U.S. Department of Labor

Office of Administrative Law Judges
36 E. 7th St., Suite 2525
Cincinnati, Ohio 45202

(513) 684-3252
(513) 684-6108 (FAX)

Issue Date: 18 October 2004

Case No.: 2004-ERA-00007

In the Matter of:

WILLIAM SALSBURY
Claimant

v.

EDWARD HINES, JR. VETERANS HOSPITAL
DEPARTMENT OF VETERANS AFFAIRS
Respondent

APPEARANCES:

Roy R. Bandys, Esq.
Childress & Zdeb
Chicago, IL
For the Claimant

Timothy B. Morgan, Esq.
Special Assistant U.S. Attorney
Chicago, IL
For the Respondent

BEFORE: JOSEPH E. KANE
Administrative Law Judge

RECOMMENDED DECISION AND ORDER
GRANTING RESPONDENT'S MOTION TO DISMISS

This proceeding arises under the Energy Reorganization Act of 1974 ("ERA"), 42 U.S.C. § 5851 (1988 and Supp. IV 1992), the Atomic Energy Act of 1954, 42 U.S.C. § 2011 *et seq.* and the regulations promulgated thereunder at 29 C.F.R. Part 24, which are the employee protective provisions of the ERA. Under these provisions, the Secretary of Labor is empowered to investigate and determine "whistleblower" complaints filed by employees at facilities licensed by the Nuclear Regulatory Commission ("NCR"), who are allegedly discharged or otherwise discriminated against with regard to their terms and conditions of employment, for taking any action relating to the fulfillment of safety or other requirements established by the NRC.

William C. Salsbury, Claimant, filed a whistleblower suit against his employer, the Edward Hines Jr. Veterans Hospital, under the Energy Reorganization Act (ERA), 42 U.S.C § 5851 (West 1995). Respondent submitted a Motion for Dismissal asserting a lack of subject matter jurisdiction, arguing that Mr. Salsbury failed to timely request his hearing under the procedures of 42 U.S.C. § 24.4. Before ruling on that motion, I *sua sponte* raised the issue of sovereign immunity, ordered Claimant to specify the relief requested with particularity and then ordered the parties to address the sovereign immunity issue, specifically under *Pastor v. Dept. of Veterans Affairs,* ARB No. 99-071, ALJ No. 1999-ERA-11 (ARB May 30, 2003) and the Administrative Procedure Act, 5 U.S.C. § 702. Thereafter, Claimant requested equitable relief including reinstatement with back pay[1] to his former position (GS-13) or alternatively, to the position (GS-11) to which he applied, and for an injunction against future harassment for his alleged whistleblower activities along with attorney's fees and costs and other remedies.[2] He also seeks compensatory damages for his pain and suffering.

Employer argues that the doctrine of sovereign immunity precludes Mr. Salsbury from pursuing his complaint unless an express waiver of immunity exists under *United States v. Testan,* 424 U.S. 392, 299 (1976)(internal citations omitted). Asserting that 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, the Veterans Administration (VA) maintains that dismissal is appropriate, citing *United States Dep't of Energy v. Ohio*, 503 U.S. 607, 615 (1992). The VA contends that the language of the ERA lacks such explicit waiver as discussed and decided in *Pastor, supra.* Lastly, Respondent argues that this claim should be barred because Mr. Salsbury's claim may be brought under the Whistle-blower Protection Act in Title 5 U.S.C. 1214 and because he has already waived his rights and settled his claim before the Merit Systems Protection Board.[3]

Claimant argues that the Administrative Procedure Act applies to permit ERA claims against federal agencies where equitable relief is sought. He adds the additional argument that back pay is specifically authorized under the Back Pay Act of 1966, which provides that a federal agency employee is entitled to back pay if "found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee." 5 U.S.C. § 5596(b)(1).

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[1] Claimant's initial response regarding relief did not specify reinstatement "with back pay" but it is included repeatedly in his Brief on the sovereign immunity issue and I will therefore include it as an item of requested relief.

[2] Claimant also seeks other relief such as an injunction requiring the Nuclear Regulatory Commission to impose the maximum fines possible should their investigation concur that retaliation took place, an injunction requiring the Nuclear Regulatory Commission to permanently suspend the Master Material License currently held by the Department of Veterans Affairs, and an injunction terminating certain individuals as a result of their conduct in this case. These items of relief are beyond the jurisdiction of this forum and are not addressed in this Order.

[3] The VA also argues that should the suit proceed, then "by virtue of the review and Complaint [sic] provisions, Section 5851(c) and (d), the United States would be placed in the ludicrous position of litigating against itself in Federal Court. It is unlikely that this was the intent of Congress." Response Brief at 4. This argument is meritless. Proceedings in this case are not enforcement actions but proceedings to adjudicate claims for relief made by the individual.

Claimant cites to *Bowen*, asserting that the Supreme Court read the Back Pay Act as mandating compensation by the federal government in a successful suit. *Bowen*, 487 U.S. at 905 n. 42.[4] The Claimant did not address his claims for compensatory relief under *Pastor* but instead relied upon the APA and the Back Pay Act to warrant waiver of sovereign immunity.

As a threshold matter, I will first address the issue of whether sovereign immunity bars Claimant's action. Because I find that immunity applies to his action for compensatory damages but not to equitable relief claims under the Administrative Procedure Act, I will then address whether his claim for back pay is equitable in nature rather than compensatory. Next, I will turn to Respondent's argument that this claim should be barred where the Whistleblower Protection Act (WPA) provides adequate remedies and where Claimant has already settled a related claim before the Merit Systems Protection Board. Lastly, I will address Respondent's Motion to Dismiss for lack of a timely request for hearing.

DISCUSSION

The Department of Veterans Affairs is an agency of the federal government. Accordingly, it is not subject to the ERA's whistleblower protection provision unless the federal government has waived its sovereign immunity. *See FDIC v. Meyer*, 510 U.S. 471, 475 (1994); *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). The concept of sovereign immunity operates as a complete bar to suits against the federal government. *Id.* Instead, legislative enactments may specifically waive the immunity to permit claims against the federal government and its agencies. *See e.g.,* Federal Tort Claims Act, 28 U.S.C. § 2671 *et* seq.; Tucker Act, 28 U.S.C. § 1491, § 2674.

In 1976, Congress broadly amended the Administrative Procedure Act and explicitly waived federal sovereign immunity for claimants seeking non-monetary relief such as the remedies available under the ERA. *See* Pub. L. 94-574, 90 Stat. 2721 (1976), codified at 5 U.S.C.A. § 702. Section 702 of the Act permits suits by individuals seeking relief, other than money damages, and asserting a claim against an agency or officer thereof, to proceed.

The Act states:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief *other than money damages* and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

[4] Claimant misreads the Supreme Court's note. The Court merely took notice that States had read the Back Pay Act as mandating compensation by the federal government for damages sustained.

5 U.S.C. § 702 (emphasis added). An action in a court of the United States seeking relief other than money damages…shall not be dismissed nor relief therein be denied on *the ground that it is against the United States…"* 5 U.S.C. § 702; *Breaux v. U.S. Postal Serv.*, 46 F. Supp. 2d 641 (D.C. Tex. 1999); *Clinton v. Babbitt,* 180 F.3d 1081 (9th Cir. 1999). Generally, there exists a strong presumption against legislative preclusion of judicial review and courts possess a considerable reluctance to read statutes as creating absolute preclusion of review. *Johnson v. Robinson*, 415 U.S. 361, 367 (1974); *McNary v. Haitian Refuge Center*, 498 U.S. 479, 496 (1991). Only upon a showing of "clear and convincing evidence" of a contrary intent are courts to conclude that Congress meant to preclude review. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-41 (1967); *in accord, Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667 (1986), *superseded by statute on other grounds, as recognized by Farkas v. Blue Cross & Blue Shield of Mich.*, 24 F.3d 853, 860 (6th Cir. 1994). Additionally, in *American Nuclear Resources, Inc. v. United States Department of Labor*, the Sixth Circuit stated, "Courts interpret the [ERA] statute broadly to implement its 'broad, remedial purpose'." 134 F.3d 1292, 1295 (6th Cir. 1998)(*quoting Mackowiak v. University Nuclear Sys., Inc.*, 735 F.2d 1159, 1163 (9th Cir. 1984).

Thereafter, in *Shalala v. Illinois Council on Long Term Care*, the U.S. Supreme Court expounded upon its decision in *Bowen,* 529 U.S. 1, 19 (2000). Holding that where reading a preclusionary provision broadly would result in "no review at all," the Court determined that the statute at issue lacked the "clear and convincing evidence" that Congress intended in order to preclude judicial review. *Id.* The *Bowen* Court's analysis of § 702 did not turn on distinctions between equitable actions versus other actions at law. Instead, the crucial question under § 702 is not whether the claim for relief is equitable but what Congress intended by the terms "money damages." *Department of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 260 (1999).

In *Department of the Army*, the Court again analyzed the terms employed by Congress in § 702. In the *Bowen* decision, the Court stated:

> We begin with the ordinary meaning of the words Congress employed. The term "money damages," 5 U.S.C. § 702 we think, normally refers to a sum of money used as compensatory relief. Damages are given to the plaintiff to *substitute* for a suffered loss, whereas specific remedies "are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled."

487 U.S., at 895 (quoting *Maryland Dept. of Human Resources* v. *Department of Health and Human Services*, 763 F.2d 1441, 1446 (CADC 1985) (citation omitted)); *quoted in Department of the Army*, *supra.* Consequently, the distinction lies, not in the terms equitable and compensatory but in specific relief versus money damages. In *Department,* the Court concluded that the Administrative Procedure Act did not waive sovereign immunity in a suit for an equitable lien despite the term "equitable." The court found dispositive the fact that the lien served as a means to obtain substitute or compensatory relief. *Supra.*

After determining the applicable analysis and case law on the applicability of § 702 to sovereign immunity, I will now address the facts of this case and the arguments of the parties.

I. Has Sovereign Immunity Been Waived?

The VA's position and the relied on case law are incorrect. First, the cited case, *United States Dep't of Energy v. Ohio*, involves an issue of state sovereign immunity under the Eleventh Amendment and not federal immunity. *Supra.* The Administrative Procedure Act, applicable to actions of federal agencies, is irrelevant to issues of state sovereign immunity as addressed in *Ohio*. Secondly, courts have repeatedly held that the amended Administrative Procedure Act provides the necessary explicit waiver to proceed in equity against the federal government's agencies. *Bowen, supra*; *Ward v. Brown*, 22 F.3d 516, 520 (2nd Cir. 1994) (APA waives defense of sovereign immunity for claims in equity against Department of Veteran's Affairs); *United States v. City of Detroit*, 329 F.3d 515, 521 (6th Cir. 2003) (citing circuit cases holding same). Consequently, actions at law are treated differently than actions in equity. *See, Bowen*, 487 U.S. 879, 893 (1988).

In a Third Circuit decision, the Court noted that other circuits "have consistently construed" the environmental and nuclear whistleblowing statutes "to lend broad coverage [to employees]. *Passaic Valley Sewerage Commissioners v. United States Dept. of Labor*, 992 F. 2d 474, 479 (3rd Cir. 1993). The broad coverage interpretation of whistleblower statutes serves to protect employees from "potentially catastrophic results" from coercion, intimidation or retribution that operates to silence employee reports of environmental law violations and safety concerns, which protect the public. *Rose v. Sec'y Dept. of Labor*, 800 F. 2d 563, 565 (6th Cir. 1986)(Edwards, J., concurring).

Turning to the language of § 5851, I find that the statute does not present "clear and convincing" confirmation, or even a suggestion, that Congress intended to preclude judicial review. At first blush, this conclusion may not seem reconcilable with the Administrative Review Board's analysis in *Pastor, supra.* There the ARB determined, and the VA admitted, that a federal agency, such as the Department of Veterans Affairs, may be considered an "employer" under the ERA but that only "persons" who discriminate are subject to the remedies of 42 U.S.C. § 5851(B).[5] The Administrative Review Board analyzed use of the term "person" in the relief section of § 5851 to find that the term was not intended to apply to a federal agency and, therefore, use of the word "person" indicated a lack of intent to explicitly waive immunity. *Supra.* The Board, however, carefully drafted its decision to apply narrowly to claims in which

[5] Section 5851(B) states:

> If, in response to a complaint filed under paragraph (1), the Secretary determines that a violation of subsection (a) of this section has occurred, the Secretary shall order the person who committed such violation to (i) take affirmative action to abate the violation, and (ii) reinstate the complainant to his former position together with the compensation (including back pay), terms, conditions, and privileges of his employment, and the Secretary may 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) reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued.

only compensatory damages are sought. The *Pastor* analysis then, applies to cases involving compensatory damages and consequently, a different decision on immunity when equitable relief is requested is reconcilable with *Pastor*.

Additionally, the *Pastor* compensatory damages claim did not fall under the explicit waiver provisions of the Administrative Procedure Act. The Administrative Procedure Act provides that federal agency decisions are reviewable except to the extent that "statutes preclude judicial review." 5 U.S.C. § 701(a)(1). Here, the facts are sufficient to differentiate the specific relief requested by Mr. Salsbury from the exclusively compensatory damages of *Pastor's* claimant and to determine that this claim falls under the waiver provision of the Administrative Procedure Act. Thus, judicial review is not prohibited by sovereign immunity unless precluded by the language of the statute: the ERA at §5851. *See Iyengar v. Barnhart*, 233 F. Supp 2d 5, 15 (D.C. Cir. 2002) (plaintiffs are entitled to an injunction against the federal agency under the APA, but are barred from seeking compensatory damages by sovereign immunity).

Additionally, I find the *Pastor* analysis regarding use of the term "person" in the remedy portion of § 5851 to be inapplicable under the waiver of the Administrative Procedure Act and the terms as defined in that Act. Specifically, § 702 provides:

> The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, [t]hat any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance.

Consequently, use of the word "person" in § 5851 comports with the language of the Administrative Procedure Act which requires that, although the Unites States and its agencies may be named as defendants, equitable relief shall be ordered against the person, namely the federal officer or officers, responsible for compliance. The United States Supreme Court repeatedly recognizes that Congressional use of terms within different parts of a statute or in related statutes is highly relevant to indicate that Congress intended to accomplish its goal, and "it knew how to do so." *See e.g., Menominee Tribe of Indians v. United States*, 391 U.S. 404, 416 n.7 (1968) (Steward, J. dissenting).

Also probative is the definition of "agency" and "person" as provided under 5 U.S.C. § 701:

> Section 701. Application; definitions
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> a) This chapter applies, according to the provisions thereof, except to the extent that -
>
> (1) statutes preclude judicial review; or
>
> (2) agency action is committed to agency discretion by law.
>
> (b) For the purpose of this chapter -

> (1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include -
>
> (A) the Congress;
> (B) the courts of the United States;
> (C) the governments of the territories or possessions of the United States;
> (D) the government of the District of Columbia;
> (E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;
> (F) courts martial and military commissions;
> (G) military authority exercised in the field in time of war or in occupied territory; or
> (H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; subchapter II of chapter 471 of title 49; or sections 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix; and
>
> (2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

Section 551 defines "person" as "includes an individual, partnership, corporation, association, or public or private organization other than an agency." 5 U.S.C. § 551(2).

Here, the named defendant is the Edward Hines, Jr. Veterans Hospital, an arm of the Department of Veterans Affairs, included under the definition of "agency." Notably, the definition of "person" excludes an agency, which is in keeping with § 702, which mandates the naming of a federal officer, rather than the agency, when **ordering** injunctive or mandatory relief. If an injunction or reinstatement is ordered, it must then be ordered against the VA officer responsible for reinstating Mr. Salsbury, hence a "person", in keeping with the wording in 5 U.S.C. § 551(2), 5 U.S.C. §§ 701, 702 and 42 U.S.C. § 5851.

Where all of the applicable code sections are read in combination, as intended, they are consistent in their application of the term "person" and cannot be read to disallow injunctive relief ordered against a federal officer of an agency. The statutes provide a comprehensive statutory and regulatory scheme set forth with particularity. Therefore, where this Complainant seeks injunctive relief, which must be ordered against the federal officer, not the agency, and this relief must be ordered against a "person" according to § 5851, then nothing in the ERA whistleblower statute suffices to negate the continuity of the explicit waiver and the applicability of the Administrative Procedure Act.

II. Is Back Pay an Equitable Remedy or a Form of 'Money Damages'?

Turning to the VA's next argument, that Claimant does indeed seek "compensable damages" in his request for reinstatement with back pay, the VA contests the equitable nature of

this relief. Additionally, the VA asserts that where Claimant, alternatively, seeks to be placed in a position to which he applied, but was not hired, after release from his previous position, the language of § 5851 pertains to "employees," not applicants. Respondent claims that providing this reparation, an injunction mandating Claimant's hire to a position he never held, would not constitute equitable relief.

On this second argument regarding appointment to a position not held, I agree. *See United States v. Testan*, 424 U.S. at 402 (*citing United States v. McLean*, 95 U.S. 750 (1878) ("[No]one is entitled to the benefit of a position until he has been duly appointed to it."); *see also, Ganse v. United States*, 376 F.2d 900, 902 (1967). Claimant may not seek to enforce the whistleblower provisions of the ERA as an applicant after he ceased his employment with the VA. Had he been denied this position as a promotion, he could have claimed that this denial equated to an adverse employment action, however; where he had already ended his employment with the VA, he cannot fall under the term "employee" as used in the statute. 42 U.S.C. § 5851; *see Tennessee Valley Authority v. Frady*, 134 F.3d 372 (6th Cir. 1998)(unpub.) (While under a reduction in force agreement, claimant applied for several new positions but was not selected and this constituted discriminatory conduct according to the Court.). Admittedly, the statue refers to "blacklisting" as a form of retaliation. However, the remedies section does not include or reference "applicant" with the term "employee." Consequently, I find that Claimant is not entitled to placement in the GS 11 position.

Turning to the issue of back pay as equitable or compensatory relief, I again look to the decisions of the Supreme Court and the Administrative Procedure Act. As previously discussed, the Administrative Procedure Act permits suits "seeking relief other than *money damages*" under the 1976 amendments. *Supra* (emphasis added). The Supreme Court held "[t]o 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 v. Pena*, 518 U.S. 187, 192 (1996) (*quoting United States v. Nordic Village, Inc.*, 503 U.S. 30, 37 (1992). The Supreme Court in *Bowen* applied the waiver of sovereign immunity under the 1976 amendments to declare "insofar as the complaints sought declaratory and injunctive relief, they were certainly not actions for money damages… and more importantly, even the monetary aspects of the relief that the State sought are not "money damages" as that term is used in the law." 487 U.S at 892-893.

A pertinent question presented in *Bowen*, a Medicaid reimbursement case, was whether an order of reinstatement with back pay constituted equitable relief or money damages. The Court held that "an order providing for reinstatement of an employee with back pay is a form of equitable relief" and applied the sovereign immunity waiver of the Administrative Procedure Act where the Medicaid Act did not provide an express waiver. The Court relied on the analysis in *Maryland Dept. of Human Resources v. Department of Columbia Health and Human Services* to parse the meaning of "money damages" from 5 U.S.C. § 702, the Administrative Procedure Act. 763 F.2d 1441 (D.C. Cir. 1985); *reaff'd by National Assn. of Counties v. Baker*, 842 F.2d 369 (D.C. Cir.1988).

In *Maryland Dept. of Human Resources*, the state sought an injunction preventing the agency from reducing the money owed to the plaintiffs or from imposing sanctions on the funds for violations of Title XX. *Supra.* The Appeals Court stated:

> We begin with the ordinary meaning of the words Congress employed. The term "money damages", 5 U.S.C. 702, we think, normally refers to a sum of money used as compensatory relief. Damages are given to the plaintiff to *substitute* for a suffered loss, whereas specific remedies "are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled." D. Dobbs, *Handbook on the Law of Remedies* 135 (1973). Thus, while in many instances an award of money is an award of damages, "[o]ccasionally a money award is also a specie remedy."

763 F.2d at 1446. After review and discussion of the legislative history behind 5 U.S.C. § 702, the Appeals Court asserted "[I]t seems to us, then, that the legislative history supports the proposition that Congress used the term "money damages" in its ordinary signification of compensatory relief." *Id.* at 1447-1448. The *Bowen* Court advocated a narrow construction of the 1976 amendments to the APA and refused to substitute the term "money relief" for "money damages." *Supra.* Certainly, the *Bowen* decision contradicts the VA's absolute bar argument against Claimant's requested relief; however, it does not address the issue of whether back pay constitutes "money damages."

Since the Supreme Court's decision in *Bowen,* some courts agree that an order for reinstatement is an equitable remedy; however, the Circuit Courts have split regarding the issue of whether back pay constitutes "money damages" or whether it is an ancillary form of equitable relief accompanying reinstatement.[6] Helpful, but not dispositive, the United States Supreme Court held in *School Comm. Of Burlington v. Dep't of Educ. Of Massachusetts*, that Congress intended retroactive reimbursement to be an equitable remedy. 471 U.S. 359, 370-371 (1985); *but cf.* The Seventh Circuit, within whose jurisdiction this case rests, has not addressed this issue. Therefore, I look to the wording of the statute to discern the legislative intent on the issue.

Section 5851 contains the following provision with regard to remedies:

> [T]he Secretary **shall** order the person who committed such violation to (i) take affirmative action to abate the violation, **and** (ii) reinstate the complainant to his former position together with the compensation (including back pay), terms, conditions, and privileges of his employment, **and** the Secretary **may** order such person to provide compensatory damages to the complainant. (Emphasis added).

Noteworthy is the use of the word "shall" as applied to the grant of affirmative action for abatement and reinstatement with back pay. The clause permitting compensatory damages employs the word "may" rather than the word "shall" as applied to the reinstatement with back pay.

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[6] In reliance on the language of Bowen, these cases treat requests for back pay as equitable: *Chandler v. U.S. Air Force, et al.*, 272 F.3d 527 (8th Cir. 2001); *Randall v. United States*, 95 F.3d 339, 347 (4th Cir. 1996); *DeVargas v. Mason & Hanger-Silas Mason Co.*, 911 F.2d 1377, 1381 n.3 (10th Cir. 1990). However, these cases found back pay to be the equivalent of a money judgment: *Sibley v. Ball*, 924 F.2d 25 (1st Cir. 1991); *Hubbard v. EPA*, 949 F.2d 453 (D.C. Cir. 1991)(*en banc*)(actions seeking back pay seek money damages and so are not covered by the APA.).

Additionally helpful is the regulation located at 29 C.F.R. § 24.6, specifically made applicable to the ERA and incorporated as part of the statutory scheme. Courts may permissibly resolve ambiguities in favor of the administrative construction if the construction enhances the purposes and policies behind the legislation. *Zuber v. Allen, et al*., 398 U.S. 168, 327-328 (1969). The Section 24.6 regulation separates items such as reinstatement with back pay from compensatory damages, stating:

> 2) If the Secretary concludes that the party charged has violated the law, the final order shall order the party charged to take appropriate affirmative action to abate the violation, including reinstatement of the complainant to that person's former or substantially equivalent position, if desired, together with the compensation (**including back pay**), terms, conditions, and privileges of that employment. **The Secretary may, where deemed appropriate, order the party charged to provide compensatory damages to the complainant.**

Again, the language selected by the Legislature in § 5851 and the administrative construction in the implementing regulations indicate that back pay is considered separate from, and not a subset of, compensatory damages.

In *Bowen*, the U.S. Supreme Court held that the Administrative Procedure Act does not waive sovereign immunity for actions at law, which "are intended to provide a victim with monetary compensation for an injury to his person, property, or reputation." 487 U.S. at 893. Yet, reinstatement with back pay is listed separately from "compensatory damages" in both the statute and the regulation. This suggests that mere payment of money does not signify the dividing line between what is equitable and what is compensatory. Where waiver is clear, the Supreme Court held that it is not to be circumscribed by strained or unnecessarily narrow interpretations. *Smith v. United States*, 507 U.S. 197, 201 (1993). The Supreme Court relied on this statement "[w]e should also have in mind that the Act [the APA] 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." *Id., citing United States v. Kubrick*, 444 U.S. 111, 117-118 (1979). Consequently, after exploring the statutory construction of the applicable sections of the Act and its attendant regulations, as well as the settled principles offered by the U.S. Supreme Court, I find that Congress intended reinstatement with back pay to be equitable relief and not money damages under the APA and the ERA. Therefore, the Administrative Procedure Act applies to waive sovereign immunity as to this aspect of Claimant's action.

As to Claimant's request for compensatory damages, I dismiss this claim for relief. Although the *Pastor* decision rested upon a definition of the term "person" and the Board's conclusion that § 5851's remedy section's use of the term precluded a waiver of sovereign immunity, I find that Title 29 C.F.R. § 24 offers opposing evidence of Congressional intent. Section 24, titled "Procedures for The Handling of Discrimination Complaints under Federal Employee Protection Statutes,"[7] specifically states that relief shall be ordered against a specified

[7] This section's beginning reads: TITLE 29--LABOR

person, a "federal" officer. Section 24 also provides specific provisions for handling discrimination suits under the ERA. Therefore, when read in conjunction with the use of "person" in the remedies portion of § 5851 of the ERA, and Section 24, the procedure section for discrimination suits (specifically including those filed under the ERA) which requires the naming of a "person" for injunctive relief, I find a consistent intent is obvious to provide equitable, but not compensatory, relief against federal agencies such as the VA.

III. Does the Whistleblower Protection Act or the Back Pay Act Preclude Application of the APA to Waive Sovereign Immunity?

Respondent next argues that the Whistleblower Protection Act provides equivalent protection and remedies to employees engaged in whistleblowing activities and therefore, Complainant is barred from pursuing this action.[8] *See* 5 U.S.C. § 1214, *et seq.* The Administrative Procedure Act contains a section that limits the Act's sovereign immunity waiver if the right to seek a remedy is available in any other court. 5 U.S.C. § 704. Under § 704, only "final agency action for which there is no other adequate remedy in a court [is] subject to judicial review." 5 U.S.C. § 704. Thus, the claimant will not qualify under the waiver in the Administrative Procedure Act as long as another remedy is available. *Mitchell v. United States*, 930 F.2d 893, 897 (Fed. Cir. 1991). In particular, Congress amended the WPA in 1994 to expressly extend whistleblower protection to Department of Veterans Affairs health-care professionals. *See* Pub. L. No. 103-424, § 7, 108 Stat. 4364. Determination of whether an adequate remedy exists in another court turns on whether an alternative court can offer adequate remedies and not on whether the claimant will be entitled to receive those remedies. *Mitchell, supra.* The Whistleblower Act at 5 U.S.C. § 1214(g) provides:

> If the Board orders corrective action under this section, such corrective action may include--

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> PART 24--PROCEDURES FOR THE HANDLING OF DISCRIMINATION COMPLAINTS UNDER FEDERAL EMPLOYEE PROTECTION STATUTES
> Sec.
> 24.1 Purpose and scope.
> 24.2 Obligations and prohibited acts.
> 24.3 Complaint.
> 24.4 Investigations.
> **24.5 Investigations under the Energy Reorganization Act.**
> 24.6 Hearings.
> 24.7 Recommended decision and order.
> 24.8 Review by the Administrative Review Board.
> 24.9 Exception.

(Emphasis added).

[8] I note that the Whistleblower Protection Act of 1989 is not written to be exclusive. *See Marcus v. U.S. Environmental Protection Agency*, 92-TSC-5, Sec'y Dec. (Feb. 7, 1994), slip op. at 5 (*citing Pogue v. U.S. Dept. of Navy Mare Is. Naval Shipyard*, 87-ERA-21 (May 19, 1990)).

> (1) that the individual be placed, as nearly as possible, in the position the individual would have been in had the prohibited personnel practice not occurred; and
>
> (2) reimbursement for attorney's fees, back pay and related benefits, medical costs incurred, travel expenses, and any other reasonable and foreseeable consequential damages.

I find that this statute is not an adequate remedy where it does not permit other injunctive relief. In *Transohio Sav. Bank v. Director, Office of Thrift Supervision*, the Federal Claims Court found that the inability to grant equitable relief precluded the existence of an adequate alternative remedy. 967 F.2d 598 (C.A. D.C. Cir. 1992). Here, Claimant seeks not only reinstatement with back pay, available under the WPA, but also an injunction preventing any further harassment. This relief is not available under the WPA. Consequently, I find that the WPA does not offer an adequate remedy to Claimant and therefore, the VA's argument here fails.

The argument that the Back Pay Act precluded relief where the APA limits its waiver applicability to complaints not addressable elsewhere is also flawed. The Supreme Court decided in *United States v. Testan*, that the Back Pay Act "was intended to grant a monetary cause of action only to those who were subjected to a reduction in their duly appointed emoluments or position." 424 U.S. 392, 407 (1976). Mr. Salsbury has not been subjected to a reduction in his position but rather he claims a wrongful, discriminatory termination. Even if the Back Pay Act were applicable to the facts of the instant claim, it would not suffice or extend to provide the requested equitable relief regarding a prohibition against future harassment. Therefore, this statute does not serve to negate the waiver of sovereign immunity.

IV. Did Complainant Fail to Name a "Person" and Therefore, the Claim Fails Procedurally?

Section 5851 requires the following procedure when filing a whistleblower suit under the ERA:

> (b) Complaint, filing and notification
>
> (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 (or have any person file on his behalf) a complaint with the Secretary of Labor (in this section referred to as the "Secretary") alleging such discharge or discrimination. Upon receipt of such a complaint, **the Secretary shall notify the person** named in the complaint of the filing of the complaint, the Commission, and the Department of Energy. (Emphasis added).

Under these facts, Mr. Salsbury did not name the "person" but instead named Hines Veterans Hospital and the Department of Veterans Affairs. Twenty-nine C.F.R. § 18.5(e) also applies to this case and reads in pertinent part:

> 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.

Consequently, it would be within my discretion to permit the Claimant to amend his petition to add the named individuals personally, which may be ordered to comply with any relief ordered, should Mr. Salsbury prevail. To the extent that this imperfection in Mr. Salsbury's complaint may be cured, assuming that no due process rights of the named individuals would be harmed, this error is not fatal to Mr. Salsbury's claim.

V. Was the Request for Hearing Timely Filed?

Having established that appropriate jurisdiction exists to proceed with Mr. Salsbury's complaint, I will address the VA's Motion to Dismiss for lack of a timely filing. Respondent argues that Claimant failed to timely file his request for a hearing. Under 29 C.F.R. §24.4(d)(2), the time for filing a request for a hearing is within five (5) business days from receipt of the Notice of Determination. According to Mr. Salsbury, the original Notice, dated September 29, 2003, was not received by him until hand-delivered by a Department of Labor investigator on or about October 30, 2003 after the original Notice was returned as "undeliverable." Mr. Salsbury then claims he sent his request for hearing on November 3, 2003.[9] However, the Claimant misaddressed his request[10] and it was returned to him. Upon its return, he claims to have immediately corrected his mistake, re-sent his hearing request within two days (on December 12, 2003), and thus made a good faith effort to timely file his request.

The VA seeks dismissal of the instant action for failure to abide by the constraints of 29 C.F.R. § 24.4; including the requirement that the hearing request be faxed, telegraphed or next-day mailed. Claimant argues that, under principles of fairness and equity, the five-day time limit should be equitably tolled. The Administrative Review Board has held that the time limit for filing a request for hearing is not a jurisdictional prerequisite and that principles of equitable tolling may be applied to whistleblower complaints. *See Crosier v. Westinghouse Hanford Company*, 92-CAA-3 (Sec'y, Jan. 12, 1994); *Degostin v. Bartlett Nuclear, Inc*., ARB No. 98-042, ALJ No.

[9] The attached copy of the misaddressed envelope reflects a postmark of November 3, 2003.

[10] Using "88 K Street" instead of "800 K Street".

98-ERA-7 (ARB May 4, 1998); *Staskelunas v. Northeast Utilities Company*, ARB No. 98-035, ALJ No. 98-ERA-7 (ARB May 4, 1998).

Twenty-nine C.F.R. § 24.4(d)(3) states:

> A request for a hearing shall be filed with the Chief Administrative Law Judge by facsimile (fax), telegram, hand delivery, or next-day delivery service. A copy of the request for a hearing shall be sent by the party requesting a hearing to the complainant or the respondent (employer), as appropriate, on the same day that the hearing is requested, by facsimile (fax), telegram, hand delivery, or next-day delivery service. A copy of the request for a hearing shall also be sent to the Assistant Secretary for Occupational Safety and Health and to the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, D.C. 20210.

In determining whether to waive a procedural limitations period, the Board has expressly held the principles of equitable tolling include, but are not necessarily limited to, situations where a party has "raised the precise statutory claim in issue but has mistakenly done so in the wrong forum." *Gutierrez v. Regents of the University of California*, ARB No. 99-116, ALJ No. 98-ERA-19 (ARB Nov. 8, 1999). Complainant relies on the general rule of *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982). The *Zipes* case held that the only circumstances where equitable tolling is permitted are: where the defendant actively misleads the claimant; where the plaintiff has in some extraordinary way been prevented from asserting his rights; or the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum. *School Dist. of Allentown v. Marshall,* 657 F.2d 16 (3rd Cir. 1981); *Rose v. Dole,* 945 F.2d 1331 (6th Cir. 1991)(per curiam).

Complainant erroneously relies on *Garcia v. Ebasco Services, Inc.*, 1989 WL 549886 (ARB July 11, 1989); (ALJ No. 87-ERA-26) to argue that a misaddressed letter should not bar this claim. In *Garcia,* however, the agency misaddressed the Notice of Determination to the complainant. Consequently, Garcia filed his hearing request some five months after the determination was sent to him. He did, however, send it within the five-day period after receiving it. The ARB remanded the case for further proceedings.

The facts here are dissimilar for several reasons. First, the time for sending Garcia's hearing request had not been triggered until he received his Notice. Second, the mistake belonged to the agency and occurred through no error on Garcia's part. Here, Complainant failed to address his request correctly and, more importantly, he failed to submit his request in accordance with the regulations and with the instructions as listed on the Notice of Determination. Although Mr. Salsbury appears to have operated in good faith, the fact that he waited four days after receiving his Notice to send his request and then waited two days after receiving his misaddressed request indicates a lack of due diligence on his part. Nevertheless, I take notice that he did not comply with the strictures contained in the procedures for requesting a hearing.

Turning to his equitable tolling argument, I note that before these principles may be employed, the one seeking equity must have clean hands. Here, the complainant failed to send his hearing request by the specified mode and offers no reason or "good cause" for his failure to do so. Had he sent his misaddressed request by next day mail, he would have been notified immediately of his mistake. As to this argument, I find that the facts of this case do not comport with the circumstances under which the doctrine of equitable tolling may be employed. Nothing in the record suggests that Respondent misled Mr. Salsbury or that he has, in some extraordinary way, been prevented from exercising his rights, or that he made his request in the wrong forum. *School Dist. of Allentown v. Marshall*, *supra.* Inadvertently misaddressing his envelope does not amount to an extraordinary prevention of his exercise of rights and therefore, I find that the tolling doctrine is not applicable under these facts.

VII. Conclusion

In sum, I find that the VA's Motion to Dismiss must be granted as Mr. Salsbury failed to request his hearing in accordance with the procedures at 29 C.F.R. § 24.4(d)(3).

RECOMMENDED ORDER

IT IS RECOMMENDED that the Motion to Dismiss filed by the Respondent be GRANTED and that William C. Salsbury's complaint be DISMISSED.

A

JOSEPH E. KANE
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 petitions for review must be received by the Administrative Review Board within ten (10) 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 and 24.8.