U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

JAMAL KANJ,

COMPLAINANT,

v.

VIEJAS BAND OF KUMEYAAY INDIANS,

RESPONDENT.

ARB CASE NO. 06-074

ALJ CASE NO. 06-WPC-01

DATE: APR 2 7 2007

BEFORE THE ADMINISTRATIVE REVIEW BOARD:

Appearances:

For the Complainant:
Bryan Rho, Esq., ***The McMillan Law Firm, APC,*** **LaMesa, California**

For the Respondent:
George S. Howard, Esq., ***Pillsbury Winthrop Shaw Pittman,*** **San Diego, California**

ORDER OF REMAND

On August 5, 2005, the Complainant, Jamal Kanj, filed a complaint in which he alleged that the Respondents, Viejas Band of Kumeyaay Indians (Band or tribe), terminated his employment as Director of Public Works and Deputy Tribal Government Manager because he reported high levels of fecal coliform in Viejas Creek to the Respondent's Tribal Council. He averred that the termination from employment and other adverse employment actions violated the whistleblower protection provisions of the Federal Water Prevention Pollution Control Act (Clean Water Act, Act).[1]

The Band moved for summary decision, arguing that tribal sovereign immunity barred the suit. On December 19, 2005, a Labor Department Administrative Law Judge

[1] 33 U.S.C.A. § 1367 (West 2001).

(ALJ) denied the motion, and on March 9, 2006, the ALJ granted the Band's motion to certify the issue of its sovereign immunity to the Administrative Review Board for interlocutory review. The Band then petitioned the Board for interlocutory review of the ALJ's order denying summary decision.[2]

On August 24, 2006, we granted the petition for interlocutory review on the question whether Congress abrogated the Band's sovereign immunity from suit by a private citizen pursuant to 33 U.S.C.A. § 1367 (West 2001).

JURISDICTION AND STANDARD OF REVIEW

"[A]n Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 416 (2001). "Although the [Supreme] Court has taken the lead in drawing the bounds of tribal immunity, Congress, subject to constitutional limitations, can alter its limits through explicit legislation." *Kiowa Tribe v. Manufacturing Techs.*, 523 U.S. 751, 759 (1998).

Sovereign immunity from suit may be invoked not only in Article III courts, but also before court-like "federal administrative tribunals." *Federal Mar. Comm'n v. South Carolina*, 535 U.S. 743, 761, 1875-76 (2002). Environmental whistleblower adjudications in the Labor Department's Office of Administrative Law Judges and the Administrative Review Board are sufficiently analogous to Article III trial proceedings that "a state is generally capable of invoking sovereign immunity in proceedings initiated by a private party under 29 C.F.R. part 24 [the environmental whistleblower regulations]." *Rhode Island v. United States,* 304 F.3d 31, 46 (1st Cir. 2002) (*Migliori*). Nothing in existing sovereign immunity jurisprudence indicates that tribes cannot invoke sovereign immunity in administrative adjudications such as this.[3]

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[2] The Secretary of Labor has delegated her authority to issue final administrative decisions in cases arising under the WPCA to the Administrative Review Board. Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002). The Secretary's delegation of authority to the Board includes, "discretionary authority to review interlocutory rulings in exceptional circumstances, provided such review is not prohibited by statute." *Id.* at 64,273.

[3] In *Migliori*, the First Circuit directly decided the question whether state sovereign immunity may be used to bar administrative adjudications like ours. As far as our research shows, no court has squarely confronted the question whether Indian sovereign immunity may be raised in our proceedings. *See e.g., Osage Tribal Council v. U.S. Dep't of Labor*, 187 F.3d 1174, 1180 (10th Cir. 1999)(court need not decide whether the Council could assert its immunity in the administrative proceeding, since court finds that "the SDWA has explicitly abrogated tribal immunity in any case"). And the Supreme Court has said that "the immunity possessed by Indian tribes is not coextensive with that of the States," and "there are reasons to doubt the wisdom of perpetuating the doctrine" of tribal immunity. *Kiowa Tribe,* 523 U.S. at 755, 758. However, inasmuch as we conclude that Congress did abrogate tribal immunity

The standard of review on summary decision is de novo, i.e., the same standard that the ALJ applies in initially evaluating a motion for summary judgment governs our review. *Honardoost v. PECO Energy Co.*, ARB No. 01-030, ALJ 00-ERA-36, slip op. at 4 (ARB Mar. 25, 2003). The standard for granting summary decision in whistleblower cases is the same as for summary judgment under the analogous Fed. R. Civ. P. 56(e). Summary decision is appropriate "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" as a matter of law. 29 C.F.R. §§ 18.40, 18.41 (2006); *Mehen v. Delta Air Lines*, ARB No. 03-070, ALJ No. 03-AIR-04, slip op. at 2 (ARB Feb. 24, 2005). If the non-moving party fails to show an element essential to his case, there can be no "genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. *Rockefeller v. U.S. Dep't of Energy*, ARB No. 03-048, ALJ No. 2002-CAA-0005, slip op. at 4 (ARB Aug. 31, 2004), citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986).

DISCUSSION

The Band seeks summary decision on grounds of tribal sovereign immunity. The ALJ denied the motion on the ground that Congress abrogated tribal sovereign immunity from suit based on the whistleblower provision of the Clean Water Act and on the ground that immunity from suit based on self-government in purely intramural matters did not arise. We affirm the ALJ on both counts.

1. Congress abrogated tribal immunity from Clean Water Act whistleblower complaints

In *Erickson v. EPA*, ARB Nos. 03-002, 03-003, 03-004, 03-064; ALJ Nos. 1999-CAA-2, 2001-CAA-8, 2001-CAA-13, 2002-CAA-3, 2002-CAA-18, slip op. at 10-12 (ARB May 31, 2006), we held that we were bound by the opinion of the Office of Legal Counsel (OLC) that Congress waived federal sovereign immunity from suit under the whistleblower provisions of the Solid Waste Disposal Act, 42 U.S.C.A. § 6971 (West 2003), and the Clean Air Act, 42 U.S.C.A. § 7622 (West 2003). OLC concluded that Congress expressly waived sovereign immunity from whistleblower suits by (1) permitting an aggrieved employee to file a complaint against "any person," and (2) defining the term "person" in the statutes' general definitions sections to include "each department, agency, and instrumentality of the United States."[4] 42 U.S.C.A. §§ 6971(b), 6903(15); 42 U.S.C.A. §§ 7622(b)(1), 7602(e) (OLC letter attached).

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from suit for violations of the Clean Water Act's whistleblower provision, we need not decide the effect of the *Migliore* decision on these proceedings.

[4] The OLC also considered the Clean Water Act and concluded that Congress did not waive federal sovereign immunity from suit under the whistleblower provision of that statute, 33 U.S.C.A. § 1323 (West 2001). Although the statute permits whistleblower claims against

The Assistant Secretary of Labor for the Occupational Safety and Health Administration (OSHA), argues in his amicus brief that OLC's reasoning compels the conclusion that Congress abrogated Indian tribal immunity from whistleblower suits under the Clean Water Act. Congress expressed that intention by (1) permitting an aggrieved employee to file a complaint against any "person," 33 U.S.C.A. § 1367(a), and (2) defining the term "person" in the statute's general definitions sections to include "municipalities," *id.* at § 1362(5), which in turn, includes "an Indian tribe or an authorized Indian tribal organization, *id.* at § 1362(4)." Amicus Br. at 6-10.

We agree that the framework OLC applied to whistleblower claims against the federal government under the SWDA and the CAA must be applied to whistleblower claims against sovereign tribes under the Clean Water Act. Under this analysis, we conclude that Congress abrogated tribal immunity from whistleblower suits under the Clean Water Act.

The Band argues that an abrogation analysis that focuses only on the text of the whistleblower provision and the general definitions provision is too narrow. It fails to account for the fact that Congress used much more explicit language elsewhere in the Clean Water Act to address tribal sovereignty, viz., the Administrator is "authorized to treat an Indian tribe as a State" for enumerated purposes, which do not include the whistleblower provision. 33 U.S.C.A. § 1377(e) (West 2001). From this, the Band argues that "[a]n elementary principle of statutory construction is that a section of a statute dealing with a specific topic (in this case, the sovereign immunity of tribes) governs or takes precedence over an interpretation based on a general provision of the statute (such as the definitional provisions in § 1362(4) and (5)[)]." Band Br. at 7.

The difficulty with this argument is that both the Clean Air Act and the Solid Waste Disposal Act include provisions that waive federal sovereign immunity with language much more explicit than the whistleblower text. 42 U.S.C.A. § 7418(a) (West 2003) (CAA) ("Each department, agency, and instrumentality of the executive, legislative, and judicial branches, of the Federal Government . . . shall be subject to, and comply with, all Federal . . . requirements, administrative authority, and process and sanctions respecting the control and abatement of air pollution in the same manner, and to the same extent as any nongovernmental entity"). 42 U.S.C.A. § 6961(a) (West 2003) (SWDA) (same). These provisions would support the same argument the Band makes under the Clean Water Act – that the contrast between text concerning federal compliance responsibilities and text concerning whistleblower liability shows that Congress drafted differently when it wanted to eliminate sovereign immunity than when it did not. In other words, the textual differences bespeak a difference in intent. But OLC's analysis did not treat the more explicit waivers in the CAA and SWDA as evidence of what Congress did not intend in the whistleblower provisions. Nowhere in its argument does the Band suggest any reason why the OLC analysis would look upon the explicit abrogations in the Clean Water Act differently.

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any "person," 33 U.S.C.A. § 1367(a), the statute's definition of "person" does not include the United States, *id.* § 1362(5).

The Band asserts that we should disregard the OLC opinion. "While opinions by the OLC may provide guidance for executive branch agencies, the Board here is performing an adjudicative function, and is not bound by an opinion." Band Reply Br. at 3. However, the Band offers no authority for its argument and makes no response to the authorities cited by amicus in support of the proposition that OLC opinions bind the Secretary of Labor and, in turn, the Board. Amicus Br. at 9 n.6. Thus, we have no basis for deviating from our conclusion in *Erickson* that we are bound by the OLC opinion. *Erickson,* slip op. at 10-12. Accordingly, we reject the Band's assertion of sovereign immunity from suit under § 1367 of the Clean Water Act.

2. Tribal immunity based on purely intramural governance does not apply

The Band also argued that it was immune from suit under subsection 1367 because Kanj's duties were inherently governmental, and the Ninth Circuit has held that federal statutes of general applicability that are silent about coverage of Indian tribes, will not apply to tribes if they concern "exclusive rights of self-governance in purely intramural matters." *See EEOC v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1078-80 (9th Cir. 2001) (following *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985). Band Opening Br. at 11.

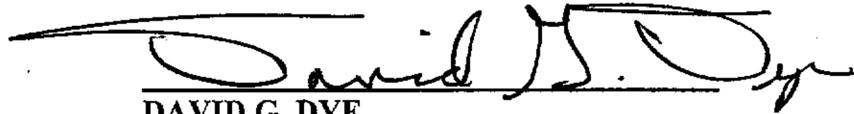
The ALJ rejected this argument because the Clean Water Act is not silent about coverage of Indian tribes. Congress specifically referred to Indian tribes twice. The whistleblower provision applies to "any person in violation of paragraph (1)" – the prohibition on discriminating against employees because they raise environmental safety concerns. *Id.* § 300j-9(i)(2)(A). The general definitions section of the Act defines the term "person" to include municipalities, which in turn includes "Indian tribes." 42 U.S.C.A. § 300f(12) and (11). And § 1377(e) authorizes EPA "to treat an Indian Tribe as a state" under certain circumstances. *See Kanj v. Viejas Band*, ALJ No. 2006-WPC-01 (ALJ Dec. 19, 2005) (order denying Respondent's motion for summary decision).

Additionally, as the ALJ pointed out, the parties are in disagreement on whether Kanj's duties are purely intramural. Thus, he concluded, "even if the statute were construed as one of general applicability, based on this dispute of fact summary judgment is inappropriate." *Id.* We concur.

CONCLUSION

Accordingly, we hold that the ALJ did not err in denying the Tribe's motion for summary decision based on tribal sovereign immunity and we **REMAND** this case for further proceedings consistent with this opinion.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge



DAVID G. DYE
Administrative Appeals Judge

ADMINISTRATIVE REVIEW BOARD
Certificate of Service

ARB CASE NAME: ***Jamal Kanj v. Viejas Band of Kumeyaay Indians***

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DOCUMENT : **Order on Remand**

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