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Issue Date: 29 November 2004

Case No.: 2005-CAA-1

In the Matter of:

ROBERT THOMPSON,
Complainant

vs.

UNIVERSITY OF GEORGIA,
Respondent.

APPEARANCES:

ROBERT THOMPSON,
Pro Se Complainant

BRYAN K. WEBB, ESQ.,
On Behalf of the Respondent

BEFORE: RICHARD D. MILLS
Administrative Law Judge

RECOMMENDED DECISION AND ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

This case arises under Section 322(a) of the Clean Air Act , 42 U.S.C. §7622; Section 110(a) of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9610; Section 507(a) of the Federal Water Pollution Control Act, 33 U.S.C. 1367; Section 1450 of the Safe Drinking Water Act, 42 U.S.C. 300j-9(i); Section 7001(a) of the Solid Waste Disposal Act, 42 U.S.C. 6971; and Section 23 of the Toxic Substances Control Act, 15 U.S.C. 2622; and the implementing regulations thereunder at 29 C.F.R. Part 24.

This claim is brought by Robert Thompson, Complainant, against his employer, the University of Georgia ("UGA"), a member institution of the Board of Regents of the University System of Georgia. On October 25, 2004, Mr. Thompson filed a complaint

against UGA, alleging that UGA discriminated against him in terms of compensation, conditions and privileges of employment in retaliation for his engagement in protected activities. In response to Complainant's original Complaint, Respondent filed a Motion to Dismiss, asserting that the Court lacks subject matter jurisdiction as UGA is a state governmental entity entitled to Eleventh Amendment immunity from Complainant's claims. Complainant filed a response, asserting that UGA waived its Eleventh Amendment immunity by virtue of accepting federal funding.

The Eleventh Amendment bars suits commenced by private citizens against a non-consenting state. See Edelman v. Jordan, 415 U.S. 651, 663 (1974); U.S. Const. Amend. XI. The Supreme Court has recently clarified that Eleventh Amendment state sovereign immunity from private suits extends to administrative adjudications. Federal Maritime Commission v. South Carolina Ports Authority, 122 S.Ct. 1864 (2002) (a private entity brought a claim before the Federal Maritime Commission against a state agency of South Carolina for an alleged violation of the Shipping Act of 1984).

A state consents to private suit only through a waiver of sovereign immunity, which is accomplished in only two ways. First, Congress may abrogate a state's immunity through unequivocal statutory language when it acts pursuant to a valid exercise of power derived from Section 5 of the Fourteenth Amendment. See Seminole Tribe of Florida v. Florida, 517 U.S. 44, 55 (1996). Second, states may voluntarily waive sovereign immunity. See Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985). A state voluntarily waives sovereign immunity when it accepts federal funding that Congress has expressly conditioned upon a waiver of sovereign immunity from private suits. See id. at 238, n.1. The funding statute must include "a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity." Id. at 247.

Complainant argues that Respondent has waived sovereign immunity by accepting federal funds. In support of this proposition, Complainant relies upon Sandoval v. Hagan, 197 F.3d 484 (11th Cir. 1999), overruled on other grounds, Alexander v. Sandoval, 532 U.S 275 (2001). However, Sandoval is distinguishable from the instant case. In Sandoval, the Eleventh Circuit found that state agencies waived their Eleventh Amendment immunity under the Rehabilitation Act when they accepted federal funds, because that particular statute contained a clear and explicit waiver of immunity. Id. at 493. The language of the statute reads, "A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in a Federal court for a violation of section 504 of the Rehabilitation Act . . ." Title VI, Section 2000d-7. In contrast, the environmental statutes under which Complainant brings his claims do not contain express language conditioning the receipt of federal funding upon a waiver of sovereign immunity.

Congress has not abrogated state sovereign immunity under these environmental statutes. Congress may abrogate state immunity from suit in federal court only by "making its intention unmistakably clear in the language of the statute." Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 73 (2000). Claimant does not point to language in any of the Acts under which his claims arise that clearly exhibits Congressional intention to abrogate state sovereign immunity. Further, the Administrative Review Board has stated, "[t]he employee protection provisions of the environmental statutes at issue—CERCLA, RCRA, CWA, and SDWA—do not clearly indicate that Congress expressed any intention to abrogate state sovereign immunity from whistleblower complaints." Ewald v. Commonwealth of Virginia, Dep't of Waste Management, BRB No. 02-027, ALJ No. 89-SDW-0001, at 6 (ARB Dec. 19, 2003). Likewise, in reference to CAA, WPCA, TSCA, SDWA, SWDA, and CERCLA whistleblower claims, a federal district court stated, "[t]he whistleblower provisions adopted by Congress evidence no clear intention by Congress to make states susceptible to whistleblower claims by private individuals." Florida v. United States, 133 F.Supp.2d 1280, 1291 (N.D. Fl. 2001).

The Court finds that the present case is controlled by Federal Maritime Commission, which similarly involved a complaint brought by a private party against a non-consenting state to be adjudicated by a federal agency; therefore, Eleventh Amendment sovereign immunity applies. Complainant has offered no evidence of voluntary waiver of sovereign immunity by the state or express abrogation of sovereign immunity by Congress. Accordingly, the Court finds that the State of Georgia is a non-consenting state in this adjudication and is entitled to Eleventh Amendment sovereign immunity.

Accordingly, the University of Georgia's Motion to Dismiss is **GRANTED** and the Complainant's complaint against the University of Georgia is **DISMISSED**.

It is further ordered that the hearing which is presently scheduled to commence before the undersigned on **Tuesday, December 14, 2004** at **9:00 a.m.** in **Watkinsville, Georgia** is **CANCELED**.

So ORDERED.

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RICHARD D. MILLS
Administrative Law Judge

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. *See* 29 C.F.R. §§ 24.7(d) and 24.8.