



U.S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

August 21, 2002

Patricia Mack Bryan, Esq.
Senate Legal Counsel
Senate Hart Office Building
Room 642
Washington, D.C. 20510-7250

Re: State of Florida v. United States, No. 01-12380-HH (11th Cir.); Ohio EPA v. United States, No. 01-3237 (6th Cir.)

Dear Ms. Bryan:

I am writing to advise you that I have determined not to file a petition for a writ of certiorari in State of Florida, and to dismiss the government's appeal in Ohio EPA.

1. These cases involve the implementation of the "whistleblower" provisions of various federal environmental statutes. The Solid Waste Disposal Act prohibits any "person" from firing or otherwise discriminating against an employee who initiates or testifies in a proceeding brought pursuant to the Act. See 42 U.S.C. 6971(a). The Act defines the term "person" to include a "State." 42 U.S.C. 6903(15). The Act provides that an employee who believes that he was the victim of a retaliatory firing or other discrimination may apply to the Secretary of Labor for a review of the alleged violation. 42 U.S.C. 6971(b). Other federal environmental laws contain similar provisions.

The Department of Labor (DOL) has by regulation established a procedural scheme used to resolve whistleblower complaints brought under the environmental laws. When the agency receives a complaint, the Assistant Secretary of Labor for the Occupational Safety and Health Administration (OSHA) conducts an initial investigation and determines whether a violation has occurred. If neither the complainant nor the alleged violator contests the Assistant Secretary's initial determination, that determination becomes the final decision of the Secretary. If either party requests a hearing before an administrative law judge (ALJ), the ALJ conducts a formal adjudicative proceeding, considers the evidence de novo, and renders a decision. The ALJ's decision becomes the final decision of the Secretary unless either party

files a petition for review with DOL's Administrative Review Board.

2. The complainant in State of Florida, Dr. Omar Shafey, alleged that the Florida Department of Health had subjected him to employment discrimination and ultimately fired him for his statements "regarding the alleged risks of occupational pesticide exposure and aerial application of malathion." 133 F. Supp. 2d at 1283. He filed an administrative complaint, alleging violations of the whistleblower provisions of the Solid Waste Disposal Act and several other federal environmental statutes. He named as respondents the State of Florida, the Florida Department of Health, and two individual employees named in their official and individual capacities. The Assistant Secretary conducted an initial investigation and concluded that no violation had occurred. Dr. Shafey requested an administrative hearing, and the matter was referred to an ALJ. Respondents moved to dismiss the complaint on sovereign immunity grounds, but the ALJ denied the motion, stating that he lacked authority to determine those issues. Respondents then filed suit in federal district court, seeking an injunction against the administrative proceedings. The district court enjoined the administrative proceedings against the State and the state agency, holding that administrative adjudication of Dr. Shafey's claims was barred by the Eleventh Amendment and related principles of state sovereign immunity.

The government filed an appeal from the district court's decision. On May 28, 2002, after the case had been briefed and argued in the Eleventh Circuit, the Supreme Court issued its decision in Federal Maritime Commission (FMC) v. South Carolina State Ports Authority (SCSPA), 122 S. Ct. 1864 (2002). In SCSPA, the Court held that "[g]iven both th[e] interest in protecting States' dignity and the strong similarities between FMC proceedings and civil litigation, * * * state sovereign immunity bars the FMC from adjudicating complaints filed by a private party against a nonconsenting State." Id. at 1874. The Court also observed that "absent sovereign immunity, States would effectively be required to defend themselves against private parties in front of the FMC," because a State would not be permitted to litigate the merits of the complaint in any subsequent action to enforce the FMC's order. Id. at 1875.

On July 10, 2002, the Court of Appeals for the Eleventh Circuit issued an order affirming the judgment of the district court on the authority of SCSPA. In light of the Supreme Court's decision in SCSPA, I believe that the federal government has no tenable basis for contesting the court of appeals' decision. As in SCSPA, the complainant in this case invoked a formal adjudicative process presided over by an agency ALJ. As in SCSPA, the DOL administrative proceedings that implement the various whistleblower provisions bear a strong functional resemblance to a lawsuit and culminate in an agency order that is reviewable in court under

ordinary administrative law principles that provide for a deferential standard of review. A petition for a writ of certiorari seeking review of the Eleventh Circuit's decision would be due on October 8, 2002. Because I see no colorable ground on which to distinguish this case from SCSPA, I have determined that the government should not file a petition for a writ of certiorari. I have enclosed copies of the district court's opinion and the court of appeals' order.

3. The complainant in Ohio EPA, Paul Jayko, was suspended from employment with the Ohio Environmental Protection Agency (Ohio EPA) and was then reassigned to a different post from the one he had previously occupied. Jayko alleged that those employment actions were taken in retaliation for his efforts to ensure compliance with various federal environmental laws, and that the Ohio EPA had thereby violated the whistleblower provisions of the relevant federal statutes. The Assistant Secretary conducted an initial investigation and determined that the state agency had violated the whistleblower provisions. The Assistant Secretary directed the Ohio EPA to provide Jayko with full back pay for the ten days of his suspension, to reinstate him to his former position, and to pay the attorney's fees that he had incurred. The state agency requested a formal hearing before an ALJ. The ALJ ruled that adjudication of Jayko's complaint was not barred by the Eleventh Amendment. After conducting discovery and a two-week hearing, the ALJ issued a decision directing the Ohio EPA to reinstate Jayko and to pay him \$45,000 in backpay, \$45,000 in compensatory damages, and \$45,000 in punitive damages. 121 F. Supp. 2d at 1158-1160.

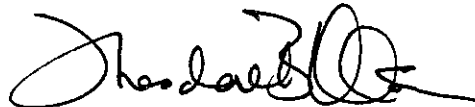
The Ohio EPA filed suit in federal district court, seeking declaratory and injunctive relief against the further adjudication by the DOL of this or any similar case against the State. The complaint also sought a declaration that any rulings previously entered during the DOL's adjudicative process are void. The district court granted in part the relief requested by the state agency. The court indicated that the Assistant Secretary's initial investigation would not raise Eleventh Amendment concerns, and it declined to set aside entirely the results of the prior ALJ proceeding. The court held, however, that future adjudicative proceedings could go forward "only if the Department of Labor itself elects to join the action at the time the case is referred to the Office of Administrative Law Judges." 121 F. Supp. 2d at 1166. The government filed an appeal from that decision. That appeal has been briefed but not yet argued in the Sixth Circuit.

In light of the Supreme Court's decision in SCSPA, I have determined to dismiss the government's appeal in this case. The district court found no constitutional problem with the Assistant Secretary's initial investigation of a complaint filed against a state employer. The court also held that, if the state employer

challenges the Assistant Secretary's initial determination, the administrative review process may go forward so long as the Department of Labor intervenes in the ALJ proceedings, because principles of state sovereign immunity do not bar adjudicative proceedings that are instituted by the United States. Proceedings before the ALJ may not go forward, however, if only the private complainant is a party to those proceedings against the State. I regard that as a correct and sensible way of harmonizing the existing statutory and regulatory scheme with the principles of state sovereign immunity articulated by the Supreme Court in SCSPA. I have enclosed a copy of the district court's opinion.

Please let me know if I can be of further assistance in this matter.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Theodore B. Olson', written in a cursive style.

Theodore B. Olson
Solicitor General

Enclosure