In the Matter of:

KAREN YAGLEY,	**ARB CASE NO. 06-042**
COMPLAINANT,	**ALJ CASE NO. 2005-TSC-003**
v.	**DATE: May 29, 2008**

HAWTHORNE CENTER OF NORTHVILLE,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Karen Yagley, *pro se*, Dearborn, Michigan

FINAL DECISION AND ORDER

Karen Yagley filed a whistleblower complaint against Hawthorne Center of Northville under the employee protection provisions of the Clean Air Act (CAA), 42 U.S.C.A. 7622 (West 2008) and the Toxic Substances Control Act (TSCA), 15 U.S.C.A. 2622 (West 2008).

Hawthorne filed a Motion to Dismiss Yagley's complaint since the ALJ "lacked subject matter jurisdiction because Hawthorne Center of Northville, as an agency of the State of Michigan, enjoys sovereign immunity under the 11th Amendment." Motion for Summary Decision at 2. On December 30, 2005, a United States Department of Labor (DOL) Administrative Law Judge (ALJ) granted the motion. As explained below, we accept the ALJ's recommendation and dismiss the complaint.

BACKGROUND

For background purposes, we take facts from the DOL Occupational Safety and Health Administration's (OSHA) August 22, 2005 Final Investigative Report (FIR).

The Hawthorne Center, an agency of the Michigan Department of Community Health, provides psychiatric services to children and adolescents. FIR at 1. Yagley worked as a registered nurse for Hawthorne. *Id.*

In 2001, the Hawthorne Center began renovating the hospital wing where Yagley worked. *See* Yagley's Initial Complaint to DOL (IC), Mar. 25, 2005. The renovations included "sanding of layers of old paint off all metal objects," which created large amounts of dust in the still operating wing of the hospital. *Id.* Yagley contended, in a complaint filed with Michigan OSHA, that Hawthorne created a hazardous workplace for the employees and patients. *Id.* Yagley also filed an additional complaint with the Environmental Protection Agency (EPA) alleging that the children suffered from excessive exposure to lead paint during the renovations. *Id.*

As part of her employment contract with Hawthorne, Yagley received Long Term Disability (LTD) benefits. FIR at 1. On March 10, 2005, Yagley received written notice that her LTD had ended effective March 1, 2005. *Id.* Her OSHA complaint alleged that Hawthorne ended her LTD abruptly in retaliation for her complaints about the renovation. *Id.*

OSHA investigated Yagley's complaint. OSHA found that Yagley's contention that she was a "victim of reprisal or discrimination simply cannot be supported by the available information." *Id.* at 3. Having reviewed unspecified evidence provided by Hawthorne, OSHA concluded that Hawthorne was not responsible for the administration of the LTD plans. *Id.* at 2. Hawthorne did not raise the question of sovereign immunity to OSHA and OSHA's findings do not address it.

Yagley, in a timely manner, appealed and invoked her right to a hearing before a DOL ALJ, who scheduled a hearing for January 10, 2006. *See* Notice of Case Assignment and Preliminary Order, Sept. 22, 2005. On November 25, 2006, Hawthorne filed a Motion for Summary Decision, asking the ALJ to dismiss the appeal on Eleventh Amendment grounds. Yagley did not respond, but instead filed a Motion to Stay the Proceedings. The ALJ granted Hawthorne's Motion for Summary Decision, cancelled the hearing, and dismissed the complaint. Recommended Order Dismissing Complaint on Summary Decision (R. O.). The ALJ found that Hawthorne was immune under the Eleventh Amendment, and did not address the merits of the case. *Id.* Yagley timely notified the Administrative Review Board (ARB or Board) of her intent to appeal.

Due to Yagley's deteriorating health, she was unable to promptly prosecute her appeal. On multiple occasions Yagley petitioned the Board for extensions of time to file an initial brief. Since Yagley demonstrated good cause, an illness that left her incapacitated, the Board granted numerous extensions of time from February 2006 until January 2008. On January 30, 2008, the Board issued an Order stating that "Yagley has

failed to provide the Board with any evidence that she will, at any time in the future, be able to prosecute her claim." The Order gave both parties a 30-day period in which to file briefs, at the end of which the Board would decide Yagley's appeal based on the record and briefs filed. On February 26, Yagley filed a Response Motion (RM) with the Board. Hawthorne did not reply to the Board's Order.[1]

ISSUE PRESENTED

We address only the following issue in considering Yagley's appeal: Whether the ALJ properly granted Hawthorne's Motion for Summary Decision and found that the Eleventh Amendment bars Yagley's whistleblower complaint against Hawthorne.

JURISDICTION AND STANDARD OF REVIEW

The ARB 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. 64,272 (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. *See* 5 U.S.C.A. § 557(b) (West 1996); 29 C.F.R. § 24.8.

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 decisions de novo. *Farmer v. Alaska Dep't of Transp. & Pub. Facilities*, ARB No. 04-002, ALJ No. 2003-ERA-011, slip op. at 4 (ARB Dec. 17, 2004); *Ewald v. Commonwealth of Va., Dep't of Waste Mgmt.*, ARB No. 02-027, ALJ No. 1998-SDW-001, slip op. at 4 (ARB Dec. 19, 2003).

DISCUSSION

The Complainant, acting pro se, has filed a "Response Motion" with the Board. As we have stated previously, "[w]e construe complaints and papers filed by pro se

[1] On May 27, 2008, Yagley filed an "Amendment to Response Motion" with the Board. This motion, however, was outside the time limit for filing imposed by the January 30, 2008 Order and therefore we have not considered it.

complainants 'liberally in deference to their lack of training in the law' and with a degree of adjudicative latitude." *Trachman v. Orkin Exterminating Co. Inc.*, ARB No. 01-067, ALJ No. 2000-TSC-003, slip op. at 6 (ARB Apr. 25, 2003); *see also Martin v. Akzo Nobel Chems., Inc.*, ARB No. 02-031, ALJ No. 2001-CAA-016, slip op. at 2 n.2 (ARB July 31, 2003) (liberally construing pro se litigant's only filing to the ARB, a copy of the same post-hearing brief submitted to the ALJ, as a brief "asserting that the ALJ's conclusions of law were erroneous").

Because Yagley's filing, together with the record and the ALJ's R. O., sufficiently present the issues involved in this matter, we have proceeded to decide this case as indicated in the Board's January 30, 2008 Order.

I. Hawthorne Has Eleventh Amendment Immunity

The Eleventh Amendment to the Constitution prohibits a citizen of one state from bringing suit against another state. *See* U.S. Const. amend. XI. The Supreme Court has held that the Eleventh Amendment also bars a citizen from suing her own State. *See Hans v. Louisiana*, 134 U.S. 1, 10 (1890). Additionally, the Eleventh Amendment also bars adjudication of private complaints against states by a federal administrative agency when such adjudication sufficiently resembles civil litigation in federal court. *See Federal Mar. Comm'n v. South Carolina Ports Auth.*, 535 U.S. 743, 760 (2002). Following this guidance, our well-established precedent has held that under the doctrine of state sovereign immunity, there is no private right of action for damages against a state or state agency. *See, e.g., Thompson v. University of Ga.*, ARB No. 05-031, 2005-CAA-001 (ARB Jan. 31, 2006); *Powers v. Tennessee Dep't of Env't & Conservation*, ARB Nos. 03-061, 03-125; ALJ Nos. 2003-CAA-008, 2003-CAA-016 (ARB June 30, 2005 (reissued Aug. 16, 2005)) (providing analysis and citing similar federal cases); *Farmer*, *supra*; *Ewald*, *supra; Cannamela v. Georgia Dep't of Natural Res.*, ARB No. 02-106, ALJ No. 2002-SWD-002 (ARB Sept. 30, 2003).

Yagley is a private citizen, and she has not disputed Hawthorne's assertion that it is a state governmental entity. Therefore, Hawthorne has sovereign immunity and Yagely's action is barred unless immunity has been clearly abrogated by the United States Congress or waived by the State of Michigan.

We also note that because sovereign immunity is jurisdictional, rather than a defense, its existence can be raised at any time. *See FDIC v. Meyer*, 510 U.S. 471, 475 (1994). Therefore, despite Yagley's argument that "proceedings were well underway before the Sovereign Immunity Claim was ever made," we must resolve Hawthorne's claim of sovereign immunity. RM at 14.

II. No Abrogation or Waiver of Eleventh Amendment Immunity

The ALJ concluded that the Congress had not abrogated state sovereign immunity when it enacted the CAA or TSCA and that Michigan had not waived its Eleventh Amendment right to sovereign immunity under the CAA or TSCA. We agree. Yagley

argues on appeal that Hawthorne's immunity has been either abrogated by Congress or waived by the State. RM at 10.

Our long-standing jurisprudence has held that the environmental whistleblower statutes do not abrogate a State's sovereign immunity. *See Thompson, supra*; *Powers, supra* (holding that the environmental whistleblower cases "do not provide for private rights of action for money damages against states and state agencies"); *Cannamela, supra* (concluding State of Georgia is immune from whistleblower suit under the environmental whistleblower statutes). Federal courts have also held that Congress did not abrogate states' immunity from whistleblower claims under the environmental statutes. *See Connecticut Dep't of Envtl. Prot. v. OSHA*, 138 F. Supp. 2d 285, 296-97 (D. Conn. 2001)(filing whistleblower 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 environmental statutes violated state's sovereign immunity); *State of Ohio E.P.A. v. United States Dept. of Labor*, 121 F. Supp. 2d 1155, 1162 (S.D. Ohio 2000)("finding no indication that Congress intended to abrogate the state's sovereign immunity in the promulgation and enactment of the whistleblower environmental statutes"). We can find no federal precedent establishing that Congress abrogated state sovereign immunity in the environmental whistleblower acts. Nor has Yagley provided any reason to question our earlier judgment. Therefore, while Hawthorne does have the obligation to protect employees under these statutes, under our federal system Yagley, a private citizen, is not permitted to bring an action against Hawthorne to enforce them.

Yagley also contends that "if the Secretary of Labor or one of their [sic] representatives became involved as a party or intervenes," Eleventh Amendment sovereign immunity does not apply. RM at 6. While it is true that if the Secretary chose to intervene, sovereign immunity would not apply; she has not chosen to do so in this case. *See Rhode Island Dep't of Envtl. Mgmt. v. United States*, 304 F.3d 31 (1st Cir. 2002)(Secretary's intervention would effectively remove the sovereign immunity bar to DOL adjudication); *Migliore v. Rhode Island Dep't of Envtl. Mgmt.*, ARB No. 04-156, ALJ No. 2000-SWD-001 (ARB Nov. 30, 2004)(same). Additionally, no federal governmental agencies have become parties to this case. Yagley cannot force the Federal Government to be a party by naming the Government as one when it is not the employer. The appeal concerns only a private citizen's suit against the state of Michigan.

As for waiver, a state may voluntarily waive sovereign immunity, but waiver occurs only "'by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction.'" *Ewald*, slip op. at 8, *quoting Edelman v. Jordan*, 415 U.S. 651, 673 (1974) at 673. Yagley offers no evidence that Michigan has unambiguously waived its sovereign immunity. She argues that Michigan defines itself as an employer, and to demonstrate this point provides an

Executive Order issued by the Governor of the State of Michigan. *See* RM, add. C.[2] However, the fact that Michigan defines itself as an employer for the purpose of this Executive Order does not establish its willingness to waive immunity under the TSCA or CAA. Any waiver of sovereign immunity must be unequivocal. Therefore, we conclude that there was no waiver in this case.

CONCLUSION AND ORDER

Yagley failed to establish that Congress abrogated a state's Eleventh Amendment immunity from a whistleblower claim under TSCA and CAA or that Michigan waived that immunity. The ALJ properly concluded that there were no issues of material fact in dispute and that sovereign immunity barred Yagley's whistleblower complaint against Hawthorne. Consequently, we **AFFIRM** the ALJ's R. O. and **DISMISS** Yagley's complaint.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge

[2] Executive Order 1979-5, "Establishment of the Office of State Employer, the Department of Management and Budget" (creating a state agency overseeing employees of the State).