



**In the Matter of:**

**KAREN YAGLEY,**

**ARB CASE NO. 09-061**

**and**

**ALJ CASE NO. 2009-CAA-002**

**CHRISTOPHER YAGLEY,**

**DATE: April 30, 2010**

**COMPLAINANTS,**

**v.**

**HAWTHORN CENTER OF  
NORTHVILLE TWP,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Complainants:*

**Karen Yagley, *pro se*, Dearborn, Michigan**

*For the Respondents:*

**Cynthia A. Arcaro, Esq., *Assistant Attorney General*, Lansing, Michigan**

**BEFORE: Paul M. Igasaki, *Chief Administrative Appeals Judge*, E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*, and Wayne C. Beyer, *Administrative Appeals Judge***

**FINAL DECISION AND ORDER**

The Complainants, Karen and Christopher Yagley, filed a retaliation complaint under the employee protection provisions of the Clean Air Act (CAA), the Federal Water Pollution Control Act (FPWCA), and the Toxic Substances Control Act of 1986 (TSCA), and their implementing regulations. 42 U.S.C.A. § 7622 (West 2003); 42 U.S.C.A. § 1367 (West 2001); 15 U.S.C.A. § 2622 (West 1998); 29 C.F.R. Part 24 (2009). They alleged that Karen Yagley's former employer, Hawthorn Center of Northville (Hawthorn), violated the CAA, the FPWCA, and the TSCA whistleblower protection provisions when it retaliated and discriminated against Karen Yagley and harassed her because she previously filed a complaint with the Occupational Safety and Health Administration (OSHA) in 2005. Complaint at 1 (July 25, 2008). A Department of Labor (DOL) Administrative Law Judge (ALJ) dismissed the Yagleys' complaint. He found that the Yagleys' claims were barred because Hawthorn had Eleventh Amendment sovereign immunity as an agency of the State of Michigan. He also found that the original complaint did not include claims against any non-state parties and that the attempt to amend the complaint after the deadline for filing a response to his briefing order was untimely.

## BACKGROUND

On July 25, 2008, Karen and Christopher Yagley filed this action with the DOL, alleging that Hawthorn violated the CAA, the FWPCA, and the TSCA when it threatened Karen Yagley, warned her, and requested information from her. *Id.*

OSHA noted that while the complaint alleged new, non-specific threats and warnings, the complaint was the same as the one that Karen Yagley previously filed on March 28, 2005. OSHA Findings at 1 (Nov. 12, 2008). OSHA dismissed that claim, and a DOL administrative law judge subsequently dismissed it. The Administrative Review Board (ARB or the Board) affirmed and concluded that the Yagleys failed to establish that Congress abrogated a state's Eleventh Amendment sovereign immunity or that the State of Michigan waived that immunity with respect to Yagley's whistleblower claims. *Yagley v. Hawthorn Center of Northville*, ARB No. 06-042, ALJ No. 2005-TSC-003, slip op. at 6 (ARB May 29, 2008) ("*Yagley I*"). Having noted this history, OSHA found that Yagley failed to establish abrogation or waiver of immunity in the new claim as well. OSHA Findings at 2 (Nov. 12, 2008).

Yagley objected to OSHA's Findings and requested a hearing before an ALJ. *See* 29 C.F.R. § 24.106(a). On January 26, 2009, the ALJ issued a Decision and Order (D. & O.) dismissing the claim as barred by state sovereign immunity. In a letter dated January 20, 2009, addressed to the Secretary of Labor, Yagley claimed that CORE and Broadspire were non-governmental entities who retaliated against her. Thus, on January 30, 2009, the ALJ issued an order reopening the matter for the limited purpose of giving the Yagleys the opportunity to establish that the July 2008 complaint included charges of whistleblower retaliation against non-government entities. The ALJ also requested that OSHA file a copy of the complaint with the Office of Administrative Law Judges (OALJ) so that he could determine whether the complaint could be construed as naming non-

government parties as entities who violated the whistleblower laws. A copy of the complaint was received, and on February 5, 2009, the ALJ issued a D. & O. finding that the complaint did not name any non-government entities as respondents. The ALJ again found that the State of Michigan and its agencies were immune from suit under the Eleventh Amendment and had not waived that immunity. Accordingly, he dismissed the complaint.

The Yagleys appealed the D. & O. to the Board. *See* 29 C.F.R. § 24.110(a). In their appeal, the only statement made in regard to the issue of sovereign immunity was: “While sovereign immunity is a very complex issue, the Complainant asserts that it may not even apply given the circumstances.” Complainant’s Appeal at 8 (Feb. 15, 2009). In response, the Board issued an order requiring the Yagleys to identify the respondents in this matter, to list their addresses, and to provide proof that the Yagleys served each respondent with each document filed with the Board. The Yagleys then filed several motions, including motions for clarification and for an extension. In a motion dated August 26, 2009, the Yagleys stated that Hawthorn, CORE, Broadspire, and Citizens Management were all involved in retaliation against Karen Yagley.

The Board issued an Order Establishing Briefing Schedule finding that the Yagleys failed to comply with the Order requesting the identity of the respondents and proof that they had been properly served. For this reason, and because the Yagleys had only identified Hawthorn as a respondent on their recent filings, the Board found that the only proper respondent in this case was Hawthorn. The Order established that the Yagleys’ brief was due at the Board on or before November 12, 2009.

The Yagleys did not file a brief in response to the Board’s Order Establishing Briefing Schedule. Thus, the Board issued an Order to Show Cause why the petition for review should not be dismissed because the Yagleys failed to prosecute their appeal in accordance with the Board’s order. *See* 29 C.F.R. § 24.110(a).

Karen Yagley responded to the order, stating that she has been ill. She also indicated that she had made other complaints and that investigations were being performed. She requested “that the further investigations be completed before [she] responded to the ARB.”

On February 1, 2010, the Board issued an Order Denying Request for Extension and Establishing Amended Briefing Schedule. This Order denied the Yagleys’ motion for still more time to submit an opening brief, permitted the Respondent to file a response brief, and allowed the Yagleys to file a reply brief should the Respondents file a brief.

On March 31, 2010, the Yagleys submitted a response. In the response, Karen Yagley alleges further harassment from Hawthorn and makes various other allegations against the State of Michigan, OSHA, and the ALJ. She makes no argument regarding the matter at issue—whether Hawthorn has sovereign immunity from the Yagleys’ suit under the Eleventh Amendment.

As stated in the Amended Briefing Schedule, the Board will now decide the claim on the merits.

### **JURISDICTION AND STANDARD OF REVIEW**

The ARB has jurisdiction to review the ALJ's recommended decisions pursuant to 29 C.F.R. § 24.110 and Secretary's Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010). (delegating to the Board the Secretary's authority to review cases under the statutes listed in 29 C.F.R. § 24.100(a), including, inter alia, the environmental whistleblower protection provisions at issue here).

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. § 24.110.

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 ALJ found that the Eleventh Amendment barred adjudication of the complaint by the OALJ and dismissed the complaint. *See* U.S. Const. amend. XI (which prohibits a citizen of one state from bringing suit against another state). 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 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, -016 (ARB June 30, 2005 (reissued Aug. 16, 2005)) (providing analysis and citing similar federal cases); *Farmer*, ARB No. 04-002, slip op. at 6-7; *Ewald*, ARB No. 02-027, slip op. at 7; *Cannamela v. Georgia Dep't of Natural Res.*, ARB No. 02-106, ALJ No. 2002-SWD-002 (ARB Sept. 30, 2003).

The Yagleys are private citizens and Hawthorn is an agent of the State of Michigan. As such, Hawthorn has sovereign immunity from suit by the Yagleys under the Eleventh Amendment. Thus, the claim is barred unless subject to abrogation or waiver of sovereign immunity.

As we noted in *Yagley I*, our jurisprudence has held that the environmental whistleblower statutes do not abrogate a State's sovereign immunity. See *Thompson*, ARB No. 05-031, slip op. at 5-6; *Powers*, ARB Nos. 03-061, 03-125, slip op. at 7 (holding that the environmental whistleblower cases "do not provide for private rights of action for money damages against states and state agencies"); *Cannamela*, ARB No. 02-106, slip op. at 6 (concluding State of Georgia is immune from whistleblower suit under the environmental whistleblower statutes). Additionally, federal courts have also held that Congress did not abrogate states' immunity from whistleblower claims under the environmental statutes. See *Connecticut Dep't of Env'tl. 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 have found no federal precedent establishing that Congress abrogated state sovereign immunity in the environmental whistleblower acts.

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*, ARB No. 02-027, slip op. at 8, quoting *Edelman v. Jordan*, 415 U.S. 651, 673 (1974). In this instance, no waiver has occurred.

The Yagleys have not put forth any arguments as to why their claim should not be dismissed because it is barred by Eleventh Amendment sovereign immunity. Thus, we agree with the ALJ for the reasons he stated, and for the identical reasons expressed in *Yagley I*, that the claim is so barred.

We also agree with the ALJ that the complaint could not reasonably be construed as naming any respondents that are not entitled to sovereign immunity and that the Yagleys' attempt to amend the complaint was untimely in response to his briefing order. Thus, we conclude that the ALJ was correct in denying the Yagleys' motion to add respondents. For these reasons and because the Yagleys failed to respond to our order requiring them to identify the Respondents, their addresses, and provide proof that all of the Respondents were served with each document filed with the Board, we agree that Hawthorn Center is the only Respondent in this matter. Thus, sovereign immunity bars the entirety of the Yagleys' complaint.

## **CONCLUSION AND ORDER**

The Yagleys failed to establish that Congress abrogated a state's Eleventh Amendment immunity from a whistleblower claim under the TSCA, the FPWCA, or the CAA or that Michigan waived that immunity. The ALJ properly concluded that sovereign immunity under the Eleventh Amendment barred the Yagleys' whistleblower complaint against Hawthorn. Consequently, we **AFFIRM** the ALJ's D. & O. and **DISMISS** the Yagleys' complaint.

**SO ORDERED.**

**E. COOPER BROWN**  
**Deputy Chief Administrative Appeals Judge**

**PAUL M. IGASAKI**  
**Chief Administrative Appeals Judge**

**WAYNE C. BEYER**  
**Administrative Appeals Judge**