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50-186

January 17, 2003

Mr. David Matthews, Director
Division of Regulatory Improvement Programs
Office of Nuclear Reactor Regulation
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Re: William B. Yelon v. University of Missouri
Case No. 202-ERA-33

Dear Mr. Matthews:

I represent Dr. William Yelon, a nuclear physicist who has the above Section 211 action pending before the United States Department of Labor.

In this proceeding, Dr. Yelon's former employer, the University of Missouri, appeals an earlier decision in Dr. Yelon's favor, finding that the University unlawfully retaliated against him for engaging in protected activities having to do with the University's research reactor. The facility is based in Columbia, Missouri on the University campus.

My purpose in writing is to advise NRC that the University is challenging DOL's jurisdiction on Eleventh Amendment grounds. I also invite your agency to intervene in support of the DOL's jurisdiction. For reference, I enclose a copy of the materials supporting the University's pending motion to dismiss.

It is my view that the University, by seeking and accepting its license to operate a nuclear reactor has waived its Eleventh Amendment protection and has submitted to the federal regulatory scheme as a condition of its license.

Obviously my primary concern is with representing Dr. Yelon and seeing that his administrative action remains viable. I believe presenting the DOL hearing officer with

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NRC's views in support of DOL's jurisdiction would help Dr. Yelon. On a broader scale, the University's success stands to set precedent compromising the power of NRC to exercise its regulatory authority against a state licensee in federal administrative proceedings or in federal court. Stated differently, Dr. Yelon and the NRC each have reasons for assuring that the University remains fully subject to federal regulation.

Thank you for considering this request and please let me know if you want any further information.

Very truly yours,

HENDREN AND ANDRAE, L.L.C.

Michael G. Berry

MGB:ls
cc: Mr. Congel
Ms. Coggins
Mr. Treby
Dr. Yelon (w/o enclosures)

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

WILLIAN B. YELON, Complainant, v. UNIVERSITY OF MISSOURI, Respondent.	Case No. 2002-ERA-33 The Honorable Linda S. Chapman

BRIEF IN SUPPORT OF RESPONDENT'S MOTION TO DISMISS

Purported Respondent the University of Missouri moves this Court for an Order dismissing complainant's claim under Section 211 of the Energy Reorganization Act, 42 U.S.C. § 5851 ("Section 211"). That claim is clearly barred by the Eleventh Amendment to the United States Constitution. This motion should be granted for the reasons set forth below.

Introduction

Complainant William Yelon was formerly employed by the University of Missouri (the "University") at the University's Columbia, Missouri campus. On or about April 10, 2002, he filed a complaint against the University that is the subject of this case. The complaint asserts a single claim: that the University discriminated against him in purported violation of Section 211. As pointed out in recent correspondence by his own counsel to this Court, Dr. Yelon has subsequently filed a complaint against the University and certain individuals in federal court in Missouri,

seeking legal and equitable relief for a purported violation of 42 U.S.C. § 1983. The facts and claims for relief in the federal proceeding are the same as or similar to those sought in this Section 211 case.

Argument

1. The Eleventh Amendment to the United States Constitution bars this Section 211 action against the University. The Eleventh Amendment provides that the judicial power of the United States shall not extend to any suit in law or equity against one of the United States by citizens of other states. The Supreme Court has long held that this amendment prohibits suit against a state by that state's own residents. Hans v. Louisiana, 134 U.S. 1, 15-16 (1890).

2. The Eleventh Amendment bar against suit exists whether the relief sought by the plaintiff is legal or equitable in nature. As the Supreme Court stated in Seminole Tribe of Florida v. Florida, 517 U.S. 56, 58 (1996): "[W]e have often made it clear that the relief sought by a plaintiff suing a State is irrelevant to the question whether the suit is barred by the Eleventh Amendment" (citing Cory v. White, 457 U.S. 85, 90 (1982) ("It would be a novel proposition indeed that the Eleventh Amendment does not bar a suit to enjoin the State itself simply because no money judgment is sought."). See also Williams v. State of Missouri, 973 F.2d 599, 599-600 (8th Cir. 1992). Whether Dr. Yelon seeks legal relief (e.g., monetary damages) or equitable relief (affirmative job-related action), the Eleventh Amendment bars his claim.

3. The Eleventh Amendment bars suit in administrative tribunals as well as in courts. In the recent case of Federal Maritime Commission v. South Carolina

State Ports Authority, 535 U.S. 743 (2002), the United States Supreme Court concluded:

> Given both this interest in protecting States' dignity and the strong similarities between [agency] proceedings and civil litigation, we hold that state sovereign immunity bars the FMC from adjudicating complaints filed by a private party against a non-consenting State. Simply put, if the Framers thought it an impermissible affront to a State's dignity to be required to answer the complaints of private parties in federal courts, we cannot imagine that they would have found it acceptable to compel a State to do exactly the same thing before the administrative tribunal of an agency, such as the FMC.

4. The University is entitled to the protection of the Eleventh Amendment because the University is an instrumentality of the State of Missouri. The Courts have so held. E.g., Sherman v. The Curators of the University of Missouri, 871 F. Supp. 344 (W.D. Mo. 1994) (holding that the University is entitled to Eleventh Amendment immunity); Schèrer v. Curators of the University of Missouri, 2002 WL 31426458 (8th Cir., Oct. 31, 2002).

Several factors have led to the conclusion that the University enjoys Eleventh Amendment protections. The Missouri Constitution expressly charges the Missouri General Assembly with the responsibility of adequately maintaining the University. Constitution of Missouri, Art. IX, §9(b). The State Constitution also provides that the University will be governed by a Board of Curators appointed by the governor, with the advice and consent of the Missouri Senate. Id. §9(a).

In addition, the University is required to furnish the Missouri General Assembly, before each regular session, with a report containing a statement of the receipts and disbursements of the University during the preceding biennial period. §172.210 RSMo. (2000). That report must set forth the amounts paid to the

president, the professors and other teachers, officers and employees of the University. Id. The University must report to the governor annually, showing the "progress, conditions and wants of the several colleges or departments of instruction in the university, the course of study in each and the number and names of the officers and students." §172.220 RSMo. (2000). The governor is then required to have the annual report made available for the use of the General Assembly. Id.

The above constitutional provisions and statutory requirements establish that the University is not independent of the State of Missouri, but rather an instrumentality of the State. As the Court held in Sherman, the University is an alter ego or instrumentality of the State because the University does not enjoy a significant level of autonomy from the State, and any judgment against the University would ultimately be derived from the State treasury. As such, the University is entitled to the protections and immunity of the Eleventh Amendment.

5. While there are some instances in which suit against the University is not barred by the Eleventh Amendment, these are not applicable here. Suit is not barred where (1) the University has waived its immunity, or (2) where Congress, in the statute at issue, has "unequivocally expresse[d] its intent to abrogate the immunity" pursuant to a valid exercise of power. Seminole Tribe, 517 U.S. at 55 (quoting Green v. Mansour, 474 U.S. 64, 68 (1985)).

As to waiver, any waiver of Eleventh Amendment immunity by the University must be "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction." Edelman v. Jordan, 415 U.S. 651, 673 (1974). No Missouri statute waives the Eleventh

Amendment immunity of the University. Moreover, the University has not taken any action that would constitute a waiver of its constitutional protections. The University has not filed any sort of affirmative claim against complainant. Because there has been no affirmative act by the University expressly consenting to the jurisdiction of this forum, there has been no waiver of the immunity.

Moreover, there has been no Congressional abrogation of the immunity pursuant to a valid exercise of power. A review of the statute under which complainant Yelon purports to bring a claim against the University, Section 211 (42 U.S.C. § 5851), demonstrates that there is no expression, in the words of the statute, of any Congressional intent to abrogate the state's Eleventh Amendment immunity. Indeed, by the terms of the statute, a state instrumentality is not even covered by the statute. 42 U.S.C. § 5851(a)(2). For abrogation, the courts require a finding that Congress "unequivocally intended to abrogate a state's sovereign immunity under the Eleventh Amendment." State of Ohio Environmental Protection Agency v. United States of America Dep't of Labor, 121 F.Supp.2d 1155, 1161 (S.D. Ohio 2000) (citing Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 527 U.S. 627, 635 (1999)). No hint of abrogation, much less evidence of unequivocal intent, resides in Section 211.

Moreover, in Seminole Tribe, the Supreme Court held that Congress' ability to abrogate Eleventh Amendment immunity is limited and that Congress does not have the authority or the power to abrogate immunity through the exercise of its powers under Article I of the Constitution. Seminole Tribe, 517 U.S. at 72 ("Even when the Constitution vests in Congress complete lawmaking authority over a particular area,

the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States. The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction."); see also In Re Creative Goldsmiths of Washington, D.C., Inc., 119 F.3d 1140, 1145 (4th Cir. 1997) (Congress' powers under Article I do not empower Congress to expand federal jurisdiction by abrogating the States' sovereign immunity).

In Seminole Tribe, the Court reaffirmed that the sole source of power for Congressional abrogation of the Eleventh Amendment is through the exercise of Congress' power under Section 5 of the Fourteenth Amendment. Seminole Tribe, 517 U.S. at 59. There can be no argument that Congress enacted Section 211 pursuant to its power under Section 5. The federal court in State of Ohio found "there is no expression of Congressional intent that the [whistleblower] statutes were enactments under the Fourteenth Amendment designed to abrogate Eleventh Amendment immunity." The Ohio Court went on to find that in all the statutes which expressly abrogated a state's Eleventh Amendment immunity, "the remedies available to private litigants include recourse to a full trial in federal court" — which Section 211 does not provide.

Moreover, while a specific referral to or recitation of the words "Fourteenth Amendment" or "Section 5" is not required, the Supreme Court has cautioned that courts "should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment." In Re NVR L.P., 1997 Bankr. LEXIS 411, at *22 (quoting Pennhurst State School & Hospital v. Halderman, 451

U.S. 1, 16 (1981)). Instead, the courts have required that "if Congress has not explicitly identified the source of its power under the Fourteenth Amendment, there must be something about the act connecting it to recognized Fourteenth Amendment aims, specifically those concerned with 'discrimination by state actors on the basis of race or gender.'" Id. (quoting Wilson-Jones v. Caviness, 99 F.3d 203, 209 (6th Cir. 1996)). In other words, the courts are more likely to find that legislation is enforceable through the Fourteenth Amendment if the purpose of the legislation is similar to the aims of the Amendment. Id. Since Section 211 has no bearing at all on the issues that motivated the Fourteenth Amendment, its purpose cannot be deemed not similar to the aims of that Amendment, and there can be no contention in this case that Congress sought to abrogate immunity by acting via the powers of Section 5.

This argument is further strengthened by the Supreme Court's recent opinion in City of Boerne v. Flores, 521 U.S. 515 (1997), in which the Court struck down the Religious Freedom Restoration Act. In City of Boerne, the Court examined the issue of what type of legislation can be passed pursuant to Section 5 of the Fourteenth Amendment. The Court expressly held that Congress' power under Section 5 extends only to "enforc[ing] the provisions of the Fourteenth Amendment, a power which is remedial in nature." Id. at 2164. ("[Congress] has been given the power 'to enforce', not the power to determine what constitutes a constitutional violation."). Section 211 is not designed to remedy some unspecified unconstitutional act of the States, nor is it designed to prevent unlawful discrimination.

6. The federal courts that have addressed the application of the Eleventh Amendment to the federal whistleblower statutes administered by the Department of Labor have uniformly held that States and their instrumentalities are not amenable to suit as respondents. Rhode Island Dep't of Env'l Mgmt. v. Department of Labor, 304 F.3d 31 (1st Cir. 2002); State of Ohio, supra; Florida v. United States, 133 F. Supp. 2d 1280 (N.D. Fla. 2001); State of Connecticut Dep't of Env'l Protection v. OSHA, 138 F. Supp.2d 285 (D. Conn. 2001). Just as the state instrumentalities in those cases were protected from suit, so should this case against the University be dismissed.

Conclusion

The University is entitled to the protection and immunity of the Eleventh Amendment. Because there has been no waiver of the immunity, and no Congressional abrogation of the immunity pursuant to a valid exercise of power, this Agency does not have jurisdiction to determine complainant's claim against the University in this matter. The complaint should be dismissed.

December 19, 2002

Respectfully submitted,

D-CM-f

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he caused a copy of the foregoing Brief in Support of Respondent's Motion to Dismiss to be served on the following by facsimile and by depositing the same in the United States Mail, first class, postage prepaid, this 19th day of December, 2002:

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