



In the Matter of

JOAN PASTOR,

COMPLAINANT,

v.

**VETERANS AFFAIRS
MEDICAL CENTER,**

RESPONDENT.

ARB CASE NO. 99-071

ALJ CASE NO. 99-ERA-11

DATE: MAR 1, 2001

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

ORDER DIRECTING ADDITIONAL BRIEFING

This case arose when the Complainant Joan Pastor filed a complaint alleging that her employer, Respondent Veterans Affairs Medical Center, United States Department of Veterans Affairs (VAMC), had terminated her employment in violation of the whistleblower protection provision of the Energy Reorganization Act, as amended, 42 U.S.C. §5851 (1994) (ERA). Upon conclusion of an investigation by the Department of Labor's Occupational Safety and Health Administration, Pastor requested that the case be referred to the Department of Labor's Office of Administrative Law Judges for a hearing.

An Administrative Law Judge held two days of a planned three-day hearing. In the interim between the second and third days, VAMC filed a "Brief in Support of Dismissal for Cause." The ALJ treated this brief as a Motion to Dismiss. Finding that Pastor failed to file a timely complaint pursuant to 42 U.S.C. §5851(b)(1),¹ the ALJ issued a Recommended Decision and Order Dismissing Complaint (R. D. & O.). Pastor appealed the R. D. & O. to the Administrative Review Board as provided in 29 C.F.R. §24.8(a) (2000).

VAMC is an agency of the federal government. Accordingly, it is not subject to the ERA's whistleblower protection provision unless the government has waived its sovereign

¹ 42 U.S.C. §5851(b)(1) provides in pertinent part:

Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of subsection (a) of this section may, within 180 days after such violation occurs, file . . . a complaint with the Secretary of Labor

immunity under that statutory provision. *See Berkman v. United States Coast Guard Academy*, ALJ No. 97-CAA-2, 97-CAA-9, ARB No. 98-056, slip op. at 11 (Feb. 29, 2000); *Johnson v. Oak Ridge Operations Office (DOE)*, ALJ Nos. 95-CAA-20, 95-CAA-21, 95CAA-22; ARB No. 97-057, slip op. at 9 (Sept. 30, 1999). Any waiver of the government's sovereign immunity must be "unequivocal," must be construed strictly in favor of the sovereign and must not be expanded beyond the requirements of the statutory language. *United States Dep't of Energy v. Ohio*, 503 U.S. 607, 615 (1992).

VMAC has not raised sovereign immunity as a defense to Pastor's complaint. However, it is not clear from VMAC's brief whether such failure was intentional or an oversight. In any event, "sovereign immunity is jurisdictional in nature." *FDIC v. Meyer*, 510 U.S. 471, 475 (1994). "It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." *United States v. Mitchell*, 463 U.S. 206, 212 (1983). Therefore, it is proper for the Board to raise *sua sponte* the issue whether the government has waived sovereign immunity under the ERA. *Accord Presidential Gardens Assoc. v. HUD*, 175 F.3d 132, 140 (2d Cir. 1999) ("a sovereign's consent to suit via Congressional enactment is a prerequisite for subject-matter jurisdiction . . . [that] may be raised at any time, by any party, or even *sua sponte* by the court").

Accordingly, we order Pastor and VMAC and request the Assistant Secretary for Occupational Safety and Health, U.S. Department of Labor,² to submit supplemental briefs, not to exceed ten (10) double-spaced pages, postmarked no later than April 2, 2001, addressing the issue whether VMAC is entitled to claim sovereign immunity under the ERA. In particular, we note that the ERA's whistleblower protection provision prohibits discrimination by "employer[s]" and "person[s]" for enumerated protected activity. 42 U.S.C. §5851(a)(1), (b)(1). *Accord Teles v. United States Dep't of Energy*, Case No. 94-ERA-22, slip op. at 2 (Sec'y Aug. 7, 1995). The term "person" is not defined in §5851. *Id.* The term "employer" expressly includes:

- (A) a licensee of the commission or of an agreement State under section 274 of the Atomic Energy Act of 1954 (42 U.S.C. 2021);
- (B) an applicant for a license from the Commission or such an agreement State;
- (C) a contractor or subcontractor of such a licensee or applicant; and
- (D) a contractor or subcontractor of the Department of Energy that is indemnified by the Department under section 170 d. of the Atomic Energy Act of 1954 (42 U.S.C. 2210(d)), but such term shall not include any contractor or subcontractor covered by Executive Order No. 12344.

42 U.S.C. §5851(a)(2)(A)-(D). Pastor asserts in her initial complaint that VMAC is an employer as defined by 42 U.S.C. §5851(a)(2); however, Pastor does not identify specifically within which of the four specified categories VMAC is included. The supplemental briefs should include a

² "At the Assistant Secretary's discretion, the Assistant Secretary may participate as a party or participate as *amicus curiae* at any time in the proceedings." 29 C.F.R. §24.7(f)(1).

discussion whether VMAC is an "employer" and/or a "person" under §5851(a)(1), (b)(2) and if so, whether that fact alone is sufficient to establish that the government has waived its sovereign immunity under the ERA's whistleblower protection provision.

FOR THE ADMINISTRATIVE REVIEW BOARD:

Janet R. Dunlop
General Counsel

NOTE: Questions regarding any case pending before the Board should be directed to the Board's staff assistant, Ernestine Battle.

Telephone: (202) 693-6207
Facsimile: (202) 693-6220