In the Matter of:

COLEEN L. POWERS,

COMPLAINANT,

v.

TENNESSEE DEPARTMENT OF ENVIRONMENT AND CONSERVATION AND TENNESSEE MILITARY DEPARTMENT,

RESPONDENTS.

ARB CASE NOS. 03-061
03-125

ALJ CASE NOS. 2003-CAA-8
2003-CAA-16

DATE: June 30, 2005
(Reissued August 16, 2005)

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Edward A. Slavin, Jr., Esq., *St. Augustine, Florida* (No. 03-061)
Coleen L. Powers, pro se, *Memphis, Tennessee* (No. 03-125)

For the Respondents:
R. Jan. Jennings, Esq.; Carrol D. Kilgore, Esq., Branstetter, *Kilgore, Stranch & Jennings, Nashville, Tennessee*

FINAL DECISION AND ORDER

Colleen L. Powers filed whistleblower complaints against the Tennessee Department of Environment and Conservation (TDEC) and later the Tennessee Military Department (TMD) under the employee protection provisions of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C.A. § 9610 (West 1995); the Solid Waste Disposal Act (SWDA), also known as the Resource Conservation and Recovery Act (RCRA), 42 U.S.C.A. § 6971 (West 2003); the Toxic Substances Control Act (TSCA), 15 U.S.C.A. § 2622 (West 1998); the Federal Water

Pollution Control Act (FWPCA), 33 U.S.C.A. § 1367 (West 2001); the Safe Drinking Water Act (SDWA), 42 U.S.C.A. § 300j-9 (West 2003); and the Clean Air Act (CAA), 42 U.S.C.A. § 7622 (West 2003) (the "environmental whistleblower protection provisions"). A United States Department of Labor (DOL) Administrative Law Judge (ALJ) granted TDEC and TMD's motions to dismiss on state sovereign immunity grounds and denied Powers's motions to amend the complaints to add two state employees and a private party as respondents. *Powers v. TDEC*, ALJ No. 2003-CAA-8 (Feb. 11, 2003) (Recommended Decision and Order, "R. D. & O. I"); *Powers v. TDEC and TMD*, 2003-CAA-16 (July 14, 2003) (R. D. & O. II"). As we now explain, we accept the ALJ's recommendations and dismiss the complaints.

BACKGROUND

The State of Tennessee Department of Environment and Conservation employed Powers as an environmental compliance inspector. On August 26, 2001, Powers filed a complaint with DOL's Occupational Safety and Health Administration (OSHA) alleging that TDEC violated the environmental whistleblower protection provisions when it proposed an adverse employment action in retaliation for her protected activity. The environmental whistleblower protection provisions prohibit employers from discharging or otherwise discriminating against any employee "with respect to the employee's compensation, terms, conditions, or privileges of employment" because the employee engaged in protected activities such as initiating, reporting, or testifying in any proceeding regarding environmental safety or health concerns. *See* 29 C.F.R. § 24.2 (2004). On October 22, 2001, TDEC terminated her employment, and Powers amended her pending OSHA complaint.

OSHA investigated Powers's complaint against TDEC. OSHA found that Powers did engage in protected activity but that Powers also engaged in insubordination and other misconduct, which placed her outside the bounds of protected activity and gave TDEC a legitimate non-discriminatory reason for the termination of her employment. OSHA rejected Powers's request to add Kim Kirk, Assistant General Counsel for TDEC, TDEC Commissioner Milton Hamilton (also a member of the Tennessee Homeland Security Council), and Pollution Control Industries (PCI), a private company, as respondents in her complaint.

In November 2002, Powers filed a second whistleblower complaint, naming TDEC, TMD, and TDEC Commissioner Hamilton and TDEC Assistant General Counsel Kirk as respondents. In this complaint, Powers alleged that TMD deliberately failed to give her notice of the action she had to take to remain on TMD's list of eligible applicants for employment. Powers further alleged that TDEC and TMD were blacklisting her because of her first whistleblower complaint against TDEC. OSHA investigated the blacklisting complaint against TDEC and TMD. OSHA found that there was no direct or indirect evidence that TMD had knowledge of Powers's prior complaints or that anyone from TDEC had any communication with TMD about Powers's protected activity. In its investigative report, OSHA identified only TDEC and TMD as respondents.

After OSHA investigated Powers's complaints and concluded that each lacked merit, Powers invoked her right under 29 C.F.R. § 24.4(d)(3) to a hearing before a DOL ALJ on each complaint. TDEC and TMD moved for dismissal on grounds of state sovereign immunity. Powers again moved to add two state employees and a private entity as party respondents. After the ALJ's rulings, R. D. & O. I, II, Powers timely petitioned for review by this Board, and we consolidated the cases for disposition.

ISSUES PRESENTED

Although the positions of the parties are not well briefed or argued,[1] we address the following issues in disposing of Powers's complaints:

1. Whether state sovereign immunity bars Powers's environmental whistleblower claims against TDEC and TMD.

2. Whether the doctrine of equitable estoppel prevents TDEC and TMD from asserting sovereign immunity.

3. Whether the ALJ erred in denying Powers's motions to add additional respondents.

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[1] Counsel initially represented Powers in both cases. On May 22, 2004, Powers advised the Board that counsel had ceased to represent her in August 2003 and that she would be acting pro se in both cases. Notice of Pro Se Status Filing, *Powers v. TDEC*, ARB No. 03-061; *Powers v. TDEC and TMD*, ARB No. 03-125 (May 22, 2004). Counsel for Powers filed briefs and other documents on her behalf in ARB No. 03-061. In ARB No. 03-125, Powers filed a pro se brief in which she sought to rely on her former counsel's submissions concerning sovereign immunity. Complainant's *Pro Se* Brief filed Sept. 14, 2003 at 2. In light of Powers's pro se status and the fact that the two cases are consolidated, we have considered the arguments briefed by counsel in ARB No. 03-061 in both cases. We note, however, that on August 27, 2004, the Supreme Court of Tennessee suspended Edward A. Slavin from the practice of law for two years. *Bd. of Prof. Resp. of the Sup. Ct. of Tenn. v. Slavin*, 145 S.W.3d 538 (Tenn. 2004). We have issued an order giving reciprocal effect to the Tennessee Supreme Court's suspension. *Edward A. Slavin, Jr.* ARB No. 04-172 (Apr. 12, 2005). Accordingly, while we will consider documents Slavin has filed on Powers's behalf at the Board prior to April 12, 2005, we will not permit him to represent Powers or any other party (other than himself) before the Board after that date until the Supreme Court of Tennessee lifts its suspension.

JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board has jurisdiction to review the ALJ's recommended decisions pursuant to 29 C.F.R. § 24.8 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), including, inter alia, the environmental whistleblower protection provisions).

Under the Administrative Procedure Act, the ARB, as the Secretary's designee, acts with all the powers the Secretary would possess in rendering a decision under the whistleblower statutes. The ARB engages in de novo review of the ALJ's findings of fact and conclusions of law. See 5 U.S.C.A. § 557(b) (West 1996); 29 C.F.R. § 24.8; *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1571-1572 (11th Cir. 1997); *Devers v. Kaiser-Hill*, ARB No. 03-113, ALJ No. 01-SWD-3, slip op. at 4 (ARB Mar. 31, 2005).

Where an ALJ considers pleadings in addition to a complainant's complaint, we treat the ALJ's dismissal as a summary decision pursuant to 29 C.F.R. §§ 18.40, 18.41. *See Farmer v. Alaska Dep't of Transp. & Pub. Facilities*, ARB No. 04-002, ALJ No. 2003-ERA-11, slip op. at 3 (ARB Dec. 17, 2004); *Ewald v. Commonweatlth 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 granting summary decision in whistleblower cases is analogous to summary judgment under the Fed. R. Civ. P. 56(e). "[The ALJ] may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 29 C.F.R. § 18.40(d). The ARB reviews an ALJ's recommended grant of summary decision de novo. *Farmer*, slip op. at 4; *Ewald*, slip op. at 4.

DISCUSSION

I. State Sovereign Immunity

A. Legal standards

The Eleventh Amendment prohibits a citizen of one state from bringing an action against another state in federal court.[2] Judicial interpretation has applied Eleventh Amendment immunity to citizens' actions against their own state in federal court, *Hans v. Louisiana*, 134 U.S. 1 (1890); to claims for money damages against agencies of state

[2] "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.

governments in federal court, *Andrews v. J.M. Daw*, 201 F.3d 521 (4th Cir. 2000); *Santiago v. N.Y.S. Dep't of Corr. Servs.*, 945 F.2d 25 (2d Cir. 1991); and to the adjudication of private parties' complaints against states before federal administrative agencies where the proceedings sufficiently resemble civil litigation in federal courts. *Federal Mar. Comm'n v. South Carolina Ports Auth*., 535 U.S. 743, 760 (2002) (state sovereign immunity barred private entity's litigation against South Carolina before Federal Maritime Commission). Congress can abrogate sovereign immunity under its power to enforce the Equal Protection Clause and other guarantees of the Fourteenth Amendment,[3] *e.g., Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), or a state can waive its immunity by consenting to suit, *e.g., Clark v. Barnard*, 108 U.S. 436, 447-448 (1883), but the intent to abrogate or to 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).

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. Georgia 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 CERCLA and SWDA. 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 v. Virginia Dep't of Waste Mgmt.*, ARB No. 02-027, ALJ No. 1989-SDW-1 (ARB Dec. 19, 2003), 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 CERCLA, SWDA, the Clean Water Act (CWA), 33 U.S.C.A. § 1367 (West 2001) (CWA), and SDWA. We ruled that the employee protection provisions at issue did not unmistakably indicate that Congress intended to abrogate state sovereign immunity from whistleblower complaints. For instance, 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. *See also Farmer*, slip op. at 7 (state sovereign immunity barred DOL adjudication of complainant's Energy Reorganization Act (ERA), 42 U.S.C.A. § 5851 (West 2003), whistleblower claim).

On state immunity grounds, 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.

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[3] "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5.

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), and other federal courts have held that Congress did not abrogate states' immunity from whistleblower claims, s*ee Connecticut Dep't of Envtl. Prot. v. OSHA*, 138 F. Supp. 2d 285, 296-97 (D. Conn. 2001) (filing, inter alia, CWA and SWDA claim with OSHA by private party against state agency violated that state's sovereign immunity); *Florida v. United States*, 133 F. Supp. 2d 1280, 1291 (N.D. Fla. 2001) (administrative hearing involving CWA, SWDA, and CERCLA, among others, violated state's sovereign immunity); *Ohio Envtl. Prot. Agency v. United States Dep't of Labor*, 121 F. Supp. 2d 1155, 1162 (S.D. Ohio 2000) (CERCLA, SDWA, SWDA, and CWA whistleblower complaint proceedings before ALJ and ARB violated states' sovereign immunity).

In *Pastor v. Dep't 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 ERA's whistleblower protection provision. 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. Because "persons" was not defined in the ERA to include the Federal Government, there was no unequivocal waiver of sovereign immunity. *Id*. at 19.

B. Immunity not abrogated

Against this background, we review Powers's contention that Eleventh Amendment immunity should not bar litigation of her environmental whistleblower complaints. Powers Opening Brief in ARB No. 03-061, at 6-11; Powers pro se Brief in ARB No. 03-125 at 2, 5. On the question of the abrogation of state sovereign immunity, Powers raises two points worthy of discussion: first, that the Supreme Court's decision in *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003), holding that state employees may recover money damages in federal court for violations of the Family and Medical Leave Act (FMLA), 29 U.S.C.A. § 2612(a)(1)(C) (West 1999), compels a reversal of our precedents; and second, that the CERCLA's legislative history shows congressional intent to abrogate immunity. Powers Rebuttal Brief in ARB No. 03-061 (*passim*).

We deal with the *Hibbs* issue first. *Hibbs* reiterated the Supreme Court standard that Congress may abrogate Eleventh Amendment immunity in federal court if (1) it makes its intention to abrogate unmistakably clear in the language of the statute and (2) acts pursuant to a valid exercise of its power under § 5, the enforcement section, of the Fourteenth Amendment. *Hibbs*, 538 U.S. at 726; *see also Tennessee v. Lane*, 124 S.Ct. 1978, 1985 (2004). Congress made its intention to abrogate unmistakably clear in the FMLA. *Hibbs*, 538 U.S. at 726. Employees can seek money damages in Federal or state

court against any "employer (including a public agency)" that violates the Act. 29 U.S.C.A. §§ 2615(a)(1), § 2617(a)(2). Congress has defined "public agency" to include both "the government of a State or political subdivision thereof" and "any agency of . . . a State, or political subdivision of a State." 29 U.S.C.A. § 2611(4)(A)(iii); 29 U.S.C.A. § 203(x). Therefore, the Court held that the clear statement rule was satisfied.[4] *Hibbs*, 538 U.S. at 726. The balance of the decision dealt with the second prong of the test, namely whether Congress acted within its constitutional authority. (The Court ruled that it did.) *Id.* at 740.

The Court's analysis in *Hibbs* supports our prior holdings. While CERCLA, SWDA, TSCA, FWPCA, SDWA, and CAA may require states to comply with the regulatory provisions of those acts, they do not provide for private rights of action for money damages against states and state agencies. Under CERCLA, a "person" (defined to include a state, 42 U.S.C.A. § 9601(21)) is prohibited from discriminating against whistleblowers, 42 U.S.C.A. § 9610(a), but only a "party" who discriminated is subject to the process and remedies for discrimination. § 9610(b). Because "party" is not defined in CERCLA to include states, there is no unequivocal abrogation of sovereign immunity. Further, the fact that § 9659(a)(1) permits citizen suits for enforcement only "to the extent permitted by the [E]leventh [A]mendment" suggests only a limited abrogation of immunity. § 9659(a)(1). *Cf. Pastor.* The same analysis applies to FWPCA, *see* 33 U.S.C.A. §§ 1367(a)-(b), 362(3), 1365(a)(1)(ii), and SWDA, *see* 42 U.S.C.A. §§ 6971(a)-(b), 6903(1), 6972(a)(1)(A).

Similarly, pursuant 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). The same analysis applies to SDWA, *see* 42 U.S.C.A. §§ 300j-9(j)(1), (2)(B)(i), 300f(12), 300j-8(a)(1)(B).

We pause to reiterate that, to effect an abrogation of state sovereign immunity, Congress must not only express its intent to do so by the terms and language of the

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[4] The FMLA statutory scheme also prohibits any "person" from discharging or otherwise discriminating against any "individual" for engaging in whistleblowing activity. "Person" is not defined to include states. 29 U.S.C.A. § 2611(8); 29 U.S.C.A. §§ 203(a). The Supreme Court did not address whether Congress intended to abrogate state sovereign immunity under this section; nor do we.

statute, but it must also act pursuant to a valid grant of constitutional authority under § 5. *Hibbs; Lane.* Powers argues that the second condition for abrogation – that Congress had the power to abrogate state sovereign immunity from environmental whistleblower suits – is also met. Powers Rebuttal Brief in *Powers v. TDEC*, ARB No. 03-016 (*passim*). Because we have held under the clear statement rule that Congress did not intend to abrogate, *Hibbs; Ewald; Cannamela; Pastor*, we need not address whether Congress had the power to abrogate under the Fourteenth Amendment.

We easily dispose of Powers's second point, the legislative intent argument. Powers asserts that Congress abrogated state sovereign immunity at least for actions to enforce the CERCLA whistleblower provision; and, therefore, she has a private right of money damages against the state and state officials. Powers Rebuttal Brief in ARB No. 03-061 (*passim*), Powers pro se Brief at 3. Powers relies on a statement in CERCLA's legislative history. "This section [the whistleblower provision codified at § 9610] is applicable, of course, to Federal, State or local employees to the same extent as any employee of a private employer." H. R. Rep. No. 294, 1977 U.S.C.C.A.N. 1077, 1404-05.

Although a statute's legislative history may be informative in other situations, the Supreme Court has made it clear that the legislative history cannot supply an abrogation that does not appear clearly in the statute itself. *Kimel v. Florida Bd. of Regents,* 528 U.S. 62, 73 (2000) (Congress may abrogate the states' constitutionally secured immunity from suit in a federal forum only by "making its intention unmistakably clear in the language of the statute"). The House Report on which Powers relies is insufficient, as a matter of law, to support the conclusion that Congress intended to abrogate state sovereign immunity with respect to CERCLA's whistleblower provision. In sum, we conclude that there was no abrogation and turn to the issue of waiver.

C. Immunity not waived

Powers contends that TDEC and the State of Tennessee impliedly waived sovereign immunity under the environmental acts by accepting millions of dollars in federal aid for environmental programs. Powers Opening Brief in ARB No. 03-061, at 11-16; Powers pro se Brief in ARB No. 03-125 at 6. But Tennessee's asserted acceptance of federal funds for environmental programs does not constitute waiver of its sovereign immunity.

We addressed (and rejected) the argument Powers makes in *Ewald*, where we said, "[T]he mere receipt of federal funds cannot establish that a state has waived its immunity" *Ewald*, slip op. at 8, *citing Atascadero State Hosp. v. Scanlon,* 473 U.S. 234, 246 (1985). The complainant argued that, since Virginia accepted Superfund grant money from the Environmental Protection Agency under CERCLA, it agreed not to discriminate against whistleblowers and also consented to its regulatory provisions, i.e., litigating whistleblower claims in the Department of Labor. But we wrote:

> Whether Virginia "understood," "explicitly" or otherwise, that federal funds would be provided only if it agreed to be bound by the provisions of CERCLA and its implementing regulations is not the test for determining whether it waived its immunity. . . . A state will be deemed to have waived its immunity "only where stated '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, *citing Edelman*, 415 U.S. at 673 (citation omitted).

In *Ewald*, we held that there was no clear, unambiguous expression of waiver of immunity from DOL whistleblower prosecution by a state's acceptance of Superfund money. *Id.* Likewise, Powers has not identified statutory language that could even arguably be construed as conditioning federal funding on waiver of state sovereign immunity from private environmental whistleblower suits. Accordingly, the Board concludes that Tennessee's purported acceptance of federal funds to enforce the environmental acts does not constitute waiver of sovereign immunity.

II. Equitable Estoppel

Powers next claims that the doctrine of equitable estoppel should prevent TDEC and TMD from asserting sovereign immunity in *Powers v. TDEC and TMD.* Powers pro se Brief in ARB No. 03-125 at 9. Remarkably, Powers states that, in her decision to prosecute her whistleblower claim, she relied on a voice mail message from an employee of the United States Environmental Protection Agency (EPA) stating that state employers should be subject to federal environmental whistleblower acts. This message, Powers contends, should estop the TDEC and TMD from asserting sovereign immunity.

Equitable estoppel claims against the government are strongly disfavored. In *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414 (1990), the Supreme Court held that estoppel will not lie against the Federal Government in claims involving money damages against the Government, but explicitly declined to adopt a flat rule that equitable estoppel could not apply against the Government under any circumstances. *Id.* at 423 ("We leave for another day whether an estoppel claim could ever succeed against the Government."). *See also Heckler v. Community Health Servs.*, 467 U.S. 51, 60-61 (1984). To hold the Wage and Hour Division of DOL subject to estoppel, the Secretary has said a complainant "would have to demonstrate that Wage and Hour made false representations to them with the intent that Harbert should rely on them, coupled with affirmative misconduct." *Harbert Int'l Inc.*, No. 91-SCA-OM-5, slip op. at 5 (Sec'y May 5, 1992), *citing Mukherjee v. INS*, 793 F.2d 1006, 1008-09 (9th Cir. 1986) and *Jaa v. INS*, 779 F.2d 569, 572 (9th Cir. 1986). *See also Dantran v. DOL*, 171 F.3d 58, 67 (1st Cir. 1999); *Russian and East European P'ships, Inc.*, ARB No. 99-025, slip op. at 17-18 (Oct. 15, 2001).

Here, Powers does not allege false representations coupled with affirmative misconduct by the respondents, TDEC and TMD. On that ground alone her estoppel argument fails. Indeed, Powers identifies no action whatever by TDEC, TMD or any other state agency as grounds for estoppel. Instead, she relies on alleged misrepresentations from an employee of a federal agency to estop a wholly independent state agency. It is well settled that the actions of one agency cannot be used to estop another agency from acting within its authority. *United States v. Stewart*, 311 U.S. 60, 70 (1940). Likewise, the actions of a federal employee cannot be used to estop a state agency from asserting its immunity. Thus, the Board concludes that the advice Powers describes is an insufficient basis for estoppel against TDEC or TMD as a matter of law.

III. Additional Respondents

A. Powers v. TDEC

In *Powers v. TDEC*, the ALJ noted that Powers had requested OSHA to amend her complaint to OSHA to add Kim Kirk, Commissioner Hamilton, and PCI as respondents to her whistleblower complaint against TDEC. Powers renewed this request before the ALJ in *Powers v. TDEC*. The ALJ ruled Powers's complaints against Kirk, Hamilton and PCI were untimely.

> Each of the federal whistleblower statutes on which the Claimant relies provides that complaints of discrimination must be filed within thirty days. Here, the Complainant first attempted to name Ms. Kirk, Commissioner Hamilton, and PCI as respondents almost five months after she filed her complaint. Clearly this was outside the legal time limits prescribed by the federal whistleblower statutes. . .

R. D. & O. I, slip op. at 8.

As the ALJ correctly noted, each of the environmental whistleblower protection statutes carries a thirty-day limitations period. *See* CAA, 42 U.S.C.A. § 7622(b)(1); CERCLA, 42 U.S.C.A. § 9610(b); SWDA, 42 U.S.C.A. § 6971(b);TSCA, 15 U.S.C.A. § 2622(b)(1); FWPCA, 33 U.S.C.A. § 1367(b), and SDWA, 42 U.S.C.A. § 300j-9(i)(2)(A). Since Powers's request to add Kirk, Hamilton and PCI as respondents was untimely, the ALJ did not err in denying Powers's request.

B. Powers v. TDEC and TMD

In *Powers v. TDEC and TMD*, Powers also requested the ALJ to add Kirk and Hamilton as respondents. Powers alleged that Kirk and Hamilton were proper parties because, after her termination, they participated in blacklisting her. ALJ No. 2003-CAA-16, Status Order, May 21, 2003. See also Powers Opening Brief in *Powers v. TDEC*, ARB No. 03-016, at 25 ("[S]ome of the individual Respondents were lawyers who were key participants in the blacklisting and firing directed against Complainant.").

The ALJ found that Kirk and Hamilton were not proper parties. "Complainant consistently refers to Ms. Kirk and Commissioner Hamilton by their official titles, indicating that they acted in their official capacities." Slip op. at 7. Observing that under Tennessee law, state officers and employees are absolutely immune from liability for actions or omissions within the scope of their office or employment, except for willful, malicious, or criminal acts or omissions, or acts or omissions done for personal gain, the ALJ concluded that neither Kirk nor Hamilton was a proper party. "The Complainant has not alleged any facts that would suggest that Ms. Kirk or Mr. Hamilton acted other than within the scope of their office or employment, or that they acted in such a manner as to subject them to personal liability." R. D. & O. II, slip op. at 7-8.

We agree with the result, but not with the ALJ's analysis. Eleventh Amendment immunity extends to state officials sued for money damages in their official, but not individual capacities. *Andrews v. J.M. Daw*, 201 F.3d 521 (4th Cir. 2000); *King v. Mississippi Highway Patrol*, 827 F. Supp. 402 (S.D. Miss. 1993). Since we have held that there has been no abrogation of state sovereign immunity, to the extent that Kirk and Hamilton are sued in their official capacities, they are immune under Eleventh Amendment immunity. That is not to say, as the ALJ suggests, that a state immunity statute would provide a defense, if Congress had intended to hold states and state officials liable in damages for violations of the whistleblower protection provisions of federal environmental laws.

It seems equally likely that Powers intended to add Kirk and Hamilton in their individual capacities to avoid the effects of state sovereign immunity. An ALJ may allow amendments to the complaint that are reasonably within the scope of the original complaint:

> If and whenever determination of a controversy on the merits will be facilitated thereby, the administrative law judge may, upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties, allow appropriate amendments to complaints, answers, or other pleadings; provided, however, that a complaint may be amended once as a matter of right prior to the answer, and thereafter if the administrative law judge determines that the amendment is reasonably within the scope of the original complaint.

29 C.F.R. § 18.5(e). We have interpreted Rule 18.5(e) to authorize amendment to add parties, and have reviewed an ALJ's decision not to add parties under the abuse of discretion standard. *Ewald,* slip op. at 11-132. *See also Cox v. Lockheed Martin Energy Sys., Inc.,* ARB No. 99-040, ALJ No. 97-ERA-17, slip op. at 5 (ARB Mar. 30, 2001).

Although Powers alleges that Kirk and Hamilton were "key participants" in her blacklisting and firing, that is short of the legal requirement under the environmental

whistleblower protection provisions that she, as a complaining employee, have an employment relationship with those individuals as respondent employers. *See Culligan v. American Heavy Lifting Shipping Co.*, ARB No. 03-046, ALJ No. 00-CAA-20, 01-CAA-09, 01-CAA-011, slip op. at 6 (ARB June 30, 2004); *Seetharaman v. General Elec. Co.*, ARB No. 03-029, ALJ No. 02-CAA-21, slip op. at 5 (May 28, 2004); *Demski v. Indiana Mich. Power Co.*, ARB No. 02-084, ALJ No. 01-ERA-36, slip op. at 4 (ARB Apr. 9, 2004); *Anderson v. Metro Wastewater Reclamation Dist.*, ARB No. 01-103, ALJ No. 97-SDW-7, slip op. at 8 (ARB May 29, 2003) (under SWDA, SDWA, CERCLA, FWPCA, TSCA, and ERA complaining employee must have employment relationship with respondent employer). Since neither Kirk nor Hamilton was Powers's employer, she cannot prevail against them as a matter of law. Accordingly, the ALJ's denial of a motion to include them as respondents was not an abuse of discretion.

CONCLUSION AND ORDER

Powers failed to establish that Congress abrogated the states' immunity from CERCLA, SWDA, TSCA, FWPCA, SDWA, or CAA whistleblower prosecution or that Tennessee waived that immunity. Because we conclude that no genuine issue of material fact exists as to whether state sovereign immunity bars Powers's whistleblower complaints, TDEC and TMD are entitled to summary decision as a matter of law. Likewise, they are entitled to summary decision on the issue of equitable estoppel. In addition, the ALJ properly concluded that Powers's complaints against additional respondents were untimely and properly exercised her discretion in denying Powers's motions to amend her complaint to add them as parties. Consequently, we **DISMISS** Powers's complaints.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge