IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. MISSISSIPPI DEPARTMENT OF PUBLIC SAFETY A Department of the State of Mississippi, Defendant.	)	CIVIL ACTION NO. 3:00CV377BN

MEMORANDUM IN REBUTTAL TO DEFENDANT'S RESPONSE TO UNITED STATES' MOTION TO ALTER OR AMEND JUDGMENT

Defendant asserts that the Attorney General, in bringing the present action "on behalf of the United States," Complaint, ¶ 1, is actually only "represent[ing] the interests of one individual," in this case Ronnie Collins. In so doing, Defendant attempts to distinguish controlling authority holding that (1) states may not assert sovereign immunity against the federal government, see United States v. West Virginia, 479 U.S. 305, 312 & n.4 (1987); cf. Alden v. Maine, 527 U.S. 706, 755 (1999), and that (2) federal agencies act "to vindicate the public interest in preventing employment discrimination" when they enforce federal employment discrimination laws pursuant to § 706 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5, incorporated by reference in § 107(a) of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12117(a). See General Tel. Co. of the N.W. v. EEOC, 446 U.S. 318, 326 (1980) (citing, *inter alia*, Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 368 (1977)). According to Defendant, the failure of this Court to comport with the holdings of these cases cannot be the clear error of law requiring reconsideration of the Court's Judgment

Defendant misapprehends the import of--and on occasion misstates--these cases. First, in urging contravention of the long-settled rule that "States have no sovereign immunity as against the Federal Government," United States v. West Virginia, 479 U.S. at 312, Defendant appears to distinguish between cases in which the United States has a "direct" interest in litigation, and cases in which the federal interest is, presumably, somehow indirect or unclear. Defendant cites no precedent for this distinction and, indeed, no principle for such categorization reveals itself among the varied factual circumstances present in the many cases in which courts have applied the rule.[1] Even had such a dichotomy been recognized in the cases, the Supreme Court has held that the public interest in enforcement of federal employment discrimination laws is distinct from, and not derivative of, the interests of those individuals filing discrimination claims with the EEOC. See General Tel. Co., 446 U.S. at 326 (noting that § 706 regulatory scheme allows for both public agency enforcement action and private right of action to enforce federal employment discrimination law, and stating that "[a]lthough the EEOC can secure specific relief . . . on behalf of discrimination victims, the agency is guided by 'the overriding public interest in equal employment opportunity . . . asserted through direct Federal enforcement'").

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[1] See, e.g., United States v. West Virginia, 479 U.S. at 312 (holding West Virginia liable for prejudgment interest on debt arising from contractual obligation to reimburse United States for services rendered by Army Corps of Engineers); United States v. Minnesota, 270 U.S. 181, 194-95 (1926) (holding that United States may sue state for cancellation of land patents and recovery of value of lands sold, even though state was immune from suit by Chippewa Tribe for whose benefit United States filed suit); United States v. Michigan, 190 U.S. 379, 396 (1903) (deciding that United States could sue Michigan for surplus monies associated with ship canal); United States v. Texas, 143 U.S. 621, 638-648 (1892) (deciding Supreme Court's jurisdiction to hear dispute concerning boundary between state and United States territory); United States v. North Carolina, 136 U.S. 211, 216-22 (1890) (deciding whether North Carolina must pay bondholder United States post-maturity interest on bonds); Mississippi Dep't of Econ. & Comm. Dev. v. United States Dep't of Labor, 90 F.3d 110, 113 (holding Mississippi liable for prejudgment interest on award to federal government of profits earned by state agency while providing federally-subsidized job training).

Defendant also draws an erroneous distinction between the factual circumstances of the present case and those present in General Telephone and Occidental Life. In the latter cases, the EEOC did *not* bring lawsuits under its § 707 "pattern or practice" authority, as Defendant asserts; instead, the agency filed complaints premised upon individual claims of sex discrimination pursuant to its § 706 authority. In the present case, similar to General Telephone and Occidental Life, the Attorney General has filed a complaint pursuant to § 107(a) of the ADA, which incorporates and is parallel to the remedies of § 706. That the present Complaint is premised on a single charge of discrimination filed pursuant to the ADA, rather than multiple individual charges as in General Telephone, is immaterial to whether the Attorney General represents interests distinct from those of Collins, or, for that matter, whether Defendant may assert sovereign immunity against the United States.

Nor does the identity of the employer in public enforcement lawsuits, whether private entity or government agency, affect the nature and importance of the public interest in federal government enforcement of federal employment laws. Compare Gen. Tel. Co., 446 U.S. 318, 331 (stating, in EEOC lawsuit against private employer, that "[t]he EEOC exists to advance the public interest in preventing and remedying employment discrimination") and Occidental Life, 432 U.S. at 368 (stating, in private-employer case, that "the EEOC does not function simply as a vehicle for conducting litigation on behalf of private parties; it is a federal administrative agency charged with the responsibility of investigating claims of employment discrimination") with, e.g., Chao v. Virginia Dep't of Transp., 157 F. Supp.2d 681, 693 (E.D. Va. 2001) (stating, in action by United States Secretary of Labor seeking to enjoin state agency employer from violating Fair Labor Standards Act, that restitutionary injunctions sought by Secretary serve

"fundamental" public interests, and citing Donovan v. Brown Equip. and Serv. Tools, Inc., 666 F.2d 148, 156-57 (5th Cir. 1982)).[2]

Grant of a motion to alter or amend a final judgment pursuant to Rule 59(e) is appropriate "where the Court has overlooked matters or controlling decisions which might have materially influenced the earlier decision." Park South Tenants Corp. v. 200 Central Park South Assocs., 754 F. Supp. 352, 354 (S.D.N.Y. 1991); accord Sedrak v. Callahan, 987 F. Supp. 1063, 1069 (N.D. Ill. 1998); Quarles v. Smith, No. Civ.A. 96-00104-C, 1997 WL 578707, *4 (W.D. Va. Aug. 25, 1997). In the instant case, the Court's Judgment cannot co-exist with the rules of law set forth in United States v. West Virginia, Alden, and General Telephone. Defendant's Reply Memorandum appears to argue implicitly that higher court authority cannot control the outcome of this case unless it is both factually and legally on point with the present case; for example, that the holding in General Telephone does not control this case because that case involved multiple complainants, or that EEOC v. Cosmair, Inc., 821 F.2d 1085 (5th Cir. 1987) and Harris v. Amoco Prod. Co., 768 F.2d 669 (5th Cir. 1986) do not control here because those cases involved claims of race discrimination instead of disability discrimination. But no court has ever followed such an exceedingly exacting standard for determining whether it must be bound by the holdings of higher courts; more specifically, such a standard is not the practice in Fifth Circuit courts. See, e.g., Cedillo-Gonzalez v. Garcia, 55 F. Supp.2d 653, 655-58 (W.D. Tex. 1999) (granting 59(e)

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[2] In holding, post-Board of Trustees v. Garrett, 121 S. Ct. 955 (2001), that Virginia may not assert sovereign immunity from the Secretary's suit to enforce the Fair Labor Standards Act, the court in Chao also cites Marshall v. A & M Consol. Indep. Sch. Dist., 605 F.2d 186, 188-89 (5th Cir. 1979) ("[T]he Fifth Circuit has noted that an action brought by the Secretary of Labor under the FLSA is one that is brought by the United States, and 'can be in the public interest even if the money sued for passes to private individuals.'"), and Bell Atl. Md., Inc. v. MCI Worldcom, Inc., 240 F.3d 279, 289 n.1 (4th Cir. 2001) ("A State's sovereign immunity does not preclude suits brought in federal court by the federal government . . . because inherent in the plan of the Constitutional Convention was the surrender by the States of immunity as to these suits."). See Chao, 157 F. Supp.2d at 695.

motion based on admitted misapprehension of Supreme Court retroactivity precedent). Thus, although Defendant is correct that no court has held that the Attorney General may bring a lawsuit pursuant to § 706 to enforce the ADA against a state government employer since the recent decision in Board of Trustees v. Garrett, 121 S. Ct. 955 (2001), was issued, the existence of a prior case with such a complete factual congruence, rather than a *material* one, is unnecessary to the Court's grant of this Motion.

Much more important, nothing in Garrett, nor in any of the Supreme Court's other recent cases discussing state sovereign immunity, suggests that Defendant may ever assert immunity from suit against the federal government,[3] including on those occasions when the United States acts, as it has regularly, to enforce federal employment discrimination laws pursuant to its § 706 authority. See, e.g., United States v. Board of Trustees, No. 92 733 WLB, 1995 WL 311336 (S.D. Ill. Jan. 13, 1995); United States v. California Dep't of Corrections, CIV. No. S-88-0082 LKK, 1990 WL 145599 (E.D. Cal. Feb. 7, 1990); United States v. University of Maryland, 438 F. Supp. 742 (D. Md. 1977). This Court's opinion to the contrary is a clear error of law which should be vacated.

[3] Indeed, the cases consistently state the opposite. See Garrett, 121 S. Ct. at 968 n.9 ("Title I of the ADA still prescribes standards applicable to the States. Those standards can be enforced by the United States in actions for money damages."); id. at 969 (Kennedy, J., concurring) (noting that states have consented to suit by federal government); Alden, 527 U.S. at 755 ("In ratifying the Constitution, the States consented to suits brought by other States or by the Federal Government."); Seminole Tribe of Florida v. Florida, 517 U.S. 44, 71 n.14 (1996) ("The Federal Government can bring suit in federal court against a State.").

CONCLUSION

For the reasons stated above, and the reasons stated in its earlier Memorandum of Authorities supporting this Motion, the United States respectfully moves the Court to alter or amend the Judgment entered September 14, 2001, and instead deny Defendant's Motion to Dismiss.

DATED this the _____ day of October, 2001.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, LEWIS BOSSING, hereby certify that I have this day mailed, postage prepaid, a true copy of the foregoing Memorandum in Rebuttal to Defendant's Response to United States' Motion to Alter or Amend Judgment to the following:

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Dated, this the ______ day of October, 2001.

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