocating against them.

Complainant also alleged that (1) in September of 2004 he applied for a Corporate Environmental Management position advertised by the Bren School in the London Economist, and for any other pending vacancies; (2) the application materials he provided included notice of his whistleblower activities; and (3) in November of 2004 he was informed that he was not suitable for the position.

The salient differences in Complainant's current complaint are that it involves a different faculty position, adds the current Dean of the Bren School as a party and includes his previous whistleblower action as a protected activity for which he was discriminated against by his non-selection.

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[2] Complainant failed to include Respondent Melack in his original administrative complaint to OSHA. If indeed Respondent Melack is more than simply an officer/agent of UCSB and has independent status as an employer, such a failure would be grounds to dismiss.
[3] 42 U.S.C. § 7622.
[4] 42 U.S.C. § 9610.
[5] 33 U.S.C. § 1367.
[6] 42 U.S.C. § 300j-9.
[7] 42 U.S.C. § 6971.
[8] 15 U.S.C. § 2622.
[9] 29 C.F.R. Part 24.

On or about 5 Dec 05, Respondent filed a motion to dismiss and abate further proceedings until the motion was ruled upon. On 15 Dec 05, Complainant filed a motion stating Respondent had not cooperated in discovery and requesting an enlargement of time to respond to any motion until Respondents meet their discovery obligations. It also sought consolidation of this case with the then still pending first complaint. Complainant did not respond to Respondent's motion to dismiss and abate.

LEGAL STANDARD OF REVIEW

In situations not specifically addressed by the rules of practice and procedure applicable to administrative hearings under environmental whistleblower statutes, the Federal Rules of Civil Procedure apply.[10] While the administrative regulations do not address motions such as Respondent's, the Federal Rules of Civil Procedure do. In motions to dismiss for legal insufficiency the allegations in the complaint are accepted as true. No evidentiary analysis or consideration is required. The only question is whether, assuming everything he alleges is true, Complainant has a valid legal cause of action upon which he can recover.[11]

ISSUES

For the purpose of this motion, the allegations in Complainant's pleadings and all reasonable inferences in favor of Complainant must be accepted as true. Essentially, Complainant alleges that: (1) he was qualified and properly applied for the Political Science faculty position advertised and sought to be filled by UCSB's Bren School; (2) he had been involved in protected activities as defined under the various acts; (3) the Bren School knew of his application, knew he was qualified, and knew of his protected activities; (4) the Bren School refused to hire him because of those protected activities; (5) Respondents Aigner and Melack were Deans of the Bren School; (6) Respondents Aigner and Melack were aware that Complainant had applied and was qualified for the position, but made the decision not to hire Complainant because of his protected activity; and (7) UCSB received both federal and private funds for doing work in areas addressed by Complainant's whistle blowing activities.

Upon that factual predicate rest the pivotal questions in this motion. Is UCSB insulated from action under these statutes because of sovereign immunity? Do the statutes invoked in this action establish jurisdiction over an individual employee of an employer, even if that employee is the company's senior manager responsible for the company's actions, the complainant's ultimate supervisor, and the individual who made the decision to take adverse action against the complainant?

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[10] 29 C.F.R. §18.1(a).

[11] F.R.C.P. 12(b)(6); *Davis Next Friend LaShonda D. v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999).

SOVEREIGN IMMUNITY

State Immunity in General

A basic tenet of American constitutional law is that states enjoy sovereign immunity from private suits.[12] Congressional attempts to subject states to lawsuits brought by private parties have been held unconstitutional.[13] This immunity applies in administrative proceedings[14] and whether the suit is brought for monetary damages or some other type of relief.[15] Whether a particular state agency is an arm of the state and therefore entitled to Eleventh Amendment immunity is a question of federal law. The University of California has been determined to be an arm of the state and entitled to immunity.[16]

Abrogation

There is an exception to the general principle of state sovereign immunity. "[T]he Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment."[17] Thus, Congress may authorize private parties to pursue lawsuits against states if doing so would further those federal constitutional interests.[18] However, to properly subject states to suits by individuals, Congress must make "its intention unmistakably clear in the language of the statute."[19] "[A] general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment."[20]

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[12] U.S. Const. amend. XI.

[13] *See e.g., Alden v. Maine,* 527 U.S. 706 (1999).

[14] *Federal Maritime Comm'n v. South Carolina State Ports,* 535 U.S. 743, 755-57 (2002); *Ohio Envtl. Prot. Agency v. United States Dep't of Labor*, 121 F.Supp.2d 1155 (S.D. Ohio 2000); *Rhode Island v. United States*, 115 F.Supp.2d 269 (D.R.I. 2000).

[15] *Federal Maritime Com'n,* 535 U.S. at 765.

[16] *Regents of the University of California v. Doe*, 519 U.S. 425 (1997).

[17] *See e.g., Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976); *Clark v. State of Cal.*, 123 F.3d 1267 (9th Cir. 1997).

[18] *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000); *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666 (1999).

[19] *Kimel*, 528 U.S. at 73 (quoting *Dellmuth v. Muth,* 491 U.S. 223, 228 (1989) (quoting *Atascadero*,473 U.S. at 242)).

[20] *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 55-56 (1996) (quoting *Atascadero*, 473 U.S. at 246).

Waiver

Such immunity is not jurisdictional and may be waived by the state by either (1) an express provision in statute or constitution or (2) participation in federal funding programs.[21]

Explicit Waiver

However, any statutory or constitutional waiver cannot be implied. It must be unequivocally expressed.[22] A state is not deemed to have waived its immunity unless the waiver is "stated by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction."[23] Such a waiver must also clearly indicate the intention of the state to subject itself to suit in federal court.[24]

Constructive Waiver

Similarly, while a waiver may be contained in a state's agreement to accept federal funds or to participate in a federal program that makes the state's waiver a condition of payment or participation, the mere receipt of federal funds cannot establish that a state has consented to suit in federal court. Acceptance of federal funds and/or participation in a federal program alone is insufficient to establish a waiver.[25] Likewise, a federal government agreement to indemnify a state instrumentality against the costs of litigation, including adverse judgments, does not divest the state of Eleventh Amendment immunity.[26] Mere state participation in a federally assisted program is insufficient to waive immunity.[27] The federal program must include a clear expression of Congressional intent to condition participation on a state's waiver of immunity and a corresponding "unequivocal indication that the State intends to consent to federal jurisdiction that otherwise would be barred by the Eleventh Amendment."[28]

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[21] *Litman v. George Mason University*, 186 F.3d 544 (4th Cir. 1999).
[22] *U.S. v. Mitchell*, 445 U.S. 535 (1980).
[23] *Edelman v. Jordan*, 415 U.S. 651, 673 (1974).
[24] *Atascadero*, 473 U.S. at 247; *Smith v. Reeves,* 178 U.S. 436 (1900).
[25] *Atascadero*, 473 U.S. at 245-47.
[26] *Regents of the University of California v. Doe*, 519 U.S. 425 (1997).
[27] *Edelman*, 415 U.S. at 673.
[28] *Atascadero*, 473 U.S. at 238 n.1, 247.

Analysis

In this case, Complainant seeks relief under six federal statutes: CAA, CERCLA, FWPCA, SDWA, SWDA, and TSCA. Trial and appellate authorities have examined the statutes and found none contain the unequivocal language required to find a federal abrogation of state sovereign immunity. Federal courts have addressed the CAA, FWPCA, and SWDA.[29] In a very recent decision, the Administrative Review Board reviewed all six applicable statutes and found state sovereign immunity applied in each one.[30] Consequently, state sovereign immunity has not been abrogated and applies in this case.

Complainant cited no expressed California constitutional provision or statute which demonstrates a clear intent to waive its immunity. Accordingly, there is no explicit waiver of immunity. In addition, a review of the applicable statutes discloses no language evincing an unequivocal Congressional intent that any type of state action constitutes a waiver of state sovereign immunity and Complainant did not identify or cite any such language.[31] As a result, the principle of constructive waiver of immunity does not apply.

In short, there is no legal basis upon which to find that Respondent UCSB is not immune from this adversarial administrative process.

Respondent UCSB is immune and the complaint against it must be dismissed.

JURISDICTION OVER INDIVIDUALS

The CAA provides that no ***employer*** may discriminate against any employee and that any employee who believes that he has been discriminated against by any ***person*** may file a complaint seeking an order that the ***person*** who committed such violation abate the violation, reinstate the complainant (including back pay), and provide

[29] *Connecticut Dept. of Envtl. Protection v. O.S.H.A.*, 356 F.3d 226 (2nd Cir. 2004); *Rhode Island v. U.S.*, 301 F.Supp.2d 151 (D.R.I. 2004).

[30] *Powers v. Tenn. Dep't of Environment and Conservation and Tenn. Military Dep't*, 2003-CAA-8, 2003-CAA-16 (June 30, 2005); *see also* Ewald v. Commonwealth of Virginia, 1989-SDW-1 (Dec 05 2001).

[31] *Cf.* 42 U.S.C. § 12202 (2004) (Americans with Disabilities Act: "A State shall not be immune under the eleventh amendment.") *and* 42 U.S.C. § 2000d-7(a)(1) (2004) (Rehabilitation Act of 1973: "A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973.").

compensatory damages. It defines the term "person" to include an individual, corporation, partnership, association, state, municipality, political subdivision of a state, and any agency, department, or instrumentality of the United States and any officer, agent, or employee thereof.[32]

The CERCLA provides that no ***person*** shall discriminate against any employee and that any employee who believes that he has been discriminated against by any ***person*** may apply for abatement of the violation and reinstatement with compensation. It defines "person" to mean an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, state, municipality, commission, political subdivision of a state, or any interstate body.[33]

The FWPCA provides that no ***person*** shall discriminate against any employee and that any employee who believes that he has been discriminated against by any ***person*** may apply for abatement of the violation or reinstatement with compensation. It defines "person" as an individual, corporation, partnership, association, state, municipality, commission, or political subdivision of a state, or any interstate body.[34]

The SDWA provides that no ***employer*** may discriminate against any employee and that any employee who believes that he has been discriminated against by any ***person*** may file a complaint seeking abatement of the violation, reinstatement with compensation, compensatory damages, and exemplary damages. [35]

The SWDA provides that no ***person*** shall discriminate against any employee and that any employee who believes that he has been discriminated against may apply for abatement including, but not limited to, reinstatement with compensation. It defines "person" to mean an individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, state, municipality, commission, political subdivision of a state, or any interstate body and shall include each department, agency, and instrumentality of the United States.[36]

The TSCA provides that no ***employer*** may discriminate against any employee and that any employee who believes he has been discriminated against by any ***person*** may file for abatement of the violation, reinstatement with compensation, compensatory damages, and where appropriate, exemplary damages.[37]

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[32] 42 U.S.C. § 7622 (***emphasis added***).
[33] 42 U.S.C. § 9610 (***emphasis added***).
[34] 33 U.S.C. § 1367 (***emphasis added***).
[35] 42 U.S.C. § 300j-9 (***emphasis added***).
[36] 42 U.S.C. § 6971 (***emphasis added***).
[37] 15 U.S.C. § 2622 (***emphasis added***).

The Department of Labor's jurisdiction under the CAA, TSCA, SWDA, and CERCLA, extends only to "employers" and "employees." A mere supervisory relationship is insufficient and the respondent must be the employer of the complainant.[38] An employment relationship between the complainant and respondent is an essential element of any claim brought under the environmental whistleblower provisions, and the failure to allege one is grounds to dismiss for failure to state a claim upon which relief can be granted.[39]

Although the CAA refers to both "employers" and "persons," a federal employee is not a proper respondent in a CAA complaint, and only employers are subject to the employee protection provisions of the CAA.[40] The same holds true for the SDWA.[41] The same conclusion was reached regarding similar language in the Energy Reorganization Act.[42]

Although the SWDA does not use the term "employer" and refers instead to persons, the remedy provisions of that act make sense only when viewed in terms of a respondent employer, not a respondent co-employee or supervisor.[43] Under the whistleblower protection provisions of the FWCPA, SWDA and CERCLA, a complainant must establish that the respondent was his employer or acted in the capacity of his employer.[44]

The clear weight of legal authority holds that under the environmental whistleblower statutes applicable in this case, a complainant must seek relief from an employer. Respondents Aigner and Melack may have been the Dean of the Bren School. They may also have been the senior leader and manager for the school, responsible for negotiating salaries on behalf of the school and determining each faculty member's work assignments. They may have been ultimately responsible for the decision not to hire Complainant or even personally made that decision.

Nonetheless, the employer in this case was neither Respondent Aigner nor Respondent Melack, but rather UCSB. Had he been hired, Complainant would not have been an employee of the Dean, but rather an employee of UCSB. Complainant would not

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[38] *Kesterson v. Y 12 Nuclear Weapons Plant, et al.*, 95-CAA-00012 *aff'd* ARB 96-173 (Apr 8 1997).
[39] *Varnadore v. Oak Ridge Nat'l Lab., et al.*, ARB June 14, 1996.
[40] *Stephenson v. National Aeronautics & Space Administration*, 1994-TSC-5 (Sec'y July 3, 1995)
[41] *Gass v. DOE et al.*, 2002-CAA-2 (Nov 20 2002).
[42] *Bath v. U.S. Nuclear Regulatory Commission*, 2001-ERA-41, ARB 02-041 (Sep 29 2003).
[43] *Id.*
[44] *Lewis v. Synagro Technologies, Inc.*, 2002-CAA-12 and 14; ARB 02-072 (Feb 27 2004).

have had any contractual relationship with the Dean. Had Complainant in fact been hired, his status as an employee would not have changed when Respondent Aigner left his position as Dean and Respondent Melack replaced him. His employer would have continued to be UCSB.

Had either Dean decided to hire Complainant, they still would not have been his employer. Accordingly, neither is subject to the employee protection provisions of the statutes invoked in this case. Complainant's allegations may or may not be factually accurate or otherwise legally meritorious. In any case, this is not the proper forum for those allegations.

RECOMMENDED DECISION AND ORDER

The motion to dismiss is **GRANTED** and the complaint **DISMISSED**. The hearing scheduled for **Monday, February 20, 2006** is **CANCELED**.

So ORDERED.

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PATRICK M. ROSENOW
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