U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 08 September 2004

Case No.: 2000-SWD-1

In the Matter of:

Beverly L. Migliore,
Complainant

v.

Rhode Island Department of
Environmental Management,
Respondent

SUPPLEMENTAL RECOMMENDED ORDER OF DISMISSAL

On July 14, 2004, I issued a Recommended Order of Dismissal, in which I noted that I had issued an Order to Show Cause, on June 22, 2004, to provide the Complainant with the opportunity to argue why this matter should not be dismissed pursuant to the decision of the First Circuit Court of Appeals in *Rhode Island Department of Environmental Management v. United States,* 304 F.3d 31 (1st Cir. 2002).[1] I noted that the Complainant did not file a response within the time provided. As the Secretary had advised the Court that she did not intend to intervene in this matter, I recommended that an Order be entered dismissing the Complainant's claim. Subsequently, counsel for the Complainant advised that he had not received the Order to Show Cause, and on August 11, 2004, I granted the Complainant's Motion for Reconsideration, and gave the Complainant ten days to show cause as to why this matter should not be dismissed pursuant to the First Circuit Court of Appeals decision in *Rhode Island Department of Environmental Management v. United States, supra.*

The Complainant filed her response on August 23, 2004; the Respondent filed its objections on September 3, 2004.

The Complainant argues that, if the Respondent is now withdrawing its request for a hearing, then the OSHA Order awarding the Complainant $10,000 stands. The Complainant pointed out that the District Court did not disturb the $10,000 award made by OSHA, nor did it

[1] On May 13, 2004, the Secretary of Labor advised the Complainant that she would not intervene in her suit against the Respondent. The Respondent subsequently requested that this case be dismissed.

enjoin OSHA from investigating the alleged violations or "seeking to enforce the State's compliance with federal law." According to the Complainant, the decision of the First Circuit only applies if the *Complainant* initiates a request for a hearing before an administrative law judge, but not if the Respondent requests a hearing. The Complainant argues that, by choosing to litigate this claim before an administrative law judge, the Respondent has waived its sovereign immunity defense. Thus, argues the Complainant, intervention by the Secretary of Labor is not necessary.

The Complainant argues that this Court has only three choices: to hold a hearing, because the Respondent has waived its sovereign immunity defense; to dismiss the Respondent's opposition to the OSHA Order because the Respondent is abandoning its request for a hearing, and award relief to the Complainant; or to dismiss the case without prejudice to the Complainant and note that the OSHA Order is valid.

The Respondent argues that the District Court and Court of Appeals have made it clear that this action is barred by sovereign immunity absent intervention by the Secretary of Labor. The Respondent stated that it has not waived its right to assert immunity by filing a notice of appeal of the OSHA determination. As the Secretary of Labor has determined that she will not intervene, this claim is barred by the doctrine of sovereign immunity. The Respondent argues that it never withdrew its request for a hearing before an administrative law judge, but that two federal courts enjoined this claim before a hearing was held.

Discussion

I find that the Complainant's arguments are unavailing, and that this claim must be dismissed as barred by the doctrine of sovereign immunity. I note that the First Circuit Court of Appeals exhaustively addressed the arguments advanced by the individual appellants on their claim that Respondent had waived its sovereign immunity. In discussing the Supreme Court's decision in *Lapides v. Board of Regents of the University System of Georgia,* 535 U.S. 613 (2002), the First Circuit noted that the individual appellants read this decision broadly, to mean that a state waives its immunity by voluntarily participating in any facet of a federal adjudicative proceeding. The Court stated:

> This approach to waiver is startling in its breadth and, more importantly, appears to conflict directly with well established principles of law. It has repeatedly been held that a state may raise its immunity from suit at any time during the proceedings, including on appeal. [citations omitted.]

Id. at 49. The First Circuit rejected the argument that the Respondent waived immunity by its conduct in the administrative proceeding, and found no attempt by the Respondent to reverse a waiver by seeking a change in forum. As the Court noted, the Respondent has consistently asserted its sovereign immunity, both in the administrative proceeding and before the federal courts.

Finally, to the extent that the Complainant's argument on the issue of waiver was not properly presented to the First Circuit Court of Appeals, it may not be raised for the first time here. Indeed, the First Circuit noted that

> Waiver occasioned by the state's litigation conduct – a principle that was well established in this circuit prior to the Supreme Court's decision in *Lapides* – was not raised by any of the appellants before the district court or before this Court. Claims of waiver of immunity are like any other legal argument and may themselves be waived or forfeited if not seasonably asserted. [citations omitted.]

Id. at 50.

Nor do I find any merit in the Complainant's suggestion that the Respondent has withdrawn its request for a hearing before an administrative law judge. This appears to be a convoluted attempt by the Complainant to return jurisdiction of this claim to OSHA, so that the determination by OSHA will become the final decision on this claim. The Complainant has not cited to anything in the record of this proceeding in support of its claim that the Respondent has withdrawn its request for a hearing, and the Respondent emphatically denies that it is or has ever withdrawn its request for a hearing. Once the Respondent filed its objections and request for hearing on the determination by OSHA, jurisdiction of this claim transferred to the Office of Administrative Law Judges, where it has remained pending determination by this Court.

As the Respondent correctly noted, the First Circuit Court of Appeals and the United States District Court for the District of Rhode Island have made it abundantly clear that this action is barred by the doctrine of sovereign immunity, absent intervention by the Secretary of Labor. *See, Rhode Island v. United States,* 304 F.3d 31 (1st Cir. 2003; *Rhode Island v. United States,* 301 F.Supp. 2d 151 (D.R.I. January 2004), *appeal withdrawn.* The Secretary has determined that she will not intervene in this matter. Thus, this claim must be dismissed pursuant to the decision of the First Circuit Court of Appeals in *Rhode Island Department of Environmental Management v. United States, supra,* as it is barred by the doctrine of sovereign immunity.

RECOMMENDED ORDER

Based upon the foregoing, I recommend that an Order be entered dismissing the Complainant's claim.

A

LINDA S. CHAPMAN
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, D.C. 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.