U.S. Department of Labor

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

JOAN L. PASTOR,

COMPLAINANT,

v.

DEPARTMENT OF VETERANS AFFAIRS,

RESPONDENT.

ARB CASE NO. 99-071

ALJ CASE NO. 99-ERA-11

DATE: May 30, 2003

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

***For the Complainant*:**
Gloria M. Gilman, Esq., *Philadelphia, Pennsylvania*

***For the Respondent*:**
Joseph H. Lopez, Regional Counsel; Christopher J. Perillo, Esq., *United States Department of Veterans Affairs, Philadelphia, Pennsylvania*

***For Amicus Curiae*:**
Howard M. Radzely, Acting Solicitor of Labor, Steven J. Mandel, Associate Solicitor, William J. Stone, Senior Attorney, *United States Department of Labor, Washington, D.C.*

FINAL DECISION AND ORDER

The question presented is whether Congress has waived the Federal Government's sovereign immunity against a claim for monetary damages under § 5851(b) of the Energy Reorganization Act (ERA), 42 U.S.C.A. § 5851(b) (West 1995). Section 5851 is the "whistleblower protection" provision of the ERA.

Complainant, Joan Pastor, petitioned this Board to review an Administrative Law Judge (ALJ) Recommended Decision and Order dismissing her ERA complaint against her former employer, the Department of Veterans Affairs (DVA). The ALJ recommended that Pastor's complaint be dismissed for untimely filing. *Pastor v. Veterans Affairs Medical Center*, 1999-ERA-00011 (ALJ Apr. 28, 1999) (R. D. & O). We conclude that we lack jurisdiction over Pastor's complaint because her claim for monetary damages is barred by sovereign immunity.

BACKGROUND

I. Pastor's successful complaint under the Civil Service Reform Act

On April 30, 1998, the Philadelphia Veterans Affairs Medical Center (PVAMC) notified Joan Pastor that she was being terminated as a research nurse effective May 15, 1998. PVAMC cited lack of funding as the reason for the termination.

On June 22, 1998, Pastor invoked her right to challenge PVAMC's decision under the Whistleblower Protection Act, part of the Civil Service Reform Act of 1978 (CSRA), 5 U.S.C.A. §§ 1221(a), 2302(b)(8) (West 1996). *Pastor v. Dep't of Veterans Affairs,* MSPB Docket No. PH-1221-99-0089. CSRA § 2302(b)(8) prohibits federal agencies from retaliating against employees who report conditions they reasonably believe constitute violations of law or hazards to public health or safety.[1]

The CSRA authorizes the Merit Systems Protection Board (MSPB) to order "appropriate corrective action" for employees who prove a violation of § 2302(b)(8). 5 U.S.C.A. § 1221(e)(1). Appropriate corrective action includes reinstatement with lost benefits, back pay,

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[1] That section reads as follows:

> § 2302. **Prohibited personnel practices**
>
> (a)(1) For the purpose of this title, "prohibited personnel practice" means any action described in subsection (b) of this section.
>
> * * *
>
> (b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority
>
> > (8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee . . . because of
> >
> > > (A) Any disclosure of information by an employee . . . which the employee . . . reasonably believes evidences
> > >
> > > > (i) a violation of any law, rule, or regulation, or
> > > >
> > > > (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety . . . .

5 U.S.C.A. § 2302(b)(8).

medical costs incurred, travel expenses, any other reasonable and foreseeable consequential damages, and attorney fees and costs. 5 U.S.C.A. § 1221(g).

Pastor's MSPB complaint asserted that her supervising physician had made known that he wanted to be rid of her long before the April termination notice. She claimed that he considered her a troublemaker because she filed charges with various agencies alleging violations of law and safety hazards in the research program. Indeed, Pastor had filed complaints against PVAMC and individuals employed there with the Drug Enforcement Administration, the Nuclear Regulatory Commission (NRC), the Food and Drug Administration, the PVAMC itself, the Office of the Inspector General, the Department of Justice, the Equal Employment Opportunity Commission, the Pennsylvania Human Relations Committee, and the United States Congress.

Pastor further asserted that lack of funding could not have been the real reason for her termination because soon after her departure PVAMC hired a nurse to take over Pastor's position. Pastor requested reinstatement, back pay and benefits, medical expenses, the cost of educating herself for another career, punitive damages, attorney fees, and $750,000 for pain and suffering. PVAMC denied that it acted against Pastor out of retaliatory motive or that it had placed another individual in Pastor's old job.

The MSPB ruled that Pastor had proven that PVAMC fired her at least in part in retaliation for whistleblowing and that PVAMC did not prove by clear and convincing evidence that it would have terminated her even if she had not engaged in whistleblowing. The MSPB ordered corrective action, including compensatory damages. *Pastor v. Dep't of Veterans Affairs*, 87 M.S.P.R. 609 (Jan. 22, 2001).[2]

II. Pastor's Energy Reorganization Act complaint; order to brief sovereign immunity issue

More than six months after Pastor filed her complaint with the MSPB, she filed a complaint with the Occupational Safety and Health Administration (OSHA) pursuant to § 5851 of the ERA. R. D. & O. at 2. In that complaint, Pastor asserted that PVAMC terminated her employment in retaliation for allegations she made (in 1996 and 1997) to the Nuclear Regulatory Commission, other agencies and Congress, that PVAMC's research program did not comply with NRC regulations. As in her CSRA case, Pastor asserted that lack of funding was mere pretext. Pastor requested reinstatement and compensatory damages.[3] OSHA investigated Pastor's complaint and concluded that it was untimely filed. ALJ Exhibit (ALJ Ex.) 1.

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[2] On July 10, 2002, Pastor petitioned for MSPB review of the latest of several MSPB ALJ remedies orders. This petition is still pending.

[3] Section 5851(b)(1) requires that employees file their complaints within 180 days of the violation. 42 U.S.C.A. § 5851(b)(1). Pastor filed her ERA complaint more than 250 days after she received her termination notice.

Pastor then requested and was afforded an evidentiary hearing before a Labor Department ALJ pursuant to 29 C.F.R. § 24.4(d)(2) (2002). At the outset of the DOL hearing, Pastor withdrew her request for reinstatement, stating that tensions would be too high for a satisfactory employment relationship. Transcript (Tr.) 13. Thus, Pastor presently seeks only monetary damages.

At the hearing, Pastor argued that her late filing should be excused because it was not until September 1998 that she had proof that PVAMC's alleged reason for terminating her employment – lack of funding – was false. Only then, Pastor alleged, did she learn from the supervising physician's deposition in her EEOC case that someone else had been hired (as she saw it) to take over her research job.

The ALJ found that as early as June 22, 1998, Pastor was fully pursuing (before the MSPB) her remedy for discriminatory retaliation for her NRC disclosures.[4] Therefore, he found that by June 22, 1998, Pastor knew the facts on which her ERA charge was predicated, and she was not deluded or lulled into thinking that her employment ended for the reasons stated by Respondents. Thus, Pastor's January 19, 1999 ERA whistleblower claim was filed more than 180 days after her employment terminated and there was no basis for equitable tolling. Consequently, he concluded that Pastor's claim was untimely and recommended that the complaint be dismissed. R. D. & O. at 5.

Pursuant to 29 C.F.R. § 24.8, Pastor petitioned this Board for review of the ALJ's recommended decision. Acting sua sponte, the Board directed the parties to brief the jurisdictional question whether Congress waived sovereign immunity from monetary damages under § 5851. The Board also invited OSHA to file an amicus brief on the question. Order, ARB No. 99-071 (March 1, 2001)

JURISDICTION

By Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002), the Secretary of Labor delegated to this Board authority to review ALJ recommended decisions and to issue final agency orders in cases arising under numerous statutes, including § 5851 of the Energy Reorganization Act. Implementing regulation 24 C.F.R. § 24.8 sets forth the procedural requirements by which a party may invoke this Board's review authority in an ERA case. Pastor complied with § 24.8, and thus we have jurisdiction to issue the final agency order in this case.

However, jurisdiction to issue the final agency order in a case does not necessarily include jurisdiction to decide the case on its merits. Our jurisdiction may sometimes extend only to deciding whether we lack jurisdiction over the substance of the claim. *Cf. United States v.*

[4] Pastor sent a letter on that date to the United States Office of Special Counsel formally charging that PVAMC terminated her employment in retaliation for her disclosures of violations of rules and regulations of the Nuclear Regulatory Commission (NRC). This letter lays the foundation for a proceeding before the MSPB. Government Exhibit 2 (GX2) D. & O., slip op. at 3 n.8. The ALJ also noted that even at that time Complainant's filing would not have been timely. *Id.* at n.10.

Mine Workers, 330 U.S. 258, 291, 67 S. Ct. 677 (1947) (federal courts always have jurisdiction to determine their own jurisdiction).

As discussed in greater detail below, a suit against the government may only be maintained if sovereign immunity has been waived. Neither side addressed the question below or in their opening briefs on appeal to the Board. Being obliged to inquire sua sponte whenever a doubt arises as to the existence of our subject matter jurisdiction, *cf. Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 278, 97 S. Ct. 568, 571 (1977), we directed the parties and invited OSHA to brief this jurisdictional question. Order, ARB No. 99-071 (March 1, 2001).

ISSUE

The issue we consider dispositive is whether Congress has waived sovereign immunity from monetary damages under 42 U.S.C.A. § 5851.

DISCUSSION

I. Supreme Court standards governing waiver of Waiver of Sovereign

A. Application to administrative adjudication

The proposition that the United States Government and its agencies cannot be sued except by consent is deeply rooted in our jurisprudence. "The United States, as sovereign, 'is immune from suit, save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'" *United States v. Testan*, 424 U.S. 392, 399, 96 S. Ct. 948, 953 (1976) (quoting *United States v. Sherwood*, 312 U.S. 584, 586, 61 S. Ct. 767, 769 (1941)).

Sovereign immunity applies in administrative adjudications as well as in Article III adjudications. *Fed. Mar. Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 761, 122 S. Ct. 1864, 1875 (2002) ("[I]t would be quite strange to prohibit Congress from exercising its Article I powers to abrogate state sovereign immunity in Article III judicial proceedings . . . but permit the use of those same Article I powers to create court-like administrative tribunals where sovereign immunity does not apply"); *United States v. Puerto Rico*, 287 F.3d 212 (1st Cir. 2002) (holding that the United States was entitled to invoke sovereign immunity in proceedings before the administrative agency).

This Board has previously applied sovereign immunity analysis in its proceedings. S*ee, e.g., Pogue v. United States Dep't of the Navy*, 87-ERA-21 (Sec'y May 10, 1990); *In re Teles*, 94-ERA-22 (Sec'y, Aug. 8, 1995).

B. Effect of immunity on jurisdiction

Because sovereign immunity shields the federal government and its agencies from suit, that immunity must be waived in order for an adjudicative body to have jurisdiction. ("Sovereign immunity is jurisdictional in nature. Indeed, the 'terms of [the United States'] consent to be sued in any court define that court's jurisdiction to entertain the suit'. . . . 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." *FDIC v. Meyer*, 510 U.S. 471, 475, 114 S. Ct. 996, 1000 (1994) (quoting *Sherwood*, 312 U.S. at 586, 61 S. Ct. at 770). So if DVA's immunity from suit for monetary damages under § 5851(b) has not been waived, we cannot entertain Pastor's appeal. Therefore whether sovereign immunity has been waived is the first question we must consider.

C. Explicit waiver requirement

The Supreme Court has set high standards for determining that sovereign immunity has been waived. To be effective, waivers of the Government's sovereign immunity must be "unequivocally expressed." *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95, 111 S. Ct. 453, 457 (1990) (quoting *United States v. Mitchell*, 445 U.S. 535, 538, 100 S. Ct. 1349, 1351 (1980), and *United States v. King*, 395 U.S. 1, 4, 89 S. Ct. 1501, 1502 (1969)) (waivers of sovereign immunity by Congress "cannot be implied but must be unequivocally expressed"). The Government's consent to be sued "must be construed strictly in favor of the sovereign," *McMahon v. United States*, 342 U.S. 25, 27, 72 S. Ct. 17, 19 (1951), and not "enlarged beyond what the language requires." *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685, 103 S. Ct. 3274, 3278 (1983).

Moreover, the waiver must be established by the statute itself. "A statute's legislative history cannot supply a waiver that does not appear clearly in any statutory text: 'the "unequivocal expression" of elimination of sovereign immunity that we insist upon is an expression in statutory text.'" *Lane v. Pena*, 518 U.S. 187, 192, 116 S. Ct. 2092, 2097 (1996) (quoting *United States v. Nordic Village, Inc.*, 503 U.S. 30, 37, 112 S. Ct. 1011, 1016 (1992)); *accord, Dep't of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 119 S. Ct. 687 (1999). Additionally, "in resolving the question, we may not enlarge the waiver beyond the purview of the statutory language." *United States v. Williams*, 514 U.S. 527, 531, 115 S. Ct. 1611, 1615 (1995), citing *Dep't of Energy v. Ohio*, 503 U.S. 607, 614-616, 112 S. Ct. 1627, 1632-1634 (1992).

"To sustain a claim that the Government is liable for awards of monetary damages, the waiver of sovereign immunity must extend unambiguously to such monetary claims." *Lane*, 518 U.S. at 192, 116 S. Ct. at 2097.[5] Indeed, the Court has suggested it is especially sensitive to the

[5] Nonetheless, exceptions to waivers of sovereign immunity may be narrowly construed where that is "consistent with Congress' clear intent, as in the context of the 'sweeping language' of the Federal Tort Claims Act." *Nordic Village*, 503 U.S. at 33, 112 S. Ct. at 1014 (quoting *United States v. Yellow Cab Co.*, 340 U.S. 543, 547, 71 S. Ct. 399, 402 (1951)).

need for specific waiver as to monetary claims. *United States v. Idaho, ex rel. Director, Idaho Dept. of Water Resources*, 508 U.S. 1, 6, 113 S. Ct. 1893, 1896 (1993) ("The cases . . . dealing with waivers of sovereign immunity as to monetary extractions from the United States in litigation show that we have been particularly alert to require a specific waiver of sovereign immunity before the United States may be held liable for them").

However, where waiver is clear, it is not to be circumscribed by strained or unnecessarily narrow interpretation. "We should also have in mind that the Act waives the immunity of the United States and that . . . we should not take it upon ourselves to extend the waiver beyond that which Congress intended. Neither, however, should we assume the authority to narrow the waiver that Congress intended." *Smith v. United States*, 507 U.S. 197, 201, 113 S. Ct. 1178, 1182 (1993) (citing *United States v. Kubrick*, 444 U.S. 111, 117-118, 100 S. Ct. 352, 357 (1979)). *See also Williams* (broad language authorizing suit for any tax erroneously collected was not narrowed by three other provisions; definition of taxpayer as one "subject to" tax was not limited to person assessed, and included one who paid the tax – therefore party who paid tax under protest to remove federal tax lien from her property could sue federal government for refund); *West v. Gibson*, 527 U.S. 212, 119 S.Ct. 1906 (1999) (In 1991 amendments to Title VII, Congress clearly waived sovereign immunity with respect to compensatory damages for intentional discrimination; previously existing language in Title VII giving EEOC authority to enforce antidiscrimination standard through "appropriate remedies" thereby was expanded to include award of compensatory damages as an appropriate remedy).[6] "'The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.'" *United States v. Aetna Casualty & Surety Co.*, 338 U.S. 366, 383, 70 S. Ct. 207, 216 (1949) (quoting *Anderson v. Hayes Constr. Co.*, 243 N.Y. 140, 147, 153 N.E. 28, 29-30 (1926) (Cardozo, J.)), cited by Justice Scalia concurring in *Williams*, 514 U.S. at 540, 115 S. Ct. at 1620.

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[6] *Gibson* was a 5-4 decision. The Court majority opinion suggested that since the 1991 amendments clearly permitted an employee to file a complaint for compensatory damages in court, the issue of whether those amendments permitted the EEOC to consider the same matter at an earlier phase was a question of how the waived damages remedy was to be administered, and therefore ordinary sovereign immunity presumptions might not apply. However, it also stated that if a strict standard had to be met, it had been in that case, because the statutory language, taken together with the statutory purposes, history, and absence of any convincing reason for denying the EEOC the relevant power, produced evidence of a waiver satisfying the stricter standard. *Gibson*, 527 U.S. at 221, 119 S. Ct. at 1911. The minority in contrast found no clear and unambiguous waiver of sovereign immunity. According to the minority, the statutory language pertaining to "appropriate remedies" could be interpreted as granting "administrative authority to determine which of the traditional forms of equitable relief are appropriate in any given case of discrimination" and therefore "does not authorize awards of compensatory damages in express and unequivocal terms." The 1991 amendments authorized courts to award damages, but did not "mention the EEOC, much less empower it to award or authorize money damages. It is settled law that a waiver of sovereign immunity in one forum does not effect a waiver in other forums." *Gibson*, 527 U.S. at 224, 119 S. Ct. at 1914.

II. History and terms of the Atomic Energy and Energy Reorganization Acts

The statutory provision at issue in this case, 42 U.S.C.A. § 5851, is part of the Energy Reorganization Act (ERA). Section 5851 expressly references the Atomic Energy Act of 1954 (AEA), and the arguments of the parties and amicus focus heavily on the relationship of provisions in the two Acts. The history of the two Acts and the specific text of § 5851 therefore are essential to addressing the issue before us.

A. History of the Acts and 42 U.S.C.A. § 5851

Congress first regulated creation and use of atomic power in the Atomic Energy Act of 1946 (AEA of 1946). Act of Aug. 1, 1946, Ch. 724, 60 Stat. 755, codified at 42 U.S.C.A. Chapter 23 (West 1994). The AEA of 1946 established the Atomic Energy Commission (AEC) and reflected the fact that at that time the production, use and control of nuclear energy rested exclusively with the federal government. "Within a decade, however, Congress concluded that the national interest would be best served if the Government encouraged the private sector to become involved in the development of atomic energy for peaceful purposes under a program of federal regulation and licensing." *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 63, 98 S. Ct. 2620, 2625 (1978). The Atomic Energy Act of 1954 implemented this policy decision, providing for licensing of private construction, ownership, and operation of commercial nuclear power reactors under AEC supervision. The AEC, however, was given exclusive jurisdiction to license the transfer, delivery, receipt, acquisition, possession and use of nuclear materials. *See Pacific Gas & Electric Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 103 S. Ct. 1713 (1983). The provisions of the Atomic Energy Act of 1954 were codified in Chapter 23 of Title 42 of the United States Code.[7]

In 1974, Congress promulgated the Energy Reorganization Act (ERA). Pub. L. 93-438, 88 Stat. 1234 (codified as amended at 42 U.S.C. Chapter 73). The ERA abolished the Atomic Energy Commission and created two new entities to take its place – the Nuclear Regulatory Commission (NRC) and the Energy Research and Development Administration (ERDA).[8] The NRC took over the AEC's regulatory and licensing functions. 42 U.S.C.A. §§ 5842-5844. ERDA took over the AEC's energy research and development functions. 42 U.S.C.A. §§ 5811–5821. However, in adopting the ERA, Congress did not repeal generally the provisions of Chapter 23.[9] Instead, the ERA's provisions explicitly transferred and superseded AEC functions

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[7] The AEA remains codified in Chapter 23.

[8] ERDA later became a part of the Department of Energy.

[9] Section 2031, which provided for establishment of the AEC, its composition, Chairman, acting Chairman, quorum, official spokesman, and seal, and Section 2032, which provided for appointment of AEC members, terms of office, and prohibitions on engaging in non-Commission employment, were repealed effective 120 days after October 11, 1974, or on such earlier date as the President may prescribe and publish in the Federal Register. Pub. L. 93-438 § 312(a), 88 Stat. 1234.

which continued to be described in Chapter 23. The ERA's provisions were placed in a new chapter of Title 42, Chapter 73.

In the years following the ERA's enactment, by adding and amending the AEA of 1954, Congress has continued to add and amend sections in Chapter 23. (See, for example, § 2282 Civil penalties, which was initially adopted in 1969 and was amended as recently as 1996, or § 2282b, Civil monetary penalties for violations of DOE regulations regarding security of classified or sensitive information or data, which was added in 1999. Both were adopted as amendments to the AEA of 1954.) In addition, by amending the ERA, Congress has similarly revised Chapter 73. Chapters 23 and 73 continue to exist separately to this day.

In 1978, Congress amended the ERA to add § 5851. Pub. L. 95-601, § 10, 92 Stat. 2951 (codified in Chapter 73 of Title 42). Section 5851 prohibits employers from discriminating against employees in the nuclear energy industry who report violations of the ERA or the AEA or who participate in any other action to carry out the purposes of those Acts. It also establishes processes and remedies to redress such discrimination.

B. Text of Energy Reorganization Act, 42 U.S.C.A. § 5851

The Energy Reorganization Act, 42 U.S.C.A. § 5851, protects employees in the nuclear industry from employer retaliation when they engage in certain activities:

> (1) No 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 (or any person acting pursuant to a request of the employee) –
>
> > (A) notified his employer of an alleged violation of this chapter or the Atomic Energy Act of 1954 (42 U.S.C. § 2011 et seq.);
> >
> > (B) refused to engage in any practice made unlawful by this chapter or the Atomic Energy Act of 1954 [42 U.S.C. § 2011 et seq.], if the employee has identified the alleged illegality to the employer;
> >
> > (C) testified before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of this chapter or the Atomic Energy Act of 1954 [42 U.S.C. § 2011 et seq.];

> (D) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C. § 2011 et seq.], or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;
>
> (E) testified or is about to testify in any such proceeding or;
>
> (F) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C. § 2011 et seq.].

42 U.S.C.A. § 5851(a).

For purposes of § 5851, the term "employer" 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);
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> (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
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> (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.A. § 5851(a)(2).

Section 5851 establishes specific processes for filing, investigating, and adjudicating employee complaints:

> (b) Complaint, filing and notification
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> (1) 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. . . . Upon receipt of such a complaint, the Secretary shall notify the person named in the complaint . . . .
>
> (2)(A) Upon receipt of a complaint . . . the Secretary shall conduct an investigation. . . . Within thirty days of the receipt of such complaint, the Secretary shall complete such investigation and shall notify in writing the complainant . . . and the person alleged to have committed such violation of the results of the investigation. . . . Within ninety days of the receipt of such complaint the Secretary shall, unless the proceeding on the complaint is terminated by the Secretary on the basis of a settlement entered into by the Secretary . . . issue an order either providing the relief prescribed by subparagraph (B) or denying the complaint. An order of the Secretary shall be made on the record after notice and opportunity for public hearing. Upon the conclusion of such hearing and the issuance of a recommended decision that the complaint has merit, the Secretary shall issue a preliminary order providing the relief prescribed in subparagraph (B), but may not order compensatory damages pending a final order. . . .

Id.

OSHA, the agency to which the Secretary has delegated her investigatory authority under § 5851(b)(2)(A), investigates these complaints and issues a determination as to whether a violation occurred. § 5851(b)(2)(A); 29 C.F.R. § 24.5 (2002). Either or both parties may appeal OSHA's preliminary determination to a Labor Department administrative law judge (ALJ) who, after a hearing, issues a recommended decision. That recommended decision may be appealed to this Board.[10] If there is such an appeal, this Board issues the final order.

If the Secretary (through her delegatees, the Office of Administrative Law Judges or this Board) concludes a violation occurred, remedies may be ordered against the person who committed the violation:

> (B) If, in response to a complaint . . . the Secretary determines that a violation of subsection (a) . . . has occurred, the Secretary shall order the person who committed the violation to (i) take affirmative action to abate the violation, and (ii) reinstate the complainant to his former position together with . . . compensation . . . and the Secretary may

[10] The recommended decision of the ALJ becomes the final order of the Secretary if it is not appealed.

> order such person to provide compensatory damages to the complainant. If an order is issued under this paragraph, the Secretary, at the request of the complainant shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys' and expert witness fees) . . . .

42 U.S.C.A. § 5851(b)(2)(B).

Any person adversely affected or aggrieved by the Secretary's order may obtain review from the United States Court of Appeals for the Circuit in which the violation allegedly occurred. *Id*. at § 5851(c).

III. Positions of the parties and amicus on waiver of immunity

Pastor contends that Congress intended all of § 5851's protections to apply to both federal and private sector employees and waived sovereign immunity. She bases her position on the definition of employer in § 5851(a)(2)(A) which includes NRC licensees and the fact that PVAMC is such a licensee, as well as references in the ERA's legislative history to Clean Air Act and Federal Water Pollution Control Act provisions which require federal facilities to meet control requirements as if they were private citizens.

As amicus, the Acting Assistant Secretary for OSHA (OSHA), also argues that the NRC's licensing of VA facilities subjects them to the ERA's whistleblower provisions. "[T]he language used by Congress in defining the statute's operative terms," OHSA says, "demonstrates an unequivocal intention to subject the [P]VAMC to the statutory licensing requirements and thereby to the requirements and sanctions of the ERA's whistleblowing provisions." OSHA Br. at 3.

OSHA notes that since 1946, the role of the Atomic Energy Commission and the NRC has included the regulation of federal agencies, and the term "person" in the AEA "has always been expressly defined to include agencies of the United States." OSHA Br. at 4-5. As a consequence, the United States and its agencies are subject to the licensing provisions of the AEA (which apply to persons). Governmental actors are not excepted from civil money penalties levied by the NRC for violations of licensing or other requirements. 42 U.S.C.A. § 2282a. [11] Moreover, according to OSHA, the employee protection provisions added to the ERA in 1978, and the amendments made to them in 1992, did not limit the scope of the NRC's licensing authority or treat federal agencies differently than other licensees with regard to whistleblower protection. *Id.* at 7.[12]

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[11] Compare 42 U.S.C.A. § 2114 (civil money penalties for actions relating to disposal of ore extraction) which excepts from its definition of person the United States or any officer or employee of the United States.

[12] OSHA cites remarks made by Senator Hart ("[DOL's] authority to investigate an alleged act

Finally, OSHA contends, while the intent of Congress controls, the practice and interpretation accorded the licensing provisions demonstrate the AEC and NRC's licensing authority over other federal actors. Further, the VA has acknowledged expressly that it is subject to the NRC's licensing authority. "In sum," OSHA concludes,

> almost 50 years of administrative experience reflects the interpretation that the original Atomic Energy Act and its amendments were intended to confer licensing authority over federal entities ('person') using atomic energy; such federal entities accordingly are 'licensees' subject to the ERA's whistleblower provisions. Congress has expressed the unequivocal intention to waive the VA Medical Center's sovereign immunity insofar as the ERA's whistleblower provisions are concerned.

OSHA Br. at 9-10.

The Department of Veterans Affairs (DVA) concedes that it is an "employer" within the meaning of § 5851(a) because it is a licensee of the NRC, and, by virtue of § 5851(a)(2)(A), licensees are expressly included in the definition of employer. However, DVA submits, that fact alone is not enough to make DVA liable for money damages under § 5851(b)(2)(B). DVA Br. at 3. DVA contends that § 5851(b)(2)(B) does not apply to federal agencies because it applies to "persons." In order for the United States to have waived sovereign immunity for monetary damages, DVA says, the term "person" in § 5851(b)(2)(B) would have to be synonymous and interchangeable with the term "employer" in § 5851(a). Since § 5851 contains no definition of the word "person," Congress has not clearly and unequivocally articulated that it intended for the United States to be liable for the payment of compensatory damages. *Id.*

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of discrimination . . . and afford a remedy . . . is [not intended to] abridge the [NRC's] current authority to investigate an alleged discrimination and take appropriate action against a licensee-employer, such as a civil penalty, license suspension or license revocation."). 124 CONG. REC. S29,771 (Oct. 14, 1978). Also cited to show the expanded coverage provided by the 1992 Amendments are remarks by Rep. Wyman ("These provisions lock into federal law strong protections for workers. . . . [P]rivate contractor employees will have the right to the same kind of grievance procedures and remedies now enjoyed by most public employees that disclose wrongdoing and face retaliation.") 138 CONG. REC. H11374-03, H11376 (Oct. 5, 1992); Rep. Sharp ("The legislation also increases protection of . . . employees of civilian and military nuclear facilities who report safety violations") 138 CONG. REC. H11399-01 (Oct. 5, 1992); and Rep. Miller ("[This Act strengthens] the protection of whistleblowers in the nuclear power industry and extends such protection to workers in the DOE weapons complex") 138 CONG. REC. H113990-01 (Oct. 5, 1992). OSHA Br. at 7 n.10.

IV. Analysis; determination that sovereign immunity has not been waived

A. NRC licensure insufficient for waiver

We begin our analysis with consideration of Pastor and OSHA's argument that the fact that DVA is an NRC licensee makes DVA subject to all of the sanctions of § 5851. That is, by making DVA subject to NRC licensure and to the substantive requirement not to discriminate against whistleblowers which is imposed on NRC licensees, Congress has waived sovereign immunity with respect to all of § 5851, including the section providing for monetary damages.

When Congress imposes a substantive requirement and provides sanctions or damages for noncompliance, some might assume that all those subject to the requirement are also subject to the sanctions or damages. The Supreme Court, however, has made very clear that no such assumption can be made when federal agencies are involved (and therefore sovereign immunity must be waived in order for sanctions or damages to be imposed).

In *Dep't of Energy v. Ohio*, the Court considered whether sovereign immunity had been waived with respect to civil fines imposed by a State for past violations of the Clean Water Act (CWA) or the Resource Conservation and Recovery Act of 1967 (RCRA) (i.e., "punitive fines"). DOE admitted in that case that it was obligated, like any other polluter, to obtain permits from EPA or the state permitting agency. It also conceded that the CWA and RCRA made federal agencies liable for fines imposed to induce compliance with injunctions or other judicial orders to modify behavior prospectively. However, DOE argued that it was not subject to punitive fines. The Court agreed.

Although the CWA and RCRA require compliance by both private and governmental entities, the Court determined that the full panoply of penalties and liability could not be imposed on federal entities. It came to that conclusion by carefully analyzing provisions in the two statutes that include the United States and private entities in compliance provisions but explicitly include only private entities in the punitive fine provisions. It also applied the tenet that waivers of sovereign immunity must be unequivocal; any ambiguity must be resolved against waiver.

Similarly, in *Lane* (discussed at greater length below), the Court rejected the argument that because Section 504 of the Rehabilitation Act of 1973 prohibited discrimination under any program or activity conducted by any Executive agency, monetary damages were available against an Executive agency for violating Section 504. *Cf. Nordic Village*, 503 U.S. at 38, 112 S. Ct. at 1017 ("The fact that Congress grants *jurisdiction* to hear a claim does not suffice to show Congress has abrogated all *defenses* to that claim. The issues are wholly distinct.") (quoting *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 786, 111 S. Ct. 2578, 2585 (1991) (emphasis in original).

Therefore we look beyond the requirements for licensure and non-discrimination against whistleblowers to ascertain whether sovereign immunity from monetary damages under § 5851 has been waived. We examine the specific language and structure of § 5851.

B. Statutory distinction between "employer" and "person"

As noted previously, § 5851 uses both the term "employer" and the term "person." The term "employer" is used to prohibit those so defined from discriminating against whistleblowers, to remove the prohibition under certain circumstances, and to state that other redress for discrimination against employees is not affected by § 5851. In addition, the term is used in provisions which prohibit investigation or ordering of relief if the "employer" demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the employee's whistleblowing activities.[13]

The term "person" is used only in the subsections of § 5851 which establish procedures for evaluating and remedying discrimination against whistleblowers.[14] Subsection 5851(b) establishes a system for investigating and adjudicating complaints filed by "any employee" who believes he has been discriminated by "any person" in violation of § 5851(a). When the Secretary of Labor finds such discrimination has occurred, § 5851(b)(2)(B) empowers the Secretary to order "the person who committed such violation" to provide certain remedies, including compensatory damages. Subsection 5851(c) enables any "person" adversely affected or aggrieved by an order issued under subsection (b) to obtain judicial review in the circuit in which the violation allegedly occurred. Subsection 5851(d) (Jurisdiction) authorizes the Secretary to file a civil action "whenever a person has failed to comply" with the Secretary's order, and § 5851(e) authorizes a person on whose behalf an order was issued to commence a civil action "against the person" to whom such order was issued.[15]

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[13] Subsection 5851(a) (Discrimination against employee) prohibits an "**employer**" from discriminating against any employee who engages in certain whistleblowing activities. Subsection 5851(g) (Deliberate Violations) states that subsection (a) (the prohibition against "**employer**" discrimination) shall not apply with respect to any employee who, "acting without direction from his or her **employer** (or the "**employer's** agent") deliberately causes a violation of chapter 73 of the AEA of 1954; and § 5851(h) (Nonpreemption) provides that § 5851 may not be construed to affect any right otherwise available to an employee to redress discriminatory action taken by the "**employer**" against the employee. Additionally, §§ 5851(b)(3)(B) and (b)(3)(D) prohibit investigation or ordering of relief if the "**employer**" demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the employee's whistleblowing activities. In all of these instances it is an "**employer**" who acts or is prohibited from acting.

[14] Throughout subsection (b) (Complaint, filing and notification), the term "person" rather than "employer" is used to refer to the alleged discriminator, except for §§ 5851(b)(3)(B) and (b)(3)(D) which prohibit investigation or ordering of relief if the "employer" demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the employee's whistleblowing activities.

[15] Subsections 5851(f), (i) and (j) do not refer to either "employer" or "person." Interestingly, § 5851(f) (Enforcement) provides that any nondiscretionary duty imposed by § 5851 shall be enforceable in a mandamus proceeding brought under § 1361 of Title 28.

Thus, under § 5851, "employers" are prohibited from discriminating against whistleblowers (and may be relieved of that requirement under certain circumstances), but only "persons" who (allegedly) discriminate are subject to the process and remedies for discrimination. Although "employer" is defined in § 5851(a)(2),[16] Chapter 73 contains no definition of "person." Are "employers" and "persons" identical? And, if not, is a federal agency a "person" for these purposes?

A well understood principle of statutory construction is that to the extent possible all Congressional provisions are to be given meaning, and that when Congress uses two different words in close proximity, the use of different words indicates a difference in meaning. *See* 2A SUTHERLAND ON STATUTORY CONSTRUCTION § 46:06 (N. SINGER, 6th ed. 2000) ("It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute." *Id.* at 181. Also, "when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended." *Id.* at 193.). Congress' use of different nouns in the two provisions ("employer" in § 5851(a) and "person" in § 5851(b)) indicates that Congress did not have the same population in mind in each. Therefore, it cannot be assumed, as OSHA and the Complainant suggest, that because DVA is a licensee, and consequently an "employer," it is also a "person" under § 5851(b).

The Supreme Court's analysis in *Lane* is instructive. There, Lane, a midshipman at the United States Merchant Marine Academy, argued that he was entitled to monetary damages because the Academy impermissibly discriminated against him based on his disability (being diabetic). Section 504 of the Rehabilitation Act of 1973 clearly prohibited the Academy from discriminating against Lane.

Subsection 504(a) of the Rehabilitation Act prohibits discrimination "**under any program or activity receiving Federal financial assistance or under any program conducted by any Executive agency** or by the United States Postal Service." 29 U.S.C.A. § 794(a) (West 1999) (emphasis added). The Academy was administered by the Maritime Administration, a part of the United States Department of Transportation, *i.e.*, it was a program conducted by an Executive agency, and its decision to disqualify Lane was based solely on the fact that he had diabetes. However, § 505(a)(2) of the Rehabilitation Act, which describes the remedies available for a violation of § 504(a), provided:

> The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by **any recipient of Federal assistance or Federal provider of**

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16 As previously noted, § 5851(a)(2)(A) includes within the term "employer" a licensee of the NRC or of an agreement State under section 274 of the AEA of 1954. Subsection 5851(a)(2)(B) also includes an applicant for such a license within the term.

> **such assistance** under [§ 504].

29 U.S.C.A. § 794a(a)(2) (emphasis added).

The prohibition against discrimination applied to programs receiving Federal financial assistance, programs conducted by any Executive agency, and the U. S. Postal Service. The remedies provision applied to recipients of Federal assistance or Federal providers of such assistance – but not to "programs conducted by any Executive agency." The Court found that the word choices in the two provisions "indicate[ ] congressional intent to treat federal Executive agencies differently from other § 504(a) defendants for purposes of remedies." *Lane*, 518 U.S. at 197, 118 S. Ct. at 2099.

As OSHA has urged us to conflate the populations covered in §§ 5851(a) and 5851(b)(2)(B), Lane urged the Supreme Court to read §§ 504(a) and 505(a)(2) "together to establish a waiver of the Federal Government's sovereign immunity against monetary damages awards for violations of § 504(a) committed by Executive agencies." *Lane*, 518 U.S. at 191, 116 S. Ct. at 2096. Calling Lane's reasoning "superficial[ly] appeal[ling]," the Court squarely rejected it. Subsection 505(a)(2) "makes no mention whatsoever of 'program[s] or activit[ies] conducted by any Executive agency,' the plainly more far-reaching language Congress employed in § 504(a) itself." *Id.*, 518 U.S. at 192–193, 116 S. Ct. at 2097.

The Court also rejected Lane's argument that even if the compliance and remedies sections were unclear about the scope of sovereign immunity, the overall statutory scheme eliminated uncertainty by showing congressional intent to "'level the playing field' by subjecting the Federal Government to the same remedies as any and all other § 504(a) defendants." *Id*., 518 U.S. at 195, 116 S. Ct. at 2098. Reminding Lane that "when it comes to an award of money damages, sovereign immunity places the Federal Government on an entirely different footing than private parties," *id.*, 518 U.S. at 196, 116 S. Ct. at 2098, the Court concluded:

> Given the existence of a statutory provision that is directed precisely to the remedies available for violations of § 504, it would be a curious application of our sovereign immunity jurisprudence to conclude . . . that the lack of clear reference to Executive agencies in any express remedies provision indicates congressional intent to subject the Federal Government to monetary damages.

Id., 518 U.S. at 197, 116 S. Ct. at 2099.

Like § 504(a) of the Rehabilitation Act which prohibits discrimination on the basis of disability under a program conducted by an Executive agency, § 5851(a) prohibits discrimination on the basis of whistleblowing by a federal agency that is an NRC licensee ("employer"). The use of different terminology ("person") in § 5851(b)(2)(B) (and thereby the apparent lack of a clear reference to such a federal agency in the remedies section), like the lack of a clear reference to Executive agencies in § 505(a)(2), runs counter to a finding that Congress intended to waive

sovereign immunity for monetary damages under § 5851(b)(2)(B).

Further, even if we thought § 5851 could be construed to mean Congress used the words "employer" and "person" interchangeably, that would be only one possible reading. Obviously, another possible reading would be that "employer" and "person" are not fungible. The former reading could support a finding of waiver, since "employer" is defined in § 5851(a)(2) to include NRC licensees and NRC licensees include government agencies. The latter reading could support a finding of no waiver, since "person" is not defined in § 5851. When one reading of a statutory text could plausibly support a finding of waiver, but another reading that is incompatible with waiver is also plausible, the latter must prevail. That is because the very presence of ambiguity precludes a finding of waiver. *Dep't of Energy v. Ohio,* 503 U.S. at 627, 112 S. Ct. at 1639.

Having established that the scope of the non-discrimination provision (§ 5851(a)) cannot be used to establish waiver of immunity for purposes of the remedies provision (§ 5851(b)), and that the use of different terminology in the two provisions ("employer" v. "person") creates an ambiguity which must be construed against waiver of immunity from monetary damages, we move to a closer examination of the word "person."

C. Federal Government presumed not included in term "person"

The word "person" is a term of art used to exclude the federal government. It is "a longstanding interpretive presumption that 'person' does not include the sovereign." *Vermont Agency of Natural Resources v. United States*, 529 U.S. 765, 780, 120 S. Ct. 1858, 1866 (2000). *Cf*. 5 U.S.C.A. § 1 (West 1996) ("the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals"). Thus the use of "person" in § 5851(b) creates the presumption that the federal government is not among the entities subject to monetary damages.

To be sure, Congress can override the presumption that "person" excludes the federal government simply by expressly defining the word "person" to include the federal government. *Cf. Dep't of Energy v. Ohio*, 503 U.S. at 618, 112 S. Ct. at 1635 (noting sections in the CWA and RCRA in which Congress specifically defined "person" to include the United States and thereby showed intent to waive sovereign immunity for purposes of those sections). Congress did not, however, choose to expressly redefine "person" in the ERA as including the United States or federal agencies, either generally, e.g., for purposes of chapter 73, or specifically, e.g., for purposes of § 5851(b)(2)(B).

D. ERA did not incorporate "person" from the Atomic Energy Act

OSHA urges that the term "person" as used in Chapter 23 has *always* included the United States and implies that the term "person" in § 5851 has the same meaning. However, the

definition of "person" in Chapter 23 is expressly limited to that chapter:

> **As used in this chapter**:
>
> * * *
>
> (l) The term "Government agency" means any executive department, commission, independent establishment, corporation wholly or partly owned by the United States of America which is an instrumentality of the United States, or any board, bureau, division, service, office, officer, authority, administration, or other establishment in the executive branch of the Government.
>
> * * *
>
> (s) The term "person" means (1) any . . . Government agency other than the Commission . . . .

42 U.S.C.A. §§ 2014(l) and (s) (emphasis added).

Moreover, the definition of "person" in Chapter 23 was established under the AEA, while the term "person" which must be construed for these purposes is part of the ERA, a separate and distinct Act. Although Congress chose to establish new agencies through the ERA and transfer to them functions given to other bodies by the AEA, it did not transfer or otherwise incorporate the definitions of the AEA. This is particularly notable because Congress did specifically incorporate into the ERA (and Chapter 73) certain other references.[17] Additionally, as noted above, Congress has continued to treat the AEA and the ERA (and Chapters 23 and 73 thereby) as separate, by selectively amending each Act. The fact that Congress chose to adopt the whistleblower provision of § 5851 as an amendment to the ERA, which contains no definition of "person," rather than as an amendment to the AEA, which contains a definition, cannot be ignored.

OSHA also contends that the term "person" as used in § 5851(b)(2)(B) of the ERA should be construed in light of the word's meaning in the context of AEA licensing. The AEA prohibits "persons" from using nuclear energy or its by-products without a license. This means that licensees are persons. Moreover, since 1946 licensees have included federal agencies.[18]

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[17] Congress incorporated references to duty, obligation, power, authority, responsibility, right, privilege, and activity, or the plural thereof by deeming them included in any Chapter 73 reference to "function" or "functions," and included the exercise of power, authority, rights and privilege when there is any reference to "perform" or "performance." *See* 42 U.S.C.A. § 5874. Congress also provided that references in any other law to a department or agency whose functions were transferred by Chapter 73 should be deemed to refer to the office or official in which Chapter 73 vested the function. 42 U.S.C.A. § 5871(h).

[18] OSHA highlights the fact that VA facilities have been continuously licensed since at least 1958. It uses this fact as support for its argument that the statutory language pertaining to the NRC's

Thus licensees may be federal agencies. Given the centrality of the licensing program to the AEA and the ERA, OSHA argues, the term "person" in § 5851(b)(2)(B) should be construed consistently with the licensing provisions, i.e., licensees under the AEA are persons with permission to use nuclear energy or its byproducts, licensees may be either private or governmental, ergo, persons liable under § 5851(b)(2)(B) may be either private or governmental. This reasoning does not satisfy the unequivocal statement requirement.

Additionally, as noted above, Congress has been quite clear that the AEA and the ERA are separate statutes. Congress chose to preserve the AEA and transfer AEC regulatory and licensing functions into the ERA. It did not choose to incorporate the AEA's provisions into the ERA. To invest § 5851(b)(2)(B) with meanings intrinsic to the AEA for purposes of establishing a waiver of sovereign immunity is to do more than the language of the ERA requires. Because the government's consent to be sued must not be "enlarged beyond what the language requires," *Ruckelshaus v. Sierra Club*, 463 U.S. at 684, 103 S. Ct. at 3278, and must be "construed strictly in favor of the sovereign," *McMahon* 342 U.S. at 27, 72 S. Ct. at 19, we cannot adopt OSHA's contention.

E. Civil penalty insufficient basis to waive immunity from monetary damages

OSHA also suggests that § 5851 be construed to authorize monetary awards against federal agencies because Congress authorized the NRC to assess civil money penalties, thereby expressing a generalized willingness to make federal agencies liable monetarily. Again, this is inferential reasoning when only unambiguous intent to waive immunity from the monetary liability at issue will satisfy. "To sustain a claim that the Government is liable for awards of monetary damages, the waiver of sovereign immunity must extend unambiguously to such monetary claims." *Lane*, 518 U.S. at 192, 116 S. Ct. at 2096-2097.

F. Waiver not determined by legislative history

Pastor and OSHA also suggest that we look beyond the text and structure of the AEA and ERA, and their historical relationship, and consider the legislative history of the ERA. OSHA believes that statements by certain legislators establish congressional intent to treat federal and non-federal licensees alike under the whistleblower provisions, thereby making federal agencies liable for monetary damages under § 5851(b)(2)(B). Pastor submits that legislators' references to the federal facilities provisions of the Clean Air Act and the Federal Water Pollution Control Act should be understood as intent to enact a broad waiver of immunity.

As OSHA sees it, the Court authorized use of legislative history in sovereign immunity analysis in *Gibson*. We do not understand *Gibson* to authorize use of legislative history in determining whether Congress intended to waive sovereign immunity. The *Gibson* Court divided five to four as to whether the issue to be decided was even a sovereign immunity issue,

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licensing authority includes licensing of VA facilities and thereby makes VA facilities subject to the ERA's whistleblower provisions.

and it divided again, with the same five to four, on whether Congress made its intentions clear enough to establish waiver. Neither the majority nor the dissent relied on legislative history in deciding whether Congress did waive sovereign immunity.

Gibson addressed the question whether, when Congress amended Title VII of the Civil Rights Act of 1964 to authorize courts to award compensatory damages against federal agencies found in violation of Title VII, Congress intended to authorize the EEOC to make such awards during its administrative adjudication of a case. Pub. L. 102-166, 86 Stat. 111 (codified at 42 U.S.C. § 1981(a)(1)).

To the majority, Congress' intention to waive immunity from compensatory damages was not being challenged. For them, the issue was "[w]hether, in light of that waiver, [Pub. L. 102-166] permits the EEOC to consider the same matter at an earlier phase of the employment discrimination claim." *Gibson* at 527 U.S. at 222, 119 S. Ct. at 1912. The majority considered this issue a question of "how the waived damages remedy is to be administered." *Id.* Consistent with its view that the question for decision was not whether immunity had been waived, the majority considered, among other things, legislative history.

The four dissenting Justices defined the question to be decided as whether Congress had waived sovereign immunity in two separate forums – Article III courts and the EEOC. The dissent concluded that Congress clearly conveyed intent to waive immunity from compensatory damage awards in court proceedings, but did not clearly convey intent to waive immunity with respect to awards made by EEOC during the administrative phase of the litigation. Applying the rule that the intent to waive immunity must be unequivocally expressed, the dissent concluded that waiver was not established for the EEOC phase of a Title VII case. The dissent suggested that its conclusion was compelled by the rigorous standards applicable in waiver of immunity cases.

The majority responded to this by stating that it would have reached the conclusion it did even under a waiver-of-immunity analysis. "[I]f we must apply a specially strict standard . . . that standard is met here," because "the statutory language, taken together with statutory purposes, history, and the absence of any convincing reason for denying the EEOC the relevant power, produce evidence of a waiver that satisfies the stricter standard." *Id.*

The sources the majority cited are mainstays of express-intent analysis. *Cf. Blue Fox* (considering both the text and history of § 702 of the APA in determining the scope of its immunity waiver); *Lane* (determining whether § 504(a) of the Rehabilitation Act of 1973 expressed a waiver of sovereign immunity by, inter alia, considering the texts of §§ 504(a), 505(a)(2) and 1003 with similar statutory provisions and the Civil Rights Act of 1991, and their respective historical contexts). Although the majority's ratio decidendi did rely in part on legislative history, the majority did not include legislative history in its alternative "specially strict standard" analysis.

That the Court is not retreating from express-intent analysis is further evidenced by its application of the strict standard in another case decided the same term as *Gibson*. *Blue Fox,*

(waiver of sovereign immunity "must be 'unequivocally expressed' in the statutory text," citing *Lane*). And the Court continued to apply the express text requirement after *Gibson. See, e.g., Kimel v. Florida Bd. Regents,* 528 U.S. 62, 73, 120 S. Ct. 631, 640 (2000) ("Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute"). *Cf. College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Board,* 527 U.S. 666, 682, 119 S. Ct. 2219, 2229 (1999) (the standard of clarity of expression is the same for Federal sovereign immunity analysis as for State sovereign immunity analysis).

The legislative history OSHA asks us to consider is comprised of statements by members of Congress in connection with the 1978 creation of the ERA and 1992 amendments to § 5851(a). An individual statement simply conveys an idea that a particular Senator or Representative had at the time the statement was made. That idea may or may not have been known or shared by others. Thus, such statements offer limited support for assertions about the meaning of the legislation as enacted.

Moreover, the statements OSHA cites do not clearly demonstrate that the speakers thought the ERA was making the Government liable for monetary damages to federal employees for violations of § 5851(b)(2)(B). For example, Congressman Wyman is quoted as saying: "These provisions [amending § 5851(a) to define "employer to include DOE contractors, licensees, and others] lock into federal law strong protections for workers. . . . [P]rivate contractor employees will have the right to the same kind of grievance procedures and remedies now enjoyed by most public employees that disclose wrongdoing and face retaliation." 138 CONG. REC. H11374-03, H11376 (Oct. 5, 1992). OSHA Br. at 7 n.10. The reference to the procedures and remedies already enjoyed by most public employers is not necessarily a reference to § 5851; it could as easily be a reference to the Whistleblower Protection Act included in the Civil Service Reform Act. *See* pages 2-3, *supra.*

In her supplemental brief, Pastor urges us to find that Congress intended to waive sovereign immunity from monetary damages for federal violations of § 5851(a). However, Pastor's arguments are all based on disallowed inferential reasoning. Accordingly, we do not address them separately here.

G. No waiver in 42 U.S.C.A. § 5871(e)

In addition to the provisions cited by the parties and amicus, we have also considered 42 U.S.C.A. § 5871(e) (Abatement of suits or other proceedings by or against officer, department, or agency). That section provides:

> No suit, action or other proceeding commenced by or against any officer in his official capacity as an officer of any department or agency, functions of which are transferred by this chapter, shall abate by reason of the enactment of this chapter. *Causes of actions, suits, actions, or other proceedings may be asserted by or against the*

> *United State or such official as may be appropriate*, and, in any litigation pending when this section takes effect the court may at any time, on its own motion or that of any party, enter any order which will give effect to the provisions of this section.

Pub. L. 93-438, Title III, § 301 (emphasis supplied).

Although the language emphasized above could be read as authorizing suits by or against the United States, the surrounding language and § 5871(e)'s placement in a section relating primarily to transitional matters indicate that it pertains to already authorized causes of action. That is, it allows the entities created by the ERA which are newly endowed with transferred functions – and their officials – to proceed to prosecute and defend actions in accordance with those transferred functions. It does not unequivocally and unambiguously waive sovereign immunity so as to permit award of damages against a federal agency under § 5851.

CONCLUSION

Having applied the Supreme Court's standards for waiver of sovereign immunity with respect to monetary damages, we are compelled to conclude that Congress did not waive sovereign immunity from monetary damages claims under § 5851. Therefore, the Secretary of Labor does not have jurisdiction to adjudicate Pastor's complaint and this Board, as her delegatee, does not have jurisdiction to decide Pastor's appeal.

Accordingly, the complaint in this case is **DISMISSED.**

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge