In the Matter of:

ROBERT THOMPSON, **ARB CASE NO. 05-031**

COMPLAINANT, **ALJ CASE NO. 2005-CAA-1**

v. **DATE: January 31, 2006**

UNIVERSITY OF GEORGIA,[1]

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Robert Thompson, pro se, *Athens, Georgia*

For the Respondent:
Bryan K. Webb, Esq., Senior Assistant Attorney General, Denis R. Dunn, Esq., Deputy Attorney General, Thurbert E. Baker, Esq., Attorney General, *Atlanta, Georgia*

FINAL DECISION AND ORDER

Robert Thompson filed a whistleblower complaint against the University of Georgia under the employee protection provisions of the Clean Air Act (CAA), 42 U.S.C.A. 7622 (West 2003); the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C.A. 9610 (West 2005); the Federal Water Pollution Control Act (FWPCA), 33 U.S.C.A. 1367 (West 2001); the Safe Drinking Water Act (SDWA), 42 U.S.C.A. 300j-9(i) (West 2003); the Solid Waste Disposal Act (SWDA), 42 U.S.C.A. 6971 (West 2003); and the Toxic Substances Control

[1] As explained *infra*, the real party in interest is the Board of Regents of the University System of Georgia.

Act (TSCA), 15 U.S.C.A. 2622 (West 1998) (together, the "environmental whistleblower protection provisions").

The Board of Regents of the University System of Georgia (the "Regents"), the legal entity empowered to act on behalf of the University of Georgia (the "University"),[2] filed a motion to dismiss on Eleventh Amendment grounds. A United States Department of Labor (DOL) Administrative Law Judge (ALJ) granted the motion. *Thompson v. University of Ga.*, ALJ No. 2005-CAA-1 (Nov. 29, 2004) (Recommended Decision & Order, R. D. & O). As explained below, we accept the ALJ's recommendation and dismiss the complaint.

BACKGROUND

The Complainant, Robert Thompson, filed a complaint with DOL's Occupational Safety and Health Administration (OSHA) alleging that his employer, the University of Georgia, had taken adverse employment actions against him in retaliation for Thompson's complaints regarding the University's pesticide practices.

Thompson, who worked at the University's Poultry Science Research Center, had made complaints to various supervisors and others at the University, and to both the State of Georgia Environmental Protection Division and the State of Georgia Department of Agriculture, regarding the University's practice of removing mites from poultry by dipping the birds up to their necks into 25-gallon cans of pesticide. *See* Thompson Complaint filed with Judge Mills, Oct. 19, 2004, at 2-4. In Thompson's view, the dipping procedure was contrary to the label instructions for the various pesticides – which either stated "Do not use on poultry or game birds" or required that the pesticide be diluted and then sprayed – and resulted in harm to the poultry (including some deaths) and possible harm to any consumers of the eggs. *Id.* Thompson also complained that the University was improperly disposing of the pesticide and the empty containers, including by pouring pesticide down the drain. *Id.* According to Thompson, Georgia's Department of Agriculture subsequently inspected the facility and decided that chicken-dipping was "inconsistent with the labeling" of the pesticide. *Id.* Yet, rather than "utter the only intelligent response to Mr. Thompson's complaint which was: *you are right we need to follow the directions on the pesticide label*," the University reacted to his complaints by giving him an unsatisfactory performance appraisal, a "defamatory" letter, insults, harassment and ostracization, a rent increase, threats of discharge, and reprisals against third parties. *Id.* In short, as Thompson put it in his February 24, 2004 letter of complaint to OSHA, the Poultry Science Research Center became a "version of Orwell's ROOM 101."

OSHA investigated Thompson's complaint and found "no merit." Having reviewed unspecified evidence provided by the University, OSHA concluded that the University's actions either were neutral with University-wide application, or were "in response to [Thompson's] requests and behavior," and in one case were "not necessarily"

[2] See discussion, *infra*.

adverse. Closing letter from OSHA Regional Administrator to Robert Thompson, dated Sept. 29, 2004. Although the Regents told the ALJ that they asked OSHA on September 20, 2004, to dismiss the complaint against the University on Eleventh Amendment grounds, OSHA's closing letter does not analyze or refer to any such request, stating simply that "[t]he Complainant and Respondent are covered under the provision of the [environmental whistleblower protection provisions]." *Id.*

Thompson invoked his right to a hearing before a DOL ALJ, who scheduled a hearing. The Regents then moved to dismiss the complaint on Eleventh Amendment grounds. The ALJ granted the motion, cancelled the hearing, and dismissed the complaint. R. D. & O. The ALJ relied solely on the Eleventh Amendment, and did not address the merits of the case. Thompson timely petitioned for review by this Board.

ISSUES PRESENTED

We address the following issues in considering Thompson's complaints:

1. Whether the Regents are the proper party in interest before this Board.

2. Whether the Eleventh Amendment bars Thompson's whistleblower complaint against the University.

3. Whether the University waived Eleventh Amendment immunity by accepting federal funds, or in some other manner.

JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board (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. 64272 (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. The ARB engages in de novo review of the ALJ's findings of fact and conclusions of law. *See* 5 U.S.C.A. § 557(b) (West 1996); 29 C.F.R. § 24.8; *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1571-1572 (11th Cir. 1997); *Devers v. Kaiser-Hill*, ARB No. 03-113, ALJ No. 01-SWD-3, slip op. at 4 (ARB Mar. 31, 2005).

Where an ALJ considers pleadings in addition to a complainant's complaint, we treat the ALJ's dismissal as a summary decision pursuant to 29 C.F.R. §§ 18.40, 18.41. *See Farmer v. Alaska Dep't of Transp. & Pub. Facilities*, ARB No. 04-002, ALJ No. 2003-ERA-11, slip op. at 3 (ARB Dec. 17, 2004); *Ewald v. Commonwealth of Va., Dep't of Waste Mgmt.*, ARB No. 02-027, ALJ No. 198-SDW-1, slip op. at 3, n.6 (ARB Dec. 19,

2003). 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*, slip op. at 4; *Ewald*, slip op. at 4.

DISCUSSION

The Complainant, acting pro se, has not filed any documents styled as briefs. He has, however, filed with the Board a petition for review, a "Motion to Strike: Motion to Dismiss in Lieu of Answer on Behalf of Respondent" ("Motion to Strike") and another document styled "Motion to Award Default Judgment to Complainant or to Remand to Administrative Law Judge to Consider Issue," and the Regents have filed a Response to that second document. As we have stated previously, "[w]e construe complaints and papers filed by pro se 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-03, slip op. at 6 (ARB Apr. 25, 2003); *see also Martin v. Akzo Nobel Chems., Inc.*, ARB No. 02-031, ALJ No. 2001-CAA-0016, 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 Thompson's filings, together with the record and the ALJ's R. D. & O., sufficiently present the issues involved in this matter, we have proceeded to decide this case. Our decision to proceed despite the lack of formal briefs is made significantly easier because we decide this case on jurisdictional grounds.

I. The Regents Are the Proper Party in Interest Before This Board

The University of Georgia has been represented in this matter by the Board of Regents of the University System of Georgia, through its counsel, the Attorney General of the State of Georgia. Thompson has argued that the Regents are not a proper party, and should not be permitted to participate in this action, because his claim is against the University, his employer, rather than against the Regents. *See* Complainant's Motion to Strike. Thompson has further argued that because the University itself has not answered his complaints, it should be found to be in default and judgment should be entered for him. *See* Complainant's Motion to Award Default Judgment to Complainant or to Remand to Administrative Law Judge to Consider Issue.

As the Regents have explained, however, the University is a member institution of the Board of Regents of the University System of Georgia and does not itself have the capacity to sue and be sued. *See* Response to Complainant's Motion to Award Default Judgment to Complainant or to Remand to Administrative Law Judge to Consider Issue (citing *McCafferty v. Medical Coll. of Ga.*, 249 Ga. 62 (Feb. 4, 1982) (finding that the

Regents have the power to sue and be sued on behalf of their member institutions, which do not have this power)). The Complainant has not offered any evidence to suggest otherwise. Therefore, we conclude that the Regents are the proper party in this action, and reject the Complainant's motion for default judgment against the University.

II. The Regents Have Eleventh Amendment Immunity

The Eleventh Amendment to the Constitution prohibits a citizen of one state from bringing suit against another state. The Supreme Court has recently held that the 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's v. South Carolina Ports Auth.*, 535 U.S. 743, 760 (2002). Following this guidance, we have dismissed several such complaints. *See, e.g., Powers v. Tennessee Dep't of Env't & Conservation*, ARB Nos. 03-061 and 03-125, ALJ Nos. 2003-CAA-8 and 2003-CAA-16 (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-2 (ARB Sept. 30, 2003).

The Complainant is indisputably a private citizen, and the Complainant has not disputed the assertion by the Respondent that it is a state governmental entity. Nor has the Complainant argued that the University does not have sovereign immunity. Therefore, the University has sovereign immunity and the Complainant's action is barred unless he can show that immunity has been abrogated or waived.

We also note that because sovereign immunity is jurisdictional, rather than a defense, its existence can be raised at any time. Therefore, despite Thompson's argument that "the instant case walks, talks and squawks like a case in which procedural due process has flown the coop," Motion to Strike at 14, we must acknowledge the University's sovereign immunity.

III. No Abrogation or Waiver of Eleventh Amendment Immunity

Thompson also appears to argue that the University's immunity has been abrogated or waived in some fashion – for example, by the University's receipt of federal funds pursuant to various Congressionally-defined programs, or by the University's status as an employer subject to various federal employment laws.

The Complainant is correct that Congress has the power to abrogate Eleventh Amendment immunity in federal court, but to do so Congress must use unmistakably clear language in the statute. *See Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003); *see also Powers, supra*. Moreover, abrogation must be determined separately with respect to every law. The Supreme Court's determination that Congress abrogated state sovereign immunity with regard to the Family Medical Leave Act does not affect, therefore, the statutes containing the environmental whistleblower protection provisions at issue in this action. The Complainant offers no evidence that such clear language

exists in these particular statutes, and we have previously concluded these statutes do not contain the unmistakably clear language necessary for abrogation. *See Powers* (analyzing statutory language and concluding that "CERCLA, TSCA, FWPCA, SDWA, and CAA … 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 CERCLA and SWDA). We see no reason to question our earlier judgment. Therefore, while the University does have the obligation to protect employees under these statutes, under our federal system Thompson, a private citizen, is not permitted to bring an action against the University to enforce them.

As for waiver, the Complainant is correct in pointing out that a state may voluntarily waive sovereign immunity by receiving federal funds. As with abrogation, however, such receipt of funds can waive sovereign immunity only when the statute providing for the program makes it "clear" that the Congress intends such receipt to serve as waiver. The Complainant offers no evidence that such waiver language is present in the particular programs under which the University receives federal funds. Therefore, we conclude that there was no waiver in this case.

CONCLUSION AND ORDER

The Complainant has failed to establish that Congress abrogated Georgia's immunity from whistleblower prosecution under CAA, CERCLA, FWPCA, SDWA, SWDA, and TSCA, or that Georgia waived that immunity. Because we conclude that no genuine issue of material fact exists as to whether state sovereign immunity bars Thompson's whistleblower complaints, the Regents are entitled to summary decision as a matter of law. Consequently, we **DISMISS** Thompson's complaint.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

A. LOUISE OLIVER
Administrative Appeals Judge