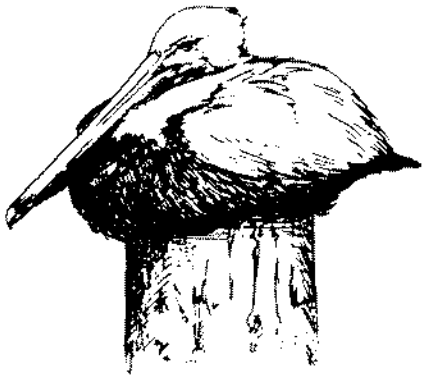

Tulane Environmental Law Journal

ENVIRONMENTAL WHISTLEBLOWERS AND THE ELEVENTH AMENDMENT: EMPLOYEE PROTECTION OR STATE IMMUNITY?

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VOLUME 15 WINTER 2001 ISSUE 1

Environmental Whistleblowers and the Eleventh Amendment: Employee Protection or State Immunity?

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I. INTRODUCTION

Environmental whistleblowers have long been recognized as serving a fundamental role in the enforcement of federal and state environmental protection statutes. Due mainly to the recognition of the important role of whistleblowers in ensuring the proper enforcement of environmental protection statutes, Congress passed seven whistleblower protection bills

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(six environmental and one nuclear) between 1972 and 1980. As amendments to the Safe Drinking Water Act (SDWA), the Clean Air Act (CAA), the Energy Reorganization Act (ERA), the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the Toxic Substance Control Act (TSCA), the Solid Waste Disposal Act ((SWDA), also known as the Resource Conservation and Recovery Act, (RCRA)), and the Water Pollution Control Act (WPCA), these laws protect employees who report environmental or nuclear safety regulations to public authorities.[1]

In passing the first of the environmental whistleblower protection provisions, the employee protection provision of the WPCA, Congress made it abundantly clear that the provision was ultimately intended to assure compliance with the WPCA.[2] Congress specifically stated in the legislative history that "[t]he best source of information about what a company is actually doing or not doing is often its own employees, and this amendment would insure that an employee could provide such information without losing his job or otherwise suffering economically from retribution from the polluter."[3]

The legislative history of all of the statutes indicates that Congress, in passing these provisions, wanted to prevent employers from using the threat of economic retaliation to silence those voicing environmental concerns.[4] Congress recognized that states would play a large role in the

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1. Safe Drinking Water Act (SDWA), 42 U.S.C. § 300j-9(i) (1994); Clean Air Act (CAA), 42 U.S.C. § 7622 (1994); Energy Reorganization Act (ERA), 42 U.S.C. § 5851 (1994); Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9610 (1994); Solid Waste Disposal Act (SWDA), 42 U.S.C. § 6971 (1994); Water Pollution Control Act (WPCA), 33 U.S.C. § 1367 (1994). All seven whistleblower statutes are collectively administered by the Department of Labor (DOL) in accordance with 29 C.F.R. § 24 (2000). The nuclear whistleblower protection law was amended in 1992. The amended law increases the protections afforded employees under that act. In 1998, the DOL issued new regulations concerning the seven environmental and nuclear protection statutes that incorporated the 1992 amendments to the ERA. Office of the Secretary of Labor (SOL), Procedures for the Handling of Discrimination Complaints Under Federal Employee Protection Statutes, 63 Fed. Reg. 6614 (Feb. 9, 1998) (codified at 29 C.F.R. § 24). For a complete description of the proceedings and rules governing the proceedings under the whistleblower statutes, see STEPHEN M. KOHN, CONCEPTS AND PROCEDURES IN WHISTLEBLOWER LAW (2001).

2. See S. REP. NO. 92-414, at 82-83 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3748-49.

3. Clean Air Act Amendment of 1977, Pub. L. No. 95-95, 1977 U.S.C.C.A.N. (91 Stat. 685) 1077, 1404.

4. See, e.g., 118 CONG. REC. H 10,766 (1972). Representative William D. Ford therein stated:

> Mr. Chairman, in offering this amendment we are only seeking to protect workers and communities from those very few in industry who refuse to face up to the fact that they are polluting our waterways, and who hope, that by pressuring their employees and

enforcement of the environmental statutes and carefully tailored the whistleblower protection provisions of the seven statutes so that states and state agencies were explicitly covered under these laws.[5]

In making the laws applicable to states and state agencies, Congress delegated the authority to investigate and prosecute whistleblower claims to the Secretary of Labor (SOL).[6] This delegation should bypass any Eleventh Amendment obstacles, because state immunity under the Eleventh Amendment does not apply to actions filed by the United States itself.[7] However, because the laws permit employees to initiate the complaint process and participate in the hearings held pursuant to the SOL's investigatory authority, a growing number of states have used the doctrine of state sovereign immunity to challenge the applicability of these statutes to state employees.[8]

The first U.S. court of appeals to review the issue of whether state sovereign immunity barred administrative hearings of a whistleblower complaint initiated under one of the seven statutes categorically rejected the attack on the applicability of the administrative hearings to states.[9] Following that case, however, the Supreme Court decided a series of hotly contested cases, many by a five to four margin, which generally strengthened the Eleventh Amendment immunity enjoyed by the states.[10] State agencies renewed their attacks on the United States Department of Labor's (DOL) proceedings based on these decisions. Florida, Ohio, and Rhode Island have each succeeded, at the district court level, in barring DOL administrative hearings related to the investigation of state employee whistleblower claims under the Eleventh Amendment and the doctrine of Sovereign Immunity.[11] These decisions have seriously eroded the protections originally granted to state employees by Congress when

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frightening communities with economic threats, they will gain relief from the requirements of any effluent limitation or abatement order.

5. *See, e.g.*, H.R. REP. NO. 95-294 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1077, 1404-05; *see also* KOHN, *supra* note 1, at 142-45.

6. *See* H.R. REP. NO. 95-294, at 1405.

7. *See, e.g.*, Florida v. United States, 133 F. Supp. 2d 1280 (N.D. Fla. 2001), *appeal docketed*, No. 01-12380-HH (11th Cir. May 1, 2001); Ohio EPA v. United States Dep't of Labor, 121 F. Supp. 2d 1115 (S.D. Ohio 2000); Rhode Island v. United States, 115 F. Supp. 2d 269 (D.R.I. 2000).

8. *See, e.g.*, *Florida*, 133 F. Supp. 2d 1280; *Ohio EPA*, 121 F. Supp. 2d 1115; *Rhode Island*, 115 F. Supp. 2d 269.

9. Ellis Fischel State Cancer Hosp. v. Marshall, 629 F.2d 563, 567 (8th Cir. 1980).

10. *See, e.g.*, Alden v. Maine, 527 U.S. 706 (1999); Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).

11. *Florida*, 133 F. Supp. 2d 1280; *Ohio EPA*, 121 F. Supp. 2d 1115; *Rhode Island*, 115 F. Supp. 2d 269.

the whistleblower protection provisions of the environmental statutes were enacted.

These rulings not only raise grave concerns over the protection of environmental whistleblowers, but also raise equally grave concerns about the potentially catastrophic effect that the inability to protect state employees from discrimination related to their whistleblower activities may have on the enforcement of environmental protection statutes. Presently, state agencies "perform the majority of environmental inspections and enforcement activities," and the Bush administration is in favor of placing even more enforcement control of federal environmental statutes in the hands of state agencies.[12] These concerns are bolstered by the fact that Congress, in making the statutes applicable to states and state agencies, clearly recognized that the protected activity of state employee whistleblowers is absolutely vital to the proper enforcement of federal environmental regulations. There are numerous cases in which state employee whistleblowers have spoken out against a failure on the part of states to properly investigate possible violations of federal environmental laws and ensure compliance with these laws.[13] Furthermore, these concerns find support in a report by the Environmental Protection Agency (EPA) Inspector General, which "criticized 44 states for their enforcement of a Clean Water Act program designed to reduce unlawful discharges of pollution."[14]

Each of these district court decisions, however, rests on a fundamental misreading of the statutes in question. Not only are the rulings in these cases impossible to reconcile with the intentions of Congress in enacting the whistleblower statutes and making them applicable to the states, but they also cannot be reconciled with the plain language of the statutes themselves. Despite the limitations placed on the investigation and prosecution of state employee whistleblower claims by these rulings, there are methods of avoiding problems involving the Eleventh Amendment and state sovereign immunity when attempting to protect environmental whistleblowers.

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12. Eric Pianin, *GAO Issues Warning on EPA Enforcement: Plan to Shift Resources Criticized*, WASH. POST, Aug. 23, 2001, at A23.

13. *See* Migliore v. R.I. Dep't of Envtl. Mgmt., 98-SWDA-3, at 11-35 (Dep't of Labor Aug. 13, 1999) (recommended decision and order, A.L.J.), *available at* http: www.oalj.dol.gov public wblower decsn 98swd03g.htm; Jayko v. Ohio EPA, 99-CAA-5, at 17-23, 86-89 (Dep't of Labor Oct. 2, 2000) (recommended decision and order and prelim. order, A.L.J.), *available at* http: www.oalj.dol.gov public arb decsn 01_009.caa.pdf.

14. Pianin, *supra* note 12, at A23; *see also* Katharine Q. Seelye, *EPA Faults Ohio Agency Headed by a Bush Nominee: Report Forced Out in Midst of Political Fight*, N.Y. TIMES, Sept. 5, 2001, at A12 (citing EPA report that Ohio state environmental protection agency failed to adequately enforce federal statutes).

II. AN OVERVIEW OF THE FEDERAL ENVIRONMENTAL WHISTLEBLOWER PROTECTION LAWS

In the early 1970s, Congress enacted the whistleblower protection provisions of the federal environmental laws upon its determination that proper implementation required that private and public employees who report violations of these laws be afforded protection from possible discrimination by their employers. The first environmental whistleblower protection law, the employee protection provision of the WPCA, was passed in 1972. After the passage of the WPCA whistleblower protection law, Congress passed six other environmental and nuclear laws (amendments to the SDWA, the CAA, the ERA, CERCLA, the TSCA, and the SWDA), all modeled after the WPCA provision.[15] These laws contain similar descriptions of the protected activity of environmental or nuclear whistleblowers.[16] Generally, these laws extend protection to employees who have "commenced, caused to be commenced, or are about to commence a proceeding" under the relevant act, testified, or are about to testify in any proceeding, or who have "assisted or participated or [are] about to assist or participate in any manner in such a proceeding or in any other action to "carry out the purposes of the [relevant act]."[17] The statutes prevent employers from discriminating against employee whistleblowers with respect to compensation, terms, conditions or privileges of employment.[18]

The legislative history of these amendments indicates that Congress intended all employees to be covered, whether they were in the private sector or employed by the federal or state governments. For example, the conference committee report for the Clean Air Act amendment stated that employees would be protected from retaliation:

> due to an employee's participation in, or assistance to, the administration, implementation, or enforcement of the Clean Air Act or any requirements

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15. *See* CERCLA, Pub. L. No. 96-510, 1980 U.S.C.C.A.N. (94 Stat.) 6119; ERA, Pub. L. No. 93-438, 1974 U.S.C.C.A.N. 5470; RCRA, Pub. L. No. 94-580, 1976 U.S.C.C.A.N. (90 Stat.) 6238; TSCA, Pub. L. No. 94-469, 1976 U.S.C.C.A.N. (90 Stat.) 4491; SWDA, Pub. L. No. 93-523, 1974 U.S.C.C.A.N. 6454; WPCA, Pub. L. No. 92-500, 1972 U.S.C.C.A.N. 3668. *See also* KOHN, *supra* note 1, at 141-202 (reviewing the rules and procedures utilized in environmental cases).

16. The ERA, 42 U.S.C. § 5851 (1994), defines protected "whistleblower" activity such that it includes not only those actions covered in the six environmental whistleblower statutes, but also the actions of employees who: "(1) notify their employer of an alleged violation, (2) oppose a practice that would be a violation of the Atomic Energy Act of 1954, or (3) testify before Congress or any federal or state agency regarding a violation of the Atomic Energy Act of 1954." *Jayko*, 99-CAA-5 at 57, *available at* http://www.oalj.dol.gov/public/arb/decsn/01_009.caa.pdf.

17. 42 U.S.C. § 7622(3)(a)(1)(3).

18. *See id.*

> promulgated pursuant to it. These requirements would include any State or local requirements which are incorporated in the applicable implementation plan . . . . Retaliatory action by the employer would also be prohibited if it were in response to any employee's exercise of rights under Federal, State, or local Clean Air Act legislation or regulations.[19]

The reference in plain language to employees who participate in the administration and enforcement of the Clean Air Act, and the inclusion of those who administer and enforce state requirements under the Act, demonstrates Congress's intent to include both federal and state employees under the whistleblower protection provision. The SOL has reasoned that any interpretation of the environmental law must be read "in conjunction with" these explicit statements of congressional purpose.[20] Further, "employees must feel secure that any action they may take that furthers [a particular] Congressional policy and purpose, especially in the area of public health and safety will not jeopardize either their current employment or future employment opportunities."[21] The United States Court of Appeals for the Third Circuit also noted, in *Passaic Valley Sewerage Commissioners v. United States Department of Labor*, that the other circuit courts "have consistently construed" the environmental and nuclear whistleblower statutes "to lend broad coverage [to employees]."[22] The broad coverage of the whistleblower statutes serves to prevent the "potentially catastrophic results" that can follow from employees being coerced and intimidated into remaining silent when they should speak out.[23]

Therefore, any employee who is terminated, harassed, blacklisted, or in any way discriminated against in retaliation for blowing the whistle on

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19. Clean Air Act Amendment of 1977, Pub. L. No. 95-95, 1977 U.S.C.C.A.N. (91 Stat. 685) 1077, 1404.

20. In 1996, the Secretary of Labor (SOL) delegated authority under the whistleblower laws to a three-member Administrative Review Board (ARB). Authority and Responsibilities of the Administrative Review Board, 61 Fed. Reg. 19,978, 19,978-79 (May 3, 1996). The SOL mandated that the ARB follow the Code of Federal Regulations (CFR) applicable to the DOL whistleblower proceedings. *Id.* The SOL also required ARB to follow all past secretarial precedent, unless they are explicitly reversed. *Id.*

21. Egenrieder v. Metro. Edison Co. G.P.U., 85-ERA-23, at 7-8 (Dep't of Labor Apr. 20, 1997) (order of remand, Sec'y of Labor), *available at* http: www.oalj.dol.gov public wblower decsn 85era23b.htm; *see also* Stone & Webster Eng'g v. Herman, 115 F.3d 1568 (11th Cir. 1997); Melendez v. Exxon, 93-ERA-6, at 13-14 (Dep't of Labor July 14, 2000) (decision and order of remand, Admin. Review Bd.), *available at* http: www.oalj.dol.gov public wblower decsn 93era06e.htm (indicating that legislative history is useful in understanding scope of protected activity).

22. 992 F.2d 474, 479 (3d Cir. 1993).

23. Rose v. Sec'y of Dep't of Labor, 800 F.2d 563, 565 (6th Cir. 1986) (Edwards, J., concurring).

violations of environmental or nuclear safety laws can file a simple complaint within the DOL and, if successful, obtain reinstatement, back pay with interest, compensatory damages, damages for pain and suffering and loss of reputation, and other affirmative relief necessary to abate the violation.[24] In addition, if the Department of Labor issues an order finding a violation of the whistleblower protection provisions, the SOL must order reimbursement for all litigation costs and expenses, including attorney fees and expert witness fees.[25] Two of the laws, the SDWA and TSCA, also have provisions for awarding exemplary damages if the employee wins his or her discrimination suit.[26]

Under the provisions of the six environmental employee protections laws, the worker (complainant) must file a written complaint with the Occupational Safety and Health Administration (OSHA) at DOL in Washington, D.C., or a local OSHA branch within 30 days of the discriminatory act.[27] If the employee fails to comply with the 30-day statute of limitations, his or her complaint will be time-barred and dismissed.[28] The nuclear whistleblower law was amended in 1992 to

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24. The DOL has exclusive jurisdiction over the adjudication of the seven environmental and nuclear whistleblower statutes. *See* 29 C.F.R. § 24 (2000). Attempts to enjoin the DOL from exercising this jurisdiction have been denied. *See* Martin Marietta Energy Sys. Inc. v. Martin, 909 F. Supp. 528, 534 (E.D. Tenn. 1993).

25. 29 C.F.R. § 24.8(d)(2).

26. *Id.* § 24.7(c)(1).

27. *Id.* § 24.3(b). The statute commences running when an employee has "final and unequivocal notice" that a decision has in fact been made to take adverse action, not on the date the decision is implemented. *See* Ross v. Fla. Power & Light Co., 96-ERA-36, at 3-5 (Dep't of Labor Mar. 31, 1999) (final decision and order, Admin. Review Bd.), *available at* http://www.oalj.dol.gov/public/wblower/decsn/96era36b.htm; McGough v. United States Navy, ROICC, 86-ERA-18 19 20, at 9-10 (Dep't of Labor June 30, 1988) (remand and decision and order, Sec'y of Labor), *available at* http://www.oalj.dol.gov/public/wblower/decsn/86era186.htm (collecting cases); Rose v. Dole, 945 F.2d 1331 (6th Cir. 1991). A statute of limitations may be subject to equitable tolling. *See* Sch. Dist. of Allentown v. Marshall, 657 F.2d 16, 18 (3d Cir. 1981); Rose v. Sec'y of Dep't of Labor, 800 F.2d 563 (6th Cir. 1986). A claim may be timely under a "continuing violation" theory. *See* Bruno v. W. Elec. Co., 829 F.2d 957, 960-61 (10th Cir. 1987); Egenrieder v. Metro. Edison Co./G.P.U., 85-ERA-23, at 4 (Dep't of Labor Apr. 20, 1997) (order of remand, Sec'y of Labor), *available at* http://www.oalj.dol.gov/public/wblower/decsn/85era23b.htm.

28. Pantanizopoulos v. Tenn. Valley Auth., 96-ERA-15, at 3 (Dep't of Labor Oct. 20, 1997) (final decision and order, Admin. Review Bd.), *available at* http://www.oalj.dol.gov/public/wblower/decsn/96era15b.htm. The statute runs, not on the date in which the harm or injury would occur, but on the date in which the employee is informed that a final adverse decision has been made. *Id.* at 3-4; *accord* Hadden v. Ga. Power Co., 89-ERA-21, at 3-2 (Dep't of Labor Feb. 9, 1994) (final decision and order, Sec'y of Labor), *available at* http://www.oalj.dol.gov/public/wblower/decsn/89era21b.htm (requiring "definite notice" or "final and unequivocal notice" to trigger the running of a statute of limitations). The tolling period for the statute of limitations on a whistleblower claim, or, in other words, the filing period for the claim itself, commences on the date that a complainant receives a "final and unequivocal" notice of the challenged actions rather than at the time the effects of the actions ultimately are felt. Wagerle v.

permit a 180-day filing period.[29] The Complaint is deemed filed when it has been mailed to the Assistant Secretary for OSHA at DOL.[30] The complaint should include a full statement of the acts and omissions, with pertinent dates, that are believed to constitute the violation.[31]

All of the whistleblower provisions contained in the environmental statutes require that the SOL conduct an investigation and issue a formal finding regarding the validity of an employee's complaint.[32] If the Secretary rules in favor of an employee and the employer appeals, it is

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Hosp. of the Univ. of Pa., 93-ERA-1, at 3 (Dep't of Labor Mar. 17, 1995) (decision and order, Sec'y of Labor), *available at* http://www.oalj.dol.gov/public/wblower/decsn/93era01e.htm. However the limitations period "may be extended when fairness requires." Hill v. United States Dep't of Labor, 65 F.3d 1331, 1335 (6th Cir. 1995); Larry v. Detroit Edison Co., 86-ERA-32 (Dep't of Labor June 28, 1991), *available at* http://www.oalj.dol.gov/public/wblower/decsn/86era32d.htm, *aff'd sub nom.*: Detroit Edison v. United States Dep't of Labor, 960 F.2d 149 (6th Cir. 1992) (unpublished opinion); Hall v. United States Dep't of Labor, 198 F.3d 257 (10th Cir. 1999) (unpublished opinion). The grounds for extending a limitations period are equitable tolling. In *Rose*, the court delineated five factors to be weighed in determining whether to apply equitable tolling: "(1) whether the plaintiff lacked actual notice of the filing requirements; (2) whether the plaintiff lacked constructive notice . . .; (3) the diligence with which the plaintiff pursued his rights; (4) whether there would be prejudice to the defendant if the statute were tolled; and (5) the reasonableness of the plaintiff remaining ignorant of his rights." Rose v. Dole, 945 F.2d 1331, 1335 (6th Cir. 1991). In *School District of Allentown, School District of Allentown v. Marshall*, 657 F.2d 16, 19-20 (3d Cir. 1981), the court set forth the three basic fact patterns often used in justifying equitable tolling: "(1) the defendant has actively misled the plaintiff respecting the cause of action, (2) the plaintiff has in some extraordinary way been prevented from asserting his rights, or (3) the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum." Furthermore, the principle of equitable estoppel focuses on the issue of whether the employer misled the complainant and thus caused the delay in filing the complaint." Prysbys v. Seminole Tribe of Fla., 95-CAA-15, at 5 (Dep't of Labor Nov. 27, 1996) (decision and order, Admin. Review Bd.), *available at* http://www.oalj.dol.gov/public/wblower/decsn/95era15b.htm. A "continuing violation" also justifies equitable tolling. See, *e.g.*, Vernadore v. Sec'y of Labor, 141 F.3d 625, 630 (6th Cir. 1998); Office of Fed. Contract Compliance Programs v. CSX Transp., Inc., 88-OFC-24, at 22-26 (Dep't of Labor Oct. 13, 1984) (decision and order of remand, Assistant Sec'y for Employment Standards), *available at* http://www.oalj.dol.gov/public/ofccp/decsn/88ofc24e.htm (citing Elliott v. Sperry Rand Corp., 79 F.R.D. 580 (D. Minn. 1978) (setting forth four basic fact patterns used in establishing a continuing violation)); Simmons v. Ariz. Pub. Serv. Co., 93-ERA-5, at 8-9 (Dep't of Labor May 9, 1995) (decision and order of remand, Sec'y of Labor), *available at* http://www.oalj.dol.gov/public/wblower/decsn/93era056.htm (finding continuing violation due to a "pattern of discrimination"). Even if tolling is justified, an employee still must "bring suit within a reasonable time after he has obtained, or by due diligence could have obtained, the necessary information."

29. 29 C.F.R. § 24.3(b)(2).

30. *Id.* § 24.3(b)(1); *see also* Sawyers v. Baldwin Union Free Sch. Dist., 85-TSC-1, at 5 (Dep't of Labor Oct. 5, 1998) (decision and order of remand, Sec'y of Labor), *available at* http://www.oalj.dol.gov/public/wblower/decsn/85tsc01b.htm.

31. 29 C.F.R. § 24.3(c).

32. See CAA, 42 U.S.C. § 7622(b) (1994); WPCA, 33 U.S.C. § 1367(b) (1994); TSCA, 15 U.S.C. § 2622(b)(2) (1994); SDWA, 42 U.S.C. § 300j-9(i)(2)(B); SWDA, 42 U.S.C. § 6971(b); CERCLA, 42 U.S.C. § 9610(b); ERA, 42 U.S.C. § 5851(b).

the SOL, not the employee, who defends the decision in federal court.[33] Conversely, if the Secretary rules that no violation occurred, the employee initiates a suit against the Secretary, not the employer, challenging the decision.[34]

In accordance with the procedural due process requirements in the environmental whistleblower statutes, the SOL has established a three-part procedure controlling the DOL investigation of a complaint. The first stage in the investigation consists of a brief initial investigation of the merits of a claim by the Assistant Secretary for OSHA.[35] At the conclusion of this initial investigation, the parties to the claim must, in accordance with the whistleblower statutes,[36] be afforded the opportunity to proceed to the second stage of the investigative process, in which public administrative hearings of the complaint are held before the DOL's Office of Administrative Law Judges.[37] In the event that one of the parties to the complaint requests a hearing, the OSHA findings are automatically vacated and the proceeding moves on to the second stage.[38] At the conclusion of the Administrative Law Judge (ALJ) hearings, either of the aggrieved may seek further review of the complaint in the third stage of the proceedings, which consists of a de novo review by the Administrative Review Board of the record created by the ALJ.[39]

Once a complaint is filed, OSHA has thirty days to conduct the initial phase I investigation of complainant's charges.[40] If OSHA fails to complete a timely initial investigation, a party may, after a reasonable period of time, request that the DOL's investigative process move into its second stage. In the second stage, the parties are afforded the opportunity for an administrative hearing based on the constructive denial of the complaint.[41] Additionally, because of the de novo nature of

33. *See* 42 U.S.C. § 7622(c); 33 U.S.C. § 1367(b); 15 U.S.C. § 2622(c); 42 U.S.C. § 300j-9(i)(2)(B); 42 U.S.C. § 6971(b); 42 U.S.C. § 9610(b); 42 U.S.C. § 5851(b).

34. *See* 42 U.S.C. § 7622(c); 33 U.S.C. § 1367(b); 15 U.S.C. § 2622(c); 42 U.S.C. § 300j-9(i)(2)(B); 42 U.S.C. § 6971(b); 42 U.S.C. § 9610(b); 42 U.S.C. § 5851(b).

35. 29 C.F.R. § 24.4-5.

36. *See* 42 U.S.C. § 7622(b); 33 U.S.C. § 1367(b); 15 U.S.C. § 2622(b)(2); 42 U.S.C. § 300j-9(i)(2)(B); 42 U.S.C. § 6971(b); 42 U.S.C. § 9610(b).

37. 29 C.F.R. § 24.6-7.

38. *Id.* § 24.4(d)(2).

39. *Id.* § 24.8.

40. *Id.* § 24.4(d)(1).

41. Newton v. Alaska, 96-TSC-10 (Dep't of Labor Oct. 25, 1996) (order denying request for hearing), *available at* http://www.oalj.dol.gov/public/wblower/decsn/96tsc10a.htm.

the hearing process, "flaws" in the investigative process are not grounds for either remand or reversal.[42]

After the investigation is completed, OSHA must decide whether the employee's complaint is valid and issue a determination letter.[43] This OSHA finding is nonbinding if either party requests a hearing under the DOL regulations,[44] and "once a hearing has been requested, the investigated findings . . . carry no weight either before the ALJ or the Administrative Review Board."[45]

Each party has only five days from the receipt of the initial ruling by the Assistant Secretary for OSHA in which to request a hearing.[46] If the request for a hearing is not filed within the five-day period, the OSHA determination becomes the final decision of the SOL.[47] The party aggrieved by the Assistant Secretary's initial findings regarding merits of the complaint must file the request for a hearing to the Chief ALJ for the DOL.[48] Copies of the request for hearing must also be sent to the other

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42. Billings v. Tenn. Valley Auth., 91-ERA-12, at 8-9 (Dep't of Labor June 26, 1996) (final decision and order of dismissal, Admin. Review Bd.), *available at* http://www.oalj.dol.gov/public/arb/decsn2/1991era12p.pdf.

43. 29 C.F.R. § 24.4(d).

44. *See* Batts v. Tenn. Valley Auth., 82-ERA-5, at 1 (Dep't of Labor May 3, 1982) (recommended decision and order, A.L.J.), *available at* http://www.oalj.dol.gov/public/whblower/decsn/82era05a.htm.

45. Majors v. Asea Brown Boveri, Inc., 96-ERA-33, at 1 n.1 (Dep't of Labor Aug. 1, 1997) (final decision and order, Admin. Review Bd.), *available at* http://www.oalj.dol.gov/public/arb/decsn2/97_017.erap.pdf.

46. 29 C.F.R. § 24.4(d)(2); *see* Staskelunas v. N.E. Utils. Co., 98-ERA-7, at 2 n.4, 3 n.3 (Dep't of Labor May 4, 1998) (final decision and order, Admin. Review Bd.), *available at* http://www.oalj.dol.gov/public/arb/decsn2/98_035a.erap.pdf. The ARB recognizes that all of its administrative deadlines are subject to tolling or modification. *See* Garcia v. Wantz Equip., 99-CAA-11, at 2 (Dep't of Labor Feb. 8, 2000) (final decision and order, Admin. Review Bd.), *available at* http://www.oalj.dol.gov/public/arb/decsn2/99_109.caap.pdf (citing Am. Farm Lines v. Black Ball Freight Serv., 397 U.S. 532, 539 (1970)).

47. 29 C.F.R. § 24.4(d)(2).

48. *Id.* § 24.4(d)(3). Care should be given to ensure strict compliance with this procedural rule. If a technical error does occur in the filing procedure, there is authority supporting "substantial compliance" or "substantial equivalent" test for overcoming such errors. *See* Daugherty v. Gen. Physics Corp., 92-SDW-2, at 3 (Dep't of Labor Dec. 14, 1992) (recommended decision and order), *available at* http://www.oalj.dol.gov/public/whblower/decsn/92sdw02a.htm. *But see* Degostin v. Bartlett Nuclear Inc., 98-ERA-7, at 3 (Dep't of Labor May 4, 1998) (final decision and order, Admin. Review Bd.), *available at* http://www.oalj.dol.gov/public/arb/decsn2/98_042a.erap.pdf (noting that "time limit[s] for filing a request for a hearing [have] been strictly construed"); Backen v. Entergy Operations Inc., 95-ERA-46, at 3-4 (Dep't of Labor June 7, 1996) (final decision and order, Admin. Review Bd.), *available at* http://www.oalj.dol.gov/public/arb/decsn/1995era46.pdf (demonstrating that time limits for filing a hearing request are "strictly construed").

parties to the dispute,[49] as well as to the Assistant Secretary for OSHA and the Associate Solicitor Division of Fair Labor Standards.[50]

Once a request for a hearing is filed, the second phase of the administrative process is initiated, and the case is assigned an ALJ, who must set a hearing date within seven days of receipt of the appeal.[51] The parties must be given at least five days notice of the hearing date,[52] and the hearing should be held within sixty days of the ALJ's receipt of the request for a hearing.[53]

All of the time requirements under the employee protection statutes are extremely short. Both the statutes and the regulations require that the SOL[54] issue a final decision within ninety days after receipt of a complaint.[55] Under the rules, continuances are granted only for "compelling reasons," and ALJs have considerable discretion in granting continuances.[56] However, ALJs frequently will grant requests for continuances,[57] especially if the complainant voluntarily waives his or her right to a ninety-day adjudication.[58] Due to the nature of the time requirements, complainants often waive their right to an expeditious hearing to obtain more time for discovery and pretrial preparation.[59] The

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49. 29 C.F.R. § 24.6(a). However, failing to promptly serve these notices will not be fatal to an appeal. *See* Pawlowski v. Hewlett-Packard Co., 97-TSC-3, (Dep't of Labor Sept. 15, 1999) (order den. mot. to dismiss, Admin. Review Bd.), *available at* http://www.oalj.dol.gov/public/wblower/decsn/97tsc03b.htm.

50. 29 C.F.R. § 24.4(d)(3).

51. *Id.* § 24.6(a).

52. *Id.* § 24.6(a).

53. *Id.* § 18.42(f).

54. In April 1996, the SOL established the Administrative Review Board (ARB) with authority to issue final decisions on behalf of the Secretary in environmental whistleblower cases. *See* Authority and Responsibilities of the Administrative Review Board, 61 Fed. Reg. 19,978, 19,978-01 (May 3, 1996). The court of appeals has rejected challenges to the ARB's authority. *See* Varnadore v. Sec'y of Labor, 141 F.3d 625, 631-32 (6th Cir. 1998).

55. 29 C.F.R. § 24.8(c).

56. *Id.* § 24.6(a); *see also* Malpass v. Gen. Elec. Co., 85-ERA-38/39 (Dep't of Labor Mar. 1, 1994) (final decision and order, Sec'y of Labor), *available at* http://www.oalj.dol.gov/public/wblower/decsn/85tsc38c.htm (discussing cases on granting continuances).

57. *See* Abson v. Kaiser Co., 84-ERA-8, at 2 (Dep't of Labor Jan. 7, 1985) (order of dismissal), *available at* http://www.oalj.dol.gov/public/wblower/decsn/84era08a.htm; Rios-Berrios v. INS, 776 F.2d 859, 862-63 (9th Cir. 1985); Lowe v. City of E. Chicago, 89 F.2d 272 (7th Cir. 1990).

58. *See* Forest v. Williams Power Corp., 2000-ERA-16/17 (Dep't of Labor Apr. 7, 2000) (order denying renewed objections), *available at* http://www.oalj.dol.gov/public/wblower/decsn/00era16a.htm (holding that "complainant who waives the statutory and regulatory deadline should be allowed time to conduct discovery").

59. 29 C.F.R. § 18.1(b); Young v. E.H. Hinds, 86-ERA-11, at 3 n.2 (Dep't of Labor July 8, 1987) (decision and order of remand to the wage and hour admin., Sec'y of Labor), *available at* http://www.oalj.dol.gov/public/wblower/decsn/86era11b.htm. *See Forest*, 2000-ERA-16/17

time limits contained in the statutes and regulations "have been construed as directory, rather than jurisdictional."[59] Therefore, the DOL and its ALJs should not allow these time limits to "interfere with [the] full and fair presentation of a case."[60]

Administrative hearings are conducted in accordance with the Administrative Procedure Act.[61] The proceedings lack a great deal of the formality of courtroom trials. For example, nonattorneys have the right to represent the parties, and telephonic testimony, where necessary and proper, is permitted.[62] Further, there is never a jury, and one ALJ sits as the trier of law and fact. The ALJ has wide discretion in admitting testimony into evidence, and the Federal Rules of Evidence are not binding.[63]

In addition to the employee and the employer, other "persons or organizations" that could be "directly and adversely" affected by a final decision have the right to intervene in the case within fifteen days of learning of the proceeding.[64] Also, the Assistant Secretary of OSHA maintains the right to participate as a party or amicus curiae at any time and at any stage of the proceeding.[65]

Upon completion of the hearing, the ALJ has twenty days to write a recommended decision.[66] The deadline is often extended. The recommended decision is subject to review by the Administrative Review Board of the DOL, if requested in a timely manner, i.e., ten business days from the date of the ALJ order, by any party.[67] The ten-day deadline is

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(Dep't of Labor Apr. 7, 2000) (order denying renewed objections), *available at* http://www.oalj.dol.gov/public/wblower/decsn/00era16a.htm.

60. Timmons v. Mattingly Testing Servs., 95-ERA-40, at 3-5 (Dep't of Labor June 21, 1996) (decision and order of remand, Admin. Review Bd.), *available at* http://www.oalj.dol.gov/public/wblower/decsn/95era40b.htm.

61. *Id.* at 5.

62. *See* 5 U.S.C. § 554 (1994); 29 C.F.R. § 18.26; *see also* SWDA, 42 U.S.C. § 6971 (b) (1994); WPCA, 33 U.S.C. § 1367(b) (1994); CERCLA, 42 U.S.C.§ 9610(b).

63. 29 C.F.R. § 18.34; *see also* Seater v. S. Cal. Edison Co., 95-ERA-13, at 14-15 (Dep't of Labor Sept. 27, 1996) (decision and order of remand, Admin. Review Bd.), *available at* http://www.oalj.dol.gov/public/wblower/decsn/95era13b.htm (discussing the admissibility of telephonic testimony).

64. 29 C.F.R. § 24.6(e). Application of the Federal Rules of Evidence is contrary to the regulatory mandate applicable to the DOL adjudicatory proceedings. Melendez v. Exxon Chem. Americas, 93-ERA-6, at 33 (Dep't of Labor July 14, 2000) (decision and order of remand, Admin. Review Bd.), *available at* http://www.oalj.dol.gov/public/wblower/decsn/93era06e.htm.

65. 29 C.F.R. § 18.10(c).

66. *Id.* § 24.6(f)(1).

67. *Id.* § 24.7(a).

68. *Id.* § 24.8(a). The SOL has delegated the authority to issue a final order regarding the complaint to the Administrative Review Board. *Id.*

subject to tolling.[69] In the event that the Administrative Review Board reviews the ALJ's decision, the Board will review both the ALJ's findings of fact and its legal conclusions de novo.[70]

If the DOL determines that the employee was discriminated against, it shall order "affirmative action to abate the violation, including reinstatement of the complainant to that person's former or substantially equivalent position, if desired, together with the compensation (including back pay), terms, conditions, and privileges of that employment. . . ."[71] The Secretary may, where deemed appropriate, order the party charged to provide compensatory damages to the complainant.[72] Additionally, the Department may, where appropriate, award exemplary damages under the SDWA and the TSCA.[73] A successful employee is also entitled to an award of reasonable attorney fees and costs, as set by the DOL.[74]

Any party aggrieved by the DOL's decision, who has sought review before the Administrative Review Board, has sixty days to file an appeal to challenge the SOL's ruling in the appropriate United States circuit court of appeals. The standard of review is determined by the Administrative Procedure Act[75] and articulated in *Mackowiak v. University Nuclear Systems, Inc.*: "We will set aside the agency decision if it is 'unsupported by substantial evidence' or 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'"[76]

The whistleblower laws also permit the aggrieved parties to file a writ of mandamus, allowing any party to a DOL proceeding to file an action in federal district court to compel the department to perform a nondiscretionary duty imposed by the employee protection statutes.[77]

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69. Garcia v. Wantz Equip., 99-CAA-11 (Dep't of Labor Feb.8, 2000) (final decision and order, Admin. Review Bd.), *available at* http://www.oalj.dol.gov/public/arb/decsn2/99_109.caap.pdf; Duncan v. Sacramento Metro. Air Quality Mgmt. Dist., 97-CAA-12 (Dep't of Labor Sept.1, 1999) (order accepting appeal and establishing briefing schedule, Admin. Review Bd.), *available at* http://www.oalj.dol.gov/public/wblower/decsn/99era12e.htm.

70. *See* Berkman v. United States Coast Guard Acad., 97-CAA-2/9, at 15 (Dep't of Labor Feb. 29, 2000) (decision and remand order, Admin. Review Bd.), *available at* http://www.oalj.dol.gov/public/wblower/decsn/97caa02d.htm; Griffith v. Wackenhut, 97-ERA-52, at 9 (Dep't of Labor Feb. 29, 2000) (final decision and order, Admin. Review Bd.), *available at* http://www.oalj.dol.gov/public/wblower/decsn/97era52b.htm.

71. 29 C.F.R. § 24.8(d)(1).

72. *Id.*

73. *Id.*; SDWA, 42 U.S.C. § 300j-9(i)(2)(B)(ii) (1994); TSCA, 15 U.S.C. § 2622(b)(2)(B) (1994).

74. *See* Pillow v. Bechtel Constr., 87-ERA-35, at 3 (Dep't of Labor Sept. 11, 1997) (supplemental order), *available at* http://www.oalj.dol.gov/public/wblower/decsn/87era35i.htm.

75. Administrative Procedure Act, 5 U.S.C. §§ 701-706 (1994).

76. 735 F.2d 1159, 1162 (9th Cir. 1984).

77. *See* ERA, 42 U.S.C. § 5851(f) (1994); CAA, 42 U.S.C. § 7622; SDWA, 42 U.S.C. § 300j-9(i)(5). Federal mandamus proceedings are controlled by 28 U.S.C. § 1361, which reads:

Before an aggrieved employee can obtain mandamus relief because of an agency's delay or inaction, the employee must generally satisfy a three prong test: (1) clear right of plaintiff to relief sought, (2) plainly defined and preemptory duty on defendant's part to do the act in question, and (3) lack of another available remedy.[78]

If any person fails to comply with a final order, the SOL can file a compliance action in federal district court.[79] For example, under the SDWA the Secretary has a duty to seek enforcement of a decision in federal district court.[80] Any request to the DOL for enforcement of an order by the Secretary should be directed to the Solicitor of Labor.[81] In the event that such a compliance action is filed, the federal district court is empowered to grant all appropriate relief, including injunctive relief, compensatory damages, and reasonable attorney fees and litigation costs.[82]

"the district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361 (2001).

78. Food Serv. Dynamics, Inc. v. Bergland, 465 F. Supp. 1178, 1181 (E.D.N.Y. 1979); *see also* Cook v. Arentzen, 582 F.2d 870, 876 (4th Cir. 1987) (holding that there was no mandamus jurisdiction because court of claims could grant relief).

79. ERA, 42 U.S.C. § 5851(d)-(e); CAA, *id.* § 7622(d), (e); SDWA, *id.* § 300j-9(i)(4); TSCA, 15 U.S.C. § 2622(d); *see* Lockheed Martin Energy Sys. v. Slavin, 190 F.R.D. 449 (E.D. Tenn. 1999).

80. 42 U.S.C. § 300j-9(i)(4). The ERA and the CAA also permit the enforcement action to be brought by "the person on whose behalf an order was issued." ERA, *id.* § 5851(e); CAA, *id.* § 7622(e)(1).

81. Goldstein v. EBASCO Constructors, Inc., 86-ERA-36, at 3 n.4 (Dep't of Labor Aug. 31, 1992) (order denying stay, Sec'y of Labor), *available at* http: www.oalj.dol.gov public wblower decsn 86era36e.htm.

82. *See id.* An enforcement action is summary in nature, requiring a court to perform a "ministerial" function in enforcing the DOL's final order. *See* Kansas Gas & Elec. Co. v. Brock, 780 F.2d 1505, 1515 (10th Cir. 1985). A district court has no authority to review the merits of the Secretary's order. *See* 42 U.S.C. § 5851(c)(2) ("An order of the Secretary to which review could have been obtained [in the court of appeals,] shall not be subject to judicial review in any criminal or other civil proceeding."); *Brock*, 780 F.2d at 1515 ("An appeal from the Secretary's decision can lie only with the court of appeals."). For example, the district court in *Wells v. Kansas Gas & Electric* held that "[Section 5851(d)] is clear on its face that the district court has jurisdiction to grant appropriate relief through its enforcement of an order by the Secretary. It cannot be interpreted to authorize this court to inquire into the appropriateness of the relief ordered by the Secretary." Wells v. Kansas Gas & Elec. Co., No. 84-2290, slip. op. at 2 (D. Kan. Oct. 15, 1984), *aff'd sub nom.* Kansas Gas & Elec. Co. v. Brock, 780 F.2d 1505 (10th Cir. 1985). In an enforcement proceeding, a district court may issue a preliminary injunction mandating the immediate reinstatement of an employee. *See* Martin v. Yellow Freight Sys., Inc., 793 F. Supp. 461 (S.D.N.Y. 1992), *aff'd*, 983 F.2d 1201 (2d Cir. 1993) (affirming the district court's order to enforce an order of reinstatement in a Surface Transportation Assistance Act whistleblowing case); Martin v. Castle Oil Corp., No. 92 Civ. 2178, 1992 U.S. Dist. LEXIS 4568, at *14 (S.D.N.Y. 1992) *dismissed on other grounds sub nom.* Castle Coal & Oil Co. v. Reich, 55 F.3d 41 (2d Cir. 1995) (enforcing the Secretary's order by granting a preliminary injunction).

III. REVIEW OF RECENT DECISIONS REGARDING ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY DEFENSES TO WHISTLEBLOWER ACTIONS AGAINST STATE AGENCIES

Despite the fact that the whistleblower protection provisions of the seven statutes were specifically designed by Congress to apply to states and state agencies, as well as private and federal employers, the DOL proceedings related to the adjudication of whistleblower claims have been subject to attack by states on numerous occasions. First, the United States Court of Appeals for the Eighth Circuit determined in *Ellis Fischel State Cancer Hospital v. Marshall* that the Eleventh Amendment could not bar administrative hearings related to the DOL's investigation of a whistleblower complaint against a state.[83] However, the Supreme Court later decided a series of cases which greatly extended the protection from suit afforded to states by the doctrine of sovereign immunity.[84] States then renewed their challenges to the DOL's investigative proceedings based on these decisions.

The United States District Court for the District of Rhode Island, in the case of *Rhode Island v. United States of America*, established the precedent, later followed by federal district courts in Southern Ohio and Northern Florida, that the administrative proceedings before a DOL ALJ initiated in response to a complaint against a state or state agency were barred by Eleventh Amendment immunity and the doctrine of sovereign immunity.[85] The rulings of the *Rhode Island*, *Ohio*, and *Florida* courts essentially bar the adjudication of any whistleblower claims by state EPA employees against the state EPA unless the United States DOL itself brings charges against the state agency.[86]

A. *Rhode Island*

In *Rhode Island v. United States*, the Rhode Island Department of Environmental Management (RIDEM) sought to enjoin the federal government and three individual whistleblower complainants (Beverly Migliore, Barbara Raddatz, and Joan Taylor) from pursuing administrative hearings related to the individual complainants'

83. 629 F.2d 563 (8th Cir. 1980).

84. *See* Alden v. Maine, 526 U.S. 706 (1999); Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).

85. 115 F. Supp. 2d 269 (D.R.I. 2000).

86. *Id.*; Ohio EPA v. United States Dep't of Labor, 121 F. Supp. 2d 1115 (S.D. Ohio 2000); Florida v. United States, 133 F. Supp. 2d 1280 (N.D. Fla. 2001), *appeal docketed*, No. 01-12380-HH (11th Cir. May 1, 2001).

allegations of RIDEM's retaliation.[87] This case involved four separate complaints by the above named employees of RIDEM.[88] The complaints alleged that RIDEM violated their statutory rights as whistleblowers by retaliating against them for reporting the agency's failure to properly implement the SWDA.[89] The complainants sought to recover front pay, back pay, compensatory damages for mental anguish and loss of professional reputation, and an award of attorney's fees.[90] The complainants also sought to obtain an order from the SOL demanding that RIDEM make "changes in the terms and conditions of employment that they regard as necessary to undo the effects of the alleged retaliation and to protect them from future retaliation."[91]

Each of the agency proceedings at issue was initiated by a complaint filed by an attorney. In response to both Migliore's first complaint and Raddatz's complaint the Assistant Secretary for OSHA completed an initial investigation of the allegations and determined that RIDEM had not violated the whistleblower provisions of the SWDA.[92] After investigating Migliore's second complaint, the Assistant Secretary determined that a violation had occurred and awarded $10,000 in damages, attorneys' fees, and costs.[93] At the time the district court issued its decision, Joan Taylor's case was still under investigation by the Assistant Secretary.[94]

After the initial investigation of Migliore's first complaint, the Assistant Secretary determined that no violation had occurred; Migliore then sought review by an ALJ.[95] At the conclusion of the hearings before the ALJ, the ALJ determined that RIDEM had violated the whistleblower

87. *Rhode Island*, 115 F. Supp. 2d at 271.

88. Beverly Migliore filed two of the complaints at issue in the district court case. In the first complaint, Migliore alleged that RIDEM retaliated against her for voicing her concerns regarding the Agency's September 23, 1996, reorganization, which effectively downgraded her position as the Senior Supervisor of Rhode Island's Resource Conservation and Recovery Act (RCRA) program, and affected changes in enforcement that she believed compromised and violated RCRA. Migliore alleged that she had been verbally abused, suspended under the pretext of insubordination, given a written reprimand, and otherwise discriminated against in response to her voicing her concerns regarding the Agency's reorganization, and enforcement of the RCRA. Migliore v. R.I. Dep't of Envtl. Mgmt., 98-SWDA-3, at 11-35 (Dep't of Labor Aug. 13, 1999) (recommended decision and order, A.L.J.), *available at* http: www.oalj.dol.gov public wblower decsn 98swd03g.htm. The second complaint alleged further retaliation by RIDEM for her having filed the first whistleblower complaint. *See Rhode Island*, 115 F. Supp. 2d at 271.

89. *Rhode Island*, 115 F. Supp. 2d at 271.

90. *Id.* at 272.

91. *Id.* at 271.

92. *Id.* at 272.

93. *Id.*

94. *Id.*

95. *Id.*

protection provisions of SWDA, and awarded Migliore $843,000 in damages.[96] None of the other claims involved in the district court case had proceeded through ALJ hearings at the time that RIDEM sought to enjoin any further proceedings.[97]

The *Rhode Island* district court based its ruling, enjoining any further administrative proceedings related to the above-mentioned claims, on the doctrine of state sovereign immunity.[98] The doctrine of state sovereign immunity protects a state from "the coercive process of judicial tribunals at the instance of private parties."[99] The court recognized that sovereign immunity cannot bar a law suit where a state has expressly waived its immunity, or where the state's immunity has been validly abrogated by Congress.[100] Furthermore, the court stated that sovereign immunity does not shield a state from suits by the United States for alleged violations of federal law.[101]

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96. The ALJ presiding over the hearings related to Migliore's first complaint found that the concerns Migliore expressed regarding the 1996 reorganization of RIDEM, especially those related to the possible violations of RCRA caused by changes in the procedures, methods, and policies of RIDEM's RCRA enforcement program, constituted protected activity under the SWDA. The ALJ specifically stated that:

> Complainant repeatedly complained of excessive re-inspections and revisions which, in her belief, violated RCRA's mandate of timely and appropriate enforcement in many cases. Complainant testified that her concerns at that time were that RIDEM's actions were in violation of RCRA, the EPA's mandates, and compromised the public health and the environment. Further, Complainant repeatedly raised issues whenever she became aware of the possible misuse of federal funds.

Migliore, 98-SWDA-3 at 39, *available at* http://www.oalj.dol.gov/public/wblower/decsn/98swd03g.htm. The ALJ went on to state that RIDEM clearly was aware of Migliore's protected activity, and that their "propounded 'legitimate, non-discriminatory reasons' for subjecting [Mrs. Migliore] to a one-day suspension, and instances of discrimination and harassment, are actually tainted, as the basis for these 'legitimate' reasons was really in retaliation for her engaging in protected activity." *Id.*

97. *Rhode Island*, 115 F. Supp. 2d at 272.

98. The court distinguished the doctrine of state sovereign immunity from the expression that it finds in the Eleventh Amendment, stating that "a state's sovereign immunity is much broader than the immunity conferred by the Eleventh Amendment. The Eleventh Amendment was not meant to limit the immunity previously enjoyed by states." *Id.* at 274. The court went on to cite the Supreme Court's decision in *Alden v. Maine*, which stated that "sovereign immunity 'does not turn on the forum in which the suits [are] prosecuted.'" *Id.* (citing Alden v. Maine, 527 U.S. 706, 733 (1999)).

99. *Alden*, 527 U.S. at 749 (quoting *In re* Ayers, 123 U.S. 443, 505 (1887)).

100. *Rhode Island*, 115 F. Supp. 2d at 273. The court explained, however, that Congress may only abrogate a state's sovereign immunity where it expressly states its intent to do so, and where, in doing so, it has acted pursuant to the enforcement powers conferred by Section 5 of the Fourteenth Amendment rather than pursuant to its Article I legislative powers. *Id.* at 273 n.4 (citing Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 55 (1996)).

101. The court stated that "the United States may bring an action against a state to enforce a federal statute. That is true even when the enforcement action is initiated in response to a complaint by a private party or when a private party benefits from the action." *Rhode Island*, 115

The court explained that the issue of whether the Eleventh Amendment and the doctrine of state sovereign immunity would prohibit any further proceedings related to the complaints would be determined largely by the purpose of the proceedings.[102] If the proceedings were an action by the federal government to enforce federal law in which a private party derives an incidental benefit then such proceedings would not be barred.[103] However, they would be barred if the proceedings were an action by, or on behalf of, a private party, when the main purpose is to obtain damages or other relief for the aggrieved individual from the state.[104]

The Rhode Island court ruled that "the proceedings in question are not investigations or enforcement actions by DOL; rather, they are proceedings to adjudicate the individual defendants' claims against the state for alleged violations of the whistleblower provision."[105] The court based this determination on several factors. First, the proceedings were initiated by complaints filed by the claimants' counsel.[106] Second, in both Migliore's first complaint and Raddatz's complaint, the Assistant Secretary for OSHA determined that no violation had occurred after an initial investigation.[107] Third, the fact that the relief sought in the proceedings and granted by the ALJ in Migliore's first case consisted almost entirely of compensatory damages and injunctive relief awarded to the individual claimants.[108] Finally, because the DOL was not a party to any of the proposed proceedings before an agency ALJ, the hearings in question were best characterized as claims brought by private individuals against a state and as such were barred by the doctrine of state sovereign immunity.[109]

The court also determined that the proceedings at issue were indeed an attempt by private individuals to subject a state to a "coercive process" in violation of the state's sovereign immunity. This was based on the fact

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F. Supp. 2d at 273 (citing Employees of the Dep't of Pub. Health and Welfare of Mo. v. Dep't of Pub. Health and Welfare of Mo., 411 U.S. 279, 285-86 (1973)). The district court went on to quote *Alden* in stating that the reason for allowing the federal government to bring suits against a state, where such suits would be otherwise barred under the doctrine of state sovereign immunity, is that suits brought by the federal government "require the exercise of political responsibility . . . a control which is absent from a broad delegation to private persons to sue nonconsenting States." *Rhode Island*, 115 F. Supp. 2d at 273 (citing *Alden*, 527 U.S. at 756).

102. *Rhode Island*, 115 F. Supp. 2d at 274.
103. *Id.* at 273.
104. *Id.*
105. *Id.* at 274-75.
106. *Id.* at 275.
107. *Id.*
108. *Id.*
109. *Id.*

that the SOL and the DOL's ALJ had the power to require the state or state agency to produce documents. Further, the court stated that the "findings and conclusions of the Secretary [and the ALJ] would be entitled to considerable deference [on appeal] and could be disturbed only if they were not supported by substantial evidence."[110] The court concluded that administrative agency proceedings, such as the ALJ hearings at issue, could be barred under the doctrine of sovereign immunity. The court based its conclusion on the determination that the DOL (in the proceedings at issue) did not function as an agency seeking to enforce a law that it was charged with administering; rather, the DOL served as a forum for adjudicating the claims of private parties.[111]

For these reasons the court ruled in favor of granting a preliminary injunction against the DOL and the individual whistleblower complainants from engaging in any further proceedings against RIDEM and the State of Rhode Island. However, the court also ruled that OSHA could not be enjoined from investigating the alleged violations of federal law on which the aggrieved employees based their claims.[112]

B. Ohio

In *Ohio Environmental Protection Agency v. United States*, the Ohio EPA (OEPA) sought to enjoin the DOL and Paul Jayko (an OEPA employee who initiated a whistleblower claim against the OEPA) from engaging in any proceedings against the OEPA.[113] Jayko worked as a site coordinator for the OEPA's investigation of a cancer cluster that had developed at the River Valley Schools in Marion, Ohio.[114] Early on in the

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110. *Id.*

111. The court noted that "[the] DOL specifically states that 'it should be made clear to all parties that the U.S. Department of Labor does not represent any of the parties in [any] hearing' before an ALJ." *Id.* (citation omitted). The district court then attempted to distinguish its ruling here from the ruling of court of appeals for the Eighth Circuit in *Ellis Fischel State Cancer Hospital v. Marshall*, 629 F.2d 563, 567 (8th Cir. 1980), in which the court held that hearings of claim against a state agency held before the DOL's ALJs were not barred by the Eleventh Amendment. The court explained:

> *Marshall*, and the cases cited by it, involved administrative actions brought by the agencies themselves for alleged violations of federal law which, as already noted, do not implicate the Eleventh Amendment. By contrast, the proceedings in this case all were brought directly by the individual claimants. DOL did not function as an agency seeking to enforce a law that it was charged with administering by taking action against what it perceived to be a violation. Rather, it served as a forum for adjudicating the claims of private parties.

Rhode Island, 115 F. Supp. 2d at 276.

112. *Id.* at 279.

113. 121 F. Supp. 2d 1155 (S.D. Ohio 2000).

114. *Id.* at 1157-58.

OEPA's investigation it became apparent that the River Valley Schools area had been the site of a former military installation, part of which was very likely used for the disposal of carcinogenic waste materials.[115]

In the summer of 1997, Jayko was placed in charge of coordinating a review of the site and ensuring compliance with the CAA, SDWA, SWDA, CERCLA, TSCA, WPCA, and ERA.[116] During the course of this review, Jayko was subjected to agency retaliation, including being suspended and ultimately removed from his position in response to his continuing expression of concerns regarding the investigation, both to the public and within the agency.[117] Many of these concerns related to the OEPA management's attempts to cover up the possibility that soil and water contaminants in the River Valley Schools area were directly linked to the abnormal levels of cancer in the area.[118]

After being transferred from his position in Marion and suspended by Donald Schregardus, then Director of the OEPA, Jayko filed a complaint with the DOL alleging violations of the whistleblower provisions of the CAA, SDWA, SWDA, CERCLA, TSCA, WPCA, and ERA.[119] After an initial investigation of Jayko's complaint, the Assistant Secretary for OSHA determined that OEPA had indeed violated whistleblower protection provisions of the seven statutes.[120] Upon receiving this adverse ruling, OEPA immediately appealed this decision to the office of ALJs for a public hearing of the complaint. Ultimately, however, the hearings before the ALJ resulted in another decision that OEPA had violated the statutes.[121] The ALJ found that Jayko had indeed engaged in protected activity by insisting on a detailed investigation of the River Valley Schools area, to be conducted in conformity with federal

115. Jayko v. Ohio EPA, 99-CAA-5, at 8 (Dep't of Labor Oct. 2, 2000) (recommended decision and order and prelim. order, A.L.J.), *available at* http: www.oalj.dol.gov public arb decsn 01_009.caa.pdf.

116. Ohio EPA v. United States Dep't of Labor, 121 F. Supp. 2d 1155, 1158 (S.D. Ohio 2000).

117. *Jayko*, 99-CAA-5 at 86-89, *available at* http: www.oalj.dol.gov public arb decsn 01_009.caa.pdf. The ALJ noted that none of the reasons provided by the OEPA for transferring and suspending Jayko were anything other than shallow attempts to cover up the agency's retaliation against Jayko for engaging in protected whistleblower speech.

118. *See id.* at 17-23. Jayko not only voiced his concerns that OEPA management was not allowing for an adequate investigation of the River Valley Schools Area, but also expressed concerns related to public statements made by agency officials, which he believed were misleading as to the seriousness of the possible problems in the River Valley Schools area.

119. *Ohio EPA*, 121 F. Supp. 2d at 1158.

120. *Id.* at 1159-60.

121. *Jayko*, 99-CAA-5 at 86-89, *available at* http: www.oalj.dol.gov public arb decsn 01_009.caa.pdf.

environmental statutes.[122] The ALJ also determined that the actual motivation for Jayko's removal from the River Valley Schools site and his suspension by the OEPA was an attempt by OEPA management to retaliate for Jayko voicing his concerns about the investigation.[123] In response to the ALJ's findings, the OEPA attempted to enjoin the DOL and Jayko from any further proceedings regarding his complaint and sought to enjoin any enforcement of the ALJ's decision, claiming that the doctrine of state sovereign immunity barred any such action.[124]

The district court ultimately granted an injunction against Jayko's enforcement of the ALJ's decision and enjoined any further proceedings related to Jayko's whistleblower claims not prosecuted by the DOL itself.[125] The court provided two principle reasons for its decision. First, the court found that the whistleblower statutes did not validly abrogate state sovereign immunity.[126] Second, the court determined that the administrative hearings at issue did constitute a suit filed against a state without its consent, and therefore were barred by the Eleventh Amendment and the doctrine of state sovereign immunity.[127]

The court began its discussion of the applicability of the defense of sovereign immunity to Jayko's suit by stating that Congress may, pursuant to its enforcement powers under Section 5 of the Fourteenth Amendment, abrogate a state's sovereign immunity by enacting "legislation which prohibits conduct 'which is not itself unconstitutional and [thereby] intrudes into legislative spheres of autonomy previously reserved to the States.'"[128] The court also stated that "[b]efore the Court may find a valid exercise of Congress' Section 5 authority, it must first conclude that Congress unequivocally intended to abrogate a state's sovereign immunity under the Eleventh Amendment."[129]

The district court went on to determine that there was no indication that in enacting the whistleblower protection provisions of the environmental and nuclear statutes, Congress intended to abrogate the

122. *Ohio EPA*, 121 F. Supp. 2d at 1160.
123. *Id.*
124. *Id.*
125. *Id.* at 1168.
126. *Id.* at 1162.
127. *Id.* at 1165.
128. *Id.* at 1161 (quoting City of Boerne v. Flores, 521 U.S. 507, 518 (1997) (quoting Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976)). The court went on to cite *Flores* in support of its statement that congressional enactments pursuant to the Fourteenth Amendment must demonstrate a "congruence and proportionality between the constitutional injury to be prevented and the means Congress has adopted to that end." *Id.* (citing *Boerne*, 521 U.S. at 520).
129. *Id.* at 1162 (citing Fla. Prepaid Secondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 635 (1999)).

states' sovereign immunity.[130] The court found nothing in the statutes' plain language, or in the legislative history, that indicated that the statutes were enactments under the Fourteenth Amendment, intended to abrogate state sovereign immunity.[131] The court also based this finding on the fact that "in all other statutes enacted by Congress in which it has expressly acted to abrogate the immunity of the states from private suits, the remedies available to private litigants include recourse to a full [de novo] trial in federal court."[132] Therefore, because the environmental whistle-blower statutes make no provision for a right to a trial de novo before an Article III court, the court found that they could not be considered enactments under Section 5 intended to abrogate state sovereign immunity.[133] As such, the court ruled that Jayko could not maintain a private cause of action against the OEPA.[134]

The Ohio district court then proceeded to determine that the hearings before the ALJ related to Jayko's complaint were indeed an exercise of judicial power, and as a result were barred by the Eleventh Amendment and the doctrine of sovereign immunity.[135] The court based this conclusion on the fact that the federal regulations related to the ALJ's hearings require that the ALJ conduct full evidentiary hearings, issue subpoenas, rule on evidence, and make a formal recommended decision and order, which becomes the basis for any review by a federal district court.[136] The court noted, in support of its position that the hearings constituted judicial action of the sort barred by the Eleventh Amendment, that "[t]here is no provision under any of the environmental statutes nor under the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* for a reviewing Article III Court to develop a *de novo* record with regard to an administrative action."[137]

The Ohio court relied in part on *Alden v. Maine* in formulating its decision regarding the applicability of the defense of state sovereign immunity to the administrative hearings involved in Jayko's claims against the OEPA.[138] The court made it clear that while a private individual would be barred from pursuing the administrative proceedings

130. *Id.*
131. *Id.* at 1163.
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.* at 1164. *See generally* 29 C.F.R. § 24 (2000); Administrative Procedure Act, 5 U.S.C. § 551 (1994) (explaining the relevant rules and regulations associated with ALJ hearings).
137. *Ohio EPA*, 121 F. Supp. 2d at 1165.
138. *Id.* at 1165.

initiated in response to Jayko's claims, the federal government would not be barred from doing so.[139] Therefore, the court ruled that in order to avoid problems of Eleventh Amendment immunity, the DOL itself must join an action against a state or state agency at the time the case is referred for hearings before a DOL ALJ.[140] "[S]o long as the [DOL] itself initiates all the stages of the proceedings other than the initial complaint," the investigative and adjudicative process set forth in the DOL's regulations for the investigation of whistleblower complaints would not be barred by state sovereign immunity.[141]

Due to the fact that the ALJ proceedings at issue in this case had been completed and judgment had been returned in favor of Paul Jayko, the district court did not issue the requested injunction. Instead, the court held that the administrative proceedings would only continue if the DOL intervened in Jayko's case. The court ruled that if the DOL chose to intervene in Jayko's case (which was pending review by the ARB) within thirty days of the district court ruling, the DOL and Paul Jayko would not be restrained from further adjudicating his claims against the OEPA.[142]

C. *Florida*

In *Florida v. United States*, the United States District Court for the Northern District of Florida determined that the Eleventh Amendment and the doctrine of sovereign immunity barred the initiation of administrative hearings before an ALJ, unless the DOL elected to take over the prosecution of the claims against the state.[143] This case involved a complaint by an employee (Dr. Shafey) of the State of Florida Department of Health, alleging that his employment had been terminated based on communications he made regarding the risks of occupational pesticide exposure and the aerial spraying of malathion.[144] The complaint alleged that the State of Florida, and certain individuals within the State of Florida Department of Health, in terminating Dr. Shafey's

139. *Id.* (citing Alden v. Maine, 527 U.S. 706, 755-56 (1999)) (stating that the federal government may bring suit against a state where a private individual may not because "[s]uits brought by the United States itself require the exercise of political responsibility for each suit prosecuted against a State, a control which is absent from a broad delegation to private persons to sue non-consenting States").

140. *Ohio EPA*, 121 F. Supp. 2d at 1166.

141. *Id.*

142. *Id.* at 1168.

143. Florida v. United States, 133 F. Supp. 2d 1280, 1292 (N.D. Fla. 2001), *appeal docketed*, No. 01-12380-HH (11th Cir. May 1, 2001).

144. *Id.* at 1283.

employment, violated the whistleblower protection provisions of the CAA, WPCA, TSCA, SDWA, SWDA, and CERCLA.[145]

The Assistant Secretary for OSHA proceeded with an initial investigation into Dr. Shafey's complaint, and determined that no violation of the statutes had occurred.[146] Dr. Shafey then elected to exercise his rights under the six statutes on which he based his claim to an administrative hearing of his complaint prior to the issuing of a final decision and order by the SOL.[147] In response, the State of Florida filed an action in federal district court to enjoin the DOL, various DOL officials, and Dr. Shafey from pursuing the administrative proceeding.[148]

The Florida court provided perhaps the most detailed explanation of all of the district courts for its conclusion that Eleventh Amendment immunity and sovereign immunity could be applied to administrative proceedings. While the court did recognize the fact that sovereign immunity cannot shield a state from all suits,[149] it also determined that a state's immunity to suit "was not limited to traditional types of proceedings, but instead applied also, perhaps especially, to novel types of proceedings not contemplated by the framers."[150] Based on this understanding of state sovereign immunity, the court ruled that "[i]f the framers 'never imagined or dreamed of' lawsuits in federal court against states by their own citizens, they surely also did not imagine or dream of claims against states by their own citizens before a federal agency or Administrative Law Judge."[151] The court therefore determined that the doctrine of state sovereign immunity, as articulated by the Supreme Court in *Alden*, could bar federal administrative agency proceedings against a state brought by a private individual.[152]

The court went on to find that the proposed hearings of Dr. Shafey's complaint did not constitute a part of a federal investigation of a claim,

145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.* at 1284.
149. The court recognized that the immunity provided to states by the doctrine of constitutional state sovereign immunity and the Eleventh Amendment could not bar suits against a state brought by the federal government, suits brought under the doctrine of *Ex parte* Young, 209 U.S. 123 (1908), against a state official in his or her official capacity, seeking solely prospective relief, or suits against an individual state official, in his or her individual capacity, seeking damages solely from the individual. *Florida*, 133 F. Supp. 2d at 1285. The court also went on to note that Congress may pass legislation abrogating a state's sovereign immunity under Section 5 of the Fourteenth Amendment. *Id.* It also noted that "a state may waive its own immunity, so long as it does so explicitly and unambiguously." *Id.* (citations omitted).
150. *Id.* at 1286.
151. *Id.* at 1287.
152. *Id.* at 1286-89.

but rather were an attempt by a private individual to prosecute a claim against a state, without that state's consent.[153] The court found that, because Dr. Shafey sought further review of his claim after the Assistant Secretary for OSHA returned an initial determination that no violation of the whistleblower statutes had occurred, it was indeed Dr. Shafey, and not the DOL, that was commencing and prosecuting the proposed administrative proceeding.[154] The Florida court also noted that the proposed ALJ proceedings included evidentiary hearings which would result in formal findings of fact entitled to a great deal of deference in any possible future enforcement proceedings in federal court. The administrative proceedings were therefore ruled to not be a part of a DOL investigation, but rather a "formal adjudicatory proceeding with defined legal consequences to which the State of Florida was being required to respond without its consent."[155]

The court then determined that because Congress had not validly abrogated the states' sovereign immunity under Section 5 of the Fourteenth Amendment in adopting the environmental whistleblower statutes, Dr. Shafey could not proceed with the prosecution of his claims in the proposed hearings before the ALJ.[156] The court found that Congress had not evidenced any intention of making states subject to the whistleblower claims of private individuals because Congress only authorized an investigation and appropriate action by the SOL, not by a private individual.[157] Furthermore, the court determined that the administrative hearings at issue were not adopted by Congress in the statute, but rather were adopted by the DOL in its regulations for the investigation and adjudication of whistleblower complaints.[158]

Based on these findings, the district court permanently enjoined any proceedings prosecuted by Dr. Shafey related to the adjudication of his whistleblower complaint.[159] However, the court recognized that it could not enjoin any such proceedings that were prosecuted by the DOL itself.[160] The court also recognized the fact that Dr. Shafey would be able to pursue his claims to the extent that he sought prospective relief as against the individual respondents in their official capacities, or to the

153. *Id.* at 1289-90.
154. *Id.* at 1289.
155. *Id.*
156. *Id.* at 1291.
157. *Id.*
158. *Id.*
159. *Id.* at 1292.
160. *Id.*

extent that it sought relief against the individual respondents in their individual capacities.[161]

IV. STATUTORY AND CONSTITUTIONAL ANALYSIS OF THE DISTRICT COURT DECISIONS

The decisions of the district courts in *Rhode Island*, *Ohio*, and *Florida* have effectively removed much of the protection originally granted to state employees by Congress in enacting the whistleblower provisions of the CAA, SWDA, SDWA, WPCA, CERCLA, TSCA, and the ERA.[162] As such, these decisions have violated the clearly expressed intentions of Congress. In each of the decisions, the courts relied on a fundamentally flawed understanding of the nature of administrative proceedings the DOL proposed to conduct on the whistleblower complaints. The courts' failure to view the administrative proceedings as an essential part of the SOL's investigation and ruling on whistleblower complaints stands in complete contradiction to the plain language of the whistleblower statutes.[163]

One of the principle mistakes made by the district courts in their analyses of the proceedings was the shared assumption that the initial investigation by the Assistant Secretary of OSHA constituted the entirety of the SOL's determination of the merits of the claim. However, under the whistleblower provisions of the abovementioned statutes, the Secretary not only has a nondiscretionary duty to investigate, but also to convene a hearing and issue a final finding regarding any potential violation of whistleblower law at the request of a party.[164] The SWDA contains a description of the SOL's investigation almost identical to the description found in the other whistleblower statutes, providing that:

> [T]he Secretary . . . shall cause such investigation to be made as he deems appropriate. *Such investigation shall provide an opportunity for a public hearing* at the request of any party to such review to enable the parties to present such information relating to such alleged violation . . . Upon

161. *Id.* at 1291-92. The court noted without ruling on the matter, that such actions might be subject to the defense of qualified immunity.

162. *See* CAA, 42 U.S.C. § 7622(b) (1994); WPCA, 33 U.S.C. § 1367(b) (1994); TSCA, 15 U.S.C. § 2622(b)(2) (1994); SDWA, 42 U.S.C. § 300j-9(i)(2)(B); SWDA, 42 U.S.C. § 6971(b); CERCLA, 42 U.S.C. § 9610(b); ERA, 42 U.S.C. § 5851(b). Each of these statutes specifically provides that as part of the SOL's investigation of a whistleblower complaint, the Secretary *must afford the parties the opportunity for a public hearing addressing the complaint*. Furthermore, the legislative histories of these statutes clearly indicates that the whistleblower provisions were meant to apply to state governments as well as private employers. *See, e.g.*, H.R. REP. NO. 95-294 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1077, 1404-05.

163. *See* statutes cited *supra* note 162.

164. *See* statutes cited *supra* note 162.

> receiving the report of such investigation, the Secretary . . . shall make findings of fact. If he finds that such violation did occur, he shall issue a decision . . . requiring the party . . . to abate the violation . . . .[165]

The plain language of these statutes indicates that the opportunity for a public hearing of the whistleblower's complaint is an essential element of the SOL's investigation. The statutes set forth the fact that the Secretary is required to conduct an investigation of the whistleblower complaint. The proceedings involved in conducting that investigation were left to the discretion of the SOL, except that as a part of the investigation Congress required that the Secretary allow for the opportunity of a public hearing of any whistleblower complaint, prior to making its final determination on the merits of a claim.[166]

It is also important to note that the whistleblower provisions of the CAA, SDWA, SWDA, TSCA, WPCA, CERCLA, and ERA specifically apply to state employees as well as to those in the private sector.[167] State employee whistleblowers are therefore guaranteed the opportunity for a public hearing of their complaint before the SOL concludes the investigation of their complaint.[168] Thus, the district courts were unjustified in attempting to qualify the opportunity for a public hearing of a whistleblower complainant's claim on the basis of whether or not the DOL itself choose to initiate the proceedings.[169] Such a qualification on the procedure for the investigation of a whistleblower complaint completely disregards the clearly expressed intent of Congress in enacting the whistleblower statutes. In addition, it is important to note that an agency's decisions about how to structure its investigations are among the paradigmatic exercises of executive discretion. The fact that Congress chose to require the SOL to include, as a part of its investigative process, the opportunity for a public hearing where any party may present information related to an alleged violation of federal law does not transform the DOL's investigatory process into the sort of

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165. 42 U.S.C. § 6971(b) (emphasis added).

166. *See* statutes cited *supra* note 162.

167. *See* H.R. REP. NO. 95-294, *reprinted in* 1977 U.S.C.C.A.N. at 1405. The *Florida* district court also acknowledged this fact when it stated that "Congress clearly acted within its constitutional authority in adopting the whistleblower provisions, making them applicable to the states, and authorizing the DOL to investigate violations." Florida v. United States, 133 F. Supp. 2d 1280, 1289 (N.D. Fla. 2001), *appeal docketed*, No. 01-12380-HH (11th Cir. May 1, 2001) (citing Garcia v. San Antonio Metro Transit Auth., 469 U.S. 528 (1985)).

168. *See* statutes cited *supra* note 162.

169. *See* Rhode Island v. United States, 115 F. Supp. 2d 269, 279 (D.R.I. 2000); Ohio EPA v. United States Dep't of Labor, 121 F. Supp. 2d 1155, 1168 (S.D. Ohio 2000); *Florida*, 133 F. Supp. 2d at 1292.

Article III proceedings otherwise barred under the doctrine of sovereign immunity.[170]

Each of the district courts cited the Supreme Court's decision in *Alden* in support of its decision to bar the proposed administrative proceedings.[171] However, this reliance on *Alden* is misplaced for a number of reasons. First, *Alden* dealt with a lawsuit brought by a private individual against a state.[172] In contrast, the administrative proceedings at issue in these district court cases are described in the whistleblower statutes as forming *a part of an investigation* by the SOL.[173] Therefore, the ruling in *Alden* should not bar any such administrative proceedings, given the fact that the Supreme Court stated in that case that states are not immune from actions taken by the federal government to enforce federal law.[174]

Furthermore, when deciding that judicial action initiated against a state by private individuals must be barred under the doctrine of sovereign immunity, the Supreme Court stressed the substantial potential impact of private suits on the state treasuries.[175] However, in contrast to suits brought in federal or state courts, the administrative bodies established by the whistleblower statutes do not possess the inherent authority to enforce awards of monetary or equitable relief. The relief awarded at the end of the administrative hearings is enforceable only in an action filed in federal district court.[176] Therefore, the only way in which the administrative processes at issue in these cases would burden the public treasury of a state is if the federal government brought suit in federal court to enforce an award issued in the course of the administrative processes. Such an action would not, however, be barred under the doctrine of sovereign immunity, because a state's sovereign immunity does not bar a suit by the federal government to enforce a federal statute.[177]

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170. *See, e.g.*, United States v. Morton Salt Co., 338 U.S. 632, 643 (1950) (holding that "[w]hen investigative and accusatory duties are delegated by statute to an administrative body, it, too, may take steps to inform itself as to whether there is probable violation of the law").

171. *See Rhode Island*, 115 F. Supp. 2d at 273-74; *Ohio EPA*, 121 F. Supp. 2d at 1165; *Florida*, 133 F. Supp. 2d at 1284-90.

172. In fact, the Supreme Court specifically referred to the actions barred by the Eleventh Amendment and sovereign immunity as "'the coercive process of *judicial tribunals*'" brought by private parties. Alden v. Maine, 527 U.S. 706, 749 (1999) (quoting *In re* Ayers, 123 U.S. 443, 505 (1887)).

173. *See* statutes cited *supra* note 162.

174. *Alden*, 527 U.S. at 759-60.

175. *Id.* at 749.

176. *See* TSCA, 15 U.S.C. § 2622(d); SDWA, 42 U.S.C. 300j-9(i)(4) (1994); CAA, *id.* § 7622(c)(1); CERCLA, *id.* § 9613(b); ERA, *id.* §§ 5851(d), (e)(1).

177. *Alden*, 527 U.S. at 757.

A series of decisions of United States courts of appeals have held that states do not have sovereign immunity from proceedings initiated by federal agencies.[178] One of these decisions in particular, *Tennessee Department of Human Services v. United States Department of Education*, strongly supports the conclusion that an administrative agency proceeding is fundamentally different from a judicial action.[179] In that case, the United States Court of Appeals for the Sixth Circuit held that a proceeding before an administrative arbitration panel did not violate the Eleventh Amendment, even though the State of Tennessee was a party in the proceeding, because, like the administrative processes at issue in the district court cases, any relief awarded against Tennessee would be enforceable only in federal court in an action commenced by the United States.[180] This ruling also found support in the statements by the United States Court of Appeals for the Third Circuit when it held that the contention that the Eleventh Amendment has "any possible application to proceedings before arbitrators . . . [is] hardly supportable by the text."[181]

The district court in *Rhode Island* also made two critical mistakes in formulating its decision that the administrative proceedings before the ALJ constituted a judicial action initiated against a state without its consent. The first of these mistakes was its attempt to distinguish the ALJ proceedings in that case from those involved in *Ellis Fischel State Cancer Hospital v. Marshall*,[182] in which the United States Court of Appeals for the Eighth Circuit found "no eleventh amendment bar to actions brought by federal administrative agencies pursuant to complaints of private individuals."[183] The second involved its conclusion that the kind of relief that the Secretary is authorized by statute to award, transformed the proceedings into a "private tort action, not an administrative enforcement proceeding."[184]

The *Marshall* case involved proceedings against a state employer brought pursuant to Section 210 of the ERA.[185] The proceedings under

178. *See* Tenn. Dep't of Human Servs v. United States Dep't of Educ., 979 F.2d 1162 (6th Cir. 1992); Ellis Fischel State Cancer Hosp. v. Marshall, 629 F.2d 563 (8th Cir. 1980); Marshall v. A&M Consol. Sch. Dist., 605 F.2d 186 (5th Cir. 1979); Hill v. United States, 453 F.2d 839 (6th Cir. 1972); United States v. Illinois, 454 F.2d 297 (7th Cir. 1971).

179. 979 F.2d at 1166-67.

180. *Id.* at 1167.

181. Del. Dep't of Health & Soc. Servs. v. United States Dep't of Educ., 772 F.2d 1123, 1138 (3d Cir. 1985).

182. Rhode Island v. United States, 115 F. Supp. 2d 269, 275-76 (D.R.I. 2000).

183. 629 F.2d at 567.

184. *Rhode Island*, 115 F. Supp. 2d at 275.

185. *Marshall v. A&M Consol. Sch. Dist.*, 605 F.2d 186, 187 (5th Cir. 1979).

that Act are initiated in the exact same manner and require that the employee play the same role in the investigation as the state employee complainants play in proceedings initiated pursuant to the whistleblower statutes.[186] Despite this fact, the *Rhode Island* district court judge stated that, unlike the proceedings at issue, the proceedings in *Marshall* were "initiated" by the "Secretary of Labor."[187] The district court was simply mistaken in believing that it could legitimately distinguish the proceedings initiated under the environmental whistleblower statutes from those under the ERA.

The *Rhode Island* district court was equally mistaken to justify its conclusion that the agency proceedings constituted judicial action against a state by reasoning that the kind of relief authorized by the statutes made the agency proceedings more akin to a private tort action. It is clear from the Sixth Circuit's decision in *Tennessee Department of Human Services* that Congress can fashion an enforcement proceeding to provide the kind of relief contemplated without turning the proceeding into a private cause of action.[188] In that case, the court determined that Eleventh Amendment immunity does not come into play merely because the remedy afforded under the statute also provides some benefits to a private individual.[189]

Furthermore, in *Employees of the Department of Public Health and Welfare v. Department of Public Health and Welfare*, the Supreme Court held that sovereign immunity of states from suits by employees under the Fair Labor Standards Act (FLSA) would not render meaningless the state employee protection coverage of that Act because the SOL still had the authority to bring suit for "unpaid minimum wages or unpaid overtime compensation under the FLSA," and thereby pass the relief through to the aggrieved individual.[190] The United States Court of Appeals for the Fifth Circuit also has ruled that requiring an employer to pay back wages is "simply a part of a reasonable and effective means which Congress . . . found . . . necessary to adopt to bring about general compliance" with the FLSA.[191] In the case of the whistleblower provisions of the seven

186. *See* ERA, 42 U.S.C. § 5851(b) (1994). The proceedings described in this statute are identical to those mentioned in the whistleblower provisions of the six environmental statutes. In fact, the structure of the employee protections in the whistleblower provisions of the ERA were largely based on those found in the WPCA. *See* WPCA, 33 U.S.C. § 1367(b) (1994).

187. *Rhode Island*, 115 F. Supp. 2d at 276.

188. 979 F.2d 1162, 1167 (6th Cir. 1992).

189. *Id.* (citing Employees of the Dep't of Pub. Health and Welfare of Mo. v. Dep't of Pub. Health & Welfare of Mo., 411 U.S. 279, 285-86 (1973)).

190. 411 U.S. at 286. The *Rhode Island* court conceded this point in its discussion of the applicability of Sovereign Immunity to the administrative hearings at issue in that case. *See Rhode Island*, 115 F. Supp. 2d at 273.

191. Wirtz v. Jones, 340 F.2d 901, 904-05 (5th Cir. 1965).

environmental protection statutes, it is clear that the protections provided to employees therein are meant to ultimately benefit the members of the public.[192] Undoubtedly, Congress intentionally chose the remedies it incorporated into these Acts because they are best suited to bring about general compliance with the six environmental protection laws and the ERA. Thus, it is mistaken, given the ruling in *Employees of the Department of Public Health*, to conclude that Congress's decision to include the kind of remedies necessary to bring about general compliance with the environmental statutes transforms the whistleblower protection proceedings provided for in those statutes into private causes of action.

The district courts also erred in ruling that, because the DOL's investigation of the alleged violations were initiated in response to the complaints of the employees themselves, these investigations are considered private causes of action. The Supreme Court in *Vermont Agency of Natural Resources v. United States* ex rel. *Stevens* concluded that a private individual could bring suit against a state in federal court under the False Claims Act.[193] Given this ruling, it is clear that the mere fact that a private individual initiates a claim against a state under federal law does not bar that claim under the Eleventh Amendment. Under the seven environmental laws, employees do not file any claim in federal court, and it is the DOL, a federal agency, that initiates an investigation of a state's possible violation of federal law in response to a private complaint.[194]

The district courts of both *Ohio* and *Florida* were also mistaken in concluding that Congress had not, pursuant to its enforcement powers under Section 5 of the Fourteenth Amendment, validly abrogated state sovereign immunity by adopting the whistleblower provisions of the six environmental statutes. Recently, the United States Supreme Court issued a clear pronouncement upon the requirements for validating federal statutes that subject states to suits by individuals in *Kimel v.*

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192. The ultimate beneficiaries of the relief sought in all three of the district court cases were the members of the public who rely on the integrity of the work of the state agencies in question to ensure the health and well being of the environment and of the public at large. Moreover, the fact that these laws were passed to "encourage" employees to report violations and to protect their reporting activity makes the remedies Congress chose to include in the Acts well tailored to the discriminatory practices the Acts seek to curtail. *See* English v. Gen. Elec. Co., 496 U.S. 72, 83 (1990); *see also* Rose v. Sec'y of Dep't of Labor, 800 F.2d 563, 565 (6th Cir. 1986) (Edwards, J., concurring).

193. 529 U.S. 765, 787-88 (2000); *see* 31 U.S.C. §§ 3729-3733 (1994).

194. *See* SDWA, 42 U.S.C. § 300j-9(i) (1994); CAA, *id.* § 7622; ERA, *id.* § 5851; CERCLA, *id.* § 9610; TSCA, 15 U.S.C. § 2622 (1994); SWDA, 42 U.S.C. § 6971; WPCA, 33 U.S.C. § 1367 (1994).

Florida Board of Regents.[195] In that case, the Court ruled that for a state's sovereign immunity to be validly abrogated, Congress must have: (1) unequivocally expressed its intent to abrogate state sovereign immunity and (2) acted pursuant to a valid grant of constitutional authority.[196] Each of these requirements is met in the case of the whistleblower statutes.

First, Congress unequivocally expressed its intent to abrogate state sovereign immunity with respect to the environmental laws at issue here. In determining the congressional intent, the Court looks to "the plain language of the provisions," which need not be found in a single specific section of the law in question.[197] In addition, the Supreme Court has held that the various subsections from which the plain language is taken need not have been passed at the same time.[198] The seven federal environmental laws and their attendant whistleblower protection and employee antidiscrimination provisions that are at issue here were originally passed over the course of eight years, beginning with the WPCA of 1972.[199] They are generally modeled after one another and share a set of DOL administrative regulations.[200]

Some, if not all, of the federal environmental statutes demonstrate the requisite unequivocal intent on the part of Congress to bind the states. The first environmental whistleblower protection and antidiscrimination law, the "employee protection" provisions of the WPCA, upon which all others are modeled,[201] states:

> No *person* shall fire, or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter.[202]

Congress sought to protect employees from discrimination based upon their "filing," "instituting," "causing to be filed or instituted," or

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195. 528 U.S. 62, 73 (2000).

196. *See id.*

197. *Id.* at 74; *see, e.g.*, Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 56-57 (1996).

198. *See* Pennsylvania v. Union Gas Co., 491 U.S. 1, 7-10 (1989).

199. SDWA, 42 U.S.C. § 300j-9(i); CAA, *id.* § 7622; ERA, *id.* § 5851; CERCLA, *id.* § 9610; TSCA, 15 U.S.C. § 2622; SWDA, 42 U.S.C. § 6971; WPCA, 33 U.S.C. § 1367.

200. *See* 29 C.F.R. §§ 18, 24 (2000); *see also* STEPHEN M. KOHN, THE WHISTLEBLOWER LITIGATION HANDBOOK 4 (1991) (collecting citations).

201. *See, e.g.*, H.R. REP. NO. 95-294 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1077, 1404-05.

202. WPCA, 33 U.S.C. § 1367(a) (emphasis added).

"testifying in" any proceeding under the WPCA by any "*person*." "Person" is plainly defined elsewhere in the Aet so as to include a "State": "[t]he term 'person' means an individual, corporation, partnership, association, *State*, municipality, commission, or political subdivision of a State, or any interstate body."[203]

As far back as 1972, when the WPCA was passed, Congress's plain language has made it unlawful for a "person," the definition of which clearly includes states, to discriminate against employees for their speech related to proceedings under thc WPCA.[204] This makes it difficult to argue, as Florida does, that Congress did not make its intention clear to hold states accountablc for discriminating against employees.[205]

Congress's carefully crafted scheme is made even more apparent by consulting another section of the WPCA that concerns the filing of "citizen suits."[206] In that provision, Congress carefully crafted the language to preclude suits against the states.[207] This is very telling, in that it indicates that Congress clearly knew how to avoid infringing upon state sovereign immunity, and did so in § 1365(a)(1) by expressly stating that citizen suits are available except where they would be prohibited by the Eleventh Amendment. No such language is contained in the whistleblower protcction provisions.

As the Supreme Court has repeatedly recognized, Congress's use of terms within different parts of a statute, or in related statutes, is highly relevant to show that where Congress intended to accomplish a goal, it "knew how to do so."[208] This maxim has been broadly used by the Supreme Court, including in cases involving the very environmental laws at issue in the district court cases.[209] Congress clearly intended to abrogate state immunity in the "employee protection" provisions of the WPCA, and did so by including states within the definition of "person" in that section.[210] As a result, Congress's own plain language demon-

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203. *Id.* § 1362(5) (emphasis added).

204. *See id.* § 1367.

205. Florida v. United States, 133 F. Supp. 2d 1280, 1290-91 (N.D. Fla. 2001), *appeal docketed*, No. 12380-HH (11th Cir. May 1, 2001).

206. *See* 33 U.S.C. § 1365.

207. *See id.* § 1365(a)(1) (providing for suits to be filed "(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution)").

208. *See, e.g.*, Menominee Tribe of Indians v. United States, 391 U.S. 404, 416 n.7 (1968) (Stewart, J., dissenting).

209. *See, e.g.*, Meghrig v. KFC Western, Inc., 516 U.S. 479, 484-85 (1996) (comparing relief available under RCRA and CERCLA to demonstrate that Congress "knows how to" provide for cleanup costs).

210. 33 U.S.C. § 1365(a)(1).

strates that under all relevant criteria used by the Supreme Court, Congress intended to abrogate the states' sovereign immunity under the WPCA's "employee protection" and anti-discrimination provisions. Likewise, the whistleblower protection provisions in the other environmental statutes, which are based upon the same framework as the WPCA,[211] were passed by Congress with the intent of abrogating the states' sovereign immunity.[212]

The second requirement for state sovereign immunity to be abrogated by the whistleblower statutes involves whether Congress acted pursuant to a "valid exercise of power" under Section 5 of the Fourteenth Amendment.[213] The Eleventh Amendment, and the principle of a state's sovereign immunity which it embodies, are necessarily limited by the enforcement provisions of Section 5 of the Fourteenth Amendment.[214] In *Kimel*, the Court ruled:

> Congress' Section 5 power is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment. Rather, Congress' power to enforce the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text.[215]

The very essence of the Supreme Court's test for congressional authority is whether Congress's legislation is an "appropriate remedy" or whether it is "merely an attempt to substantively redefine the States' legal obligations with respect to . . . discrimination."[216] Most recently, the Court struck down provisions of the American Disabilities Act that attempted to abrogate state immunity and allow discrimination suits by disabled state employees.[217] The whistleblower statutes, however, protect public employee speech.[218] Congress in no way attempted to "redefine"

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211. *See, e.g.*, H.R. REP. NO. 95-294 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1077, 1404-05.

212. *See id.*

213. *See* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 80-82 (2000).

214. *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976).

215. *Kimel*, 528 U.S. at 81 (citing City of Boerne v. Flores, 527 U.S. 507, 518 (1997)).

216. *Id.* at 88.

217. *See* Bd. of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001).

218. *See, e.g.*, *Kimel*, 528 U.S. at 89. Significantly, in *Eastern Ohio Regional Waste Water Authority* v. *Charvat*, 246 F.3d 607 (6th Cir. 2001), the court held that discrimination against environmental whistleblowers impacted speech clearly protected under the First Amendment. Consequently, it would be illogical to constitutionally permit state employees to seek relief in federal court under 42 U.S.C. § 1983, while simultaneously holding that these same employees were barred from filing less costly administrative proceedings which would address the same alleged misconduct.

the states' legal obligation with respect to public employee speech-based discrimination.[219] Rather, Congress carefully crafted the environmental laws so that the whistleblower provisions would protect rights guaranteed under the First Amendment and would remedy states' abridgment of those rights with respect to their employees.[220] Furthermore, the case law governing public employee speech is well-settled,[221] and Congress's enactments under the federal environmental laws do nothing to create state liability where it would not otherwise exist under the Constitution.[222]

The Supreme Court has long established that the rights guaranteed by the First Amendment are applicable as against the States by the First Amendment's "incorporation" into the Fourteenth.[223] That is, the "fundamental concept of liberty embodied in the [Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment."[224] The Court has reaffirmed that Congress has the authority under Section 5 to "enforce" the rights protected by the Fourteenth Amendment.[225] In the federal environmental laws, Congress has attempted to do just that: to enforce the rights of public employees, protected by the First Amendment, made applicable to the States by the Fourteenth Amendment.

Finally, the definition of "protected activity" contained in the seven environmental whistleblower protection provisions does not impose upon the states a standard of conduct that exceeds that which they must adhere to under the Constitution.[226] Congress did not create a mechanism for

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219. *See, e.g., Charvat*, 246 F.3d at 613.

220. *See* Pickering v. Bd. of Educ. of Township High Sch. Dist. 205, 391 U.S. 563, 568 (1968).

221. *See id.*; United States v. Nat'l Treasury Employees Union, 513 U.S. 454 (1995); Sanjour v. EPA, 56 F.3d 85 (D.C. Cir. 1995) (granting nationwide injunctive relief on behalf of federal employee whistleblowers).

222. *See, e.g., Charvat*, 246 F.3d at 613-16; Florida v. United States, 133 F. Supp. 2d 1280, 1291 (N.D. Fla. 2001) (citing *Pickering*, 391 U.S. 563).

223. *E.g.*, Cantwell v. Connecticut, 310 U.S. 296, 303 (1946).

224. *Id.*; *accord* Pennekamp v. Florida, 328 U.S. 331, 335 (1946) (examining statements at issue to determine if they are of a character which "the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect").

225. Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 81-82 (2000) (citing City of Boerne v. Flores, 521 U.S. 507, 518 (1997)).

226. For an analysis of the scope of protected activity under the whistleblower laws, see KOHN, *supra* note 1, at 249-59. Clearly, the prohibitive language of the statutes substantially reaches employees' speech or expression, or attempted speech or expression, to uncover violations of the law, which are actions that have been held to be protected speech in the Sixth Circuit. *See, e.g.*, Chappel v. Montgomery County Fire Prot. Dist. No. 1, 131 F.3d 564, 573 (6th Cir. 1997) (holding that public interest is near its zenith when ensuring that public organizations are being operated in accordance with the law). The court in *Chappel* noted that the key to recognizing protected speech by public employees is the "distinction between *matters* of public concern and *matters* of personal interest" *Id.* at 575. Furthermore, it is clear that public

employees to vent their frustrations about minor or random personal matters. The enforcement of environmental and nuclear statutes is a matter of public concern. Accordingly, the statutes create an administrative mechanism protecting public employee speech.[227] Given the broad constitutional protection afforded to public employees' free speech rights on matters of public concern, it can hardly be said that Congress has created anything but a proper remedial scheme that protects free speech rights of public employees concerning potential violations of federal environmental and nuclear laws. It is therefore clear that, in enacting the whistleblower provisions of the CAA, WPCA, SDWA, SWDA, TSCA, CERCLA, and ERA, Congress acted squarely within its Section 5 authority by creating a prophylactic scheme designed to protect employees' First Amendment rights on a matter of public concern and to deter otherwise unconstitutional conduct on the part of employers.

V. SOLUTIONS TO PROBLEMS RAISED BY THE ELEVENTH AMENDMENT AND STATE SOVEREIGN IMMUNITY

If the district court rulings in *Florida*, *Rhode Island*, and *Ohio* are upheld in later decisions by federal courts, state employees may well face severe problems in obtaining any relief from discrimination based on their whistleblowing activities. There are several avenues, however, by which the whistleblower may try to avoid these difficulties.

First, an employee can request that the Assistant Secretary for OSHA join in the litigation, and effectively pre-empt an Eleventh Amendment attack.[228] If the Secretary fails to join the action, the employee could file a writ of mandamus[229] to compel the DOL to join in the prosecution of the proceedings. Proceedings seeking a writ of mandamus were initiated in response to the Ohio court's decision in *Ohio Environmental Protection Agency v. United States Department of Labor*.[230] However, the case was dismissed without prejudice, in order to provide the Assistant Secretary for OSHA with enough time to determine

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employees have a constitutional right to be free from retaliation on account of their speech on matters of public concern. *See* Rankin v. McPherson, 483 U.S. 378, 384 (1987).

227. *See* S. REP. No. 92-414, 83 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3748. In discussing the employee protection provision of the WPCA the Senate Conference Report stated that "[u]nder this section employees and union officials could help assure that employers do not contribute to the degradation of our environment." *See also* 120 Cong. Rec. 27, at 36,389 (1974) (discussing enforcement of the SDWA).

228. *See* 29 C.F.R. § 24.7(f)(1) (2000).

229. *Id.* § 24.8(c); ERA, 42 § 5851(f) (1994); CAA, *id.* § 7622; SDWA, *id.* § 300j-9(i)(5).

230. 21 F. Supp. 2d 1155, 1162 (S.D. Ohio 2000).

whether to intervene in the case.[231] The Assistant Secretary ultimately chose to intervene in Jayko's administrative proceedings, which undermined Ohio's attempt to have the case dismissed on Eleventh Amendment grounds.[232] After the Assistant Secretary intervened, Ohio chose to abandon its appeals of the DOL determinations and elected to settle Jayko's claims. The case was favorably settled.[233]

Jayko sought a writ of mandamus to compel the Assistant Secretary for OSHA to intervene. The basis for his action was that the SOL is under a nondiscretionary duty to investigate and rule on whistleblower complaints initiated under the seven environmental statutes.[234] Furthermore, the statutes state that the Secretary's investigation must "provide an opportunity for a public hearing at the request of any party to such review to enable the parties to present information relating to such alleged violation."[235] Thus, in order for the Secretary to comply with her nondiscretionary duty to conclude an investigation of a whistleblower complaint (including the complaints of state employees), the parties to the complaint *must* be afforded the opportunity for a public hearing.

In order to implement the whistleblower laws, the SOL created regulations that assign various responsibilities under the laws to various components within the DOL.[236] The Secretary mandated that OSHA conduct a preliminary investigation into allegations that the seven acts were violated.[237] OSHA's investigatory findings would constitute a final order of the SOL, unless any party to that proceeding requested an on-the-record hearing.[238]

The authority to conduct the hearing was vested in the DOL Office of Administrative Law Judges (OALJ).[239] The ALJ's were also authorized to render a "Recommended Decision and Order" based on the hearing.[240] The regulations providing for a hearing before the OALJ also state that the Assistant Secretary for OSHA may at his or her discretion,

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231. *See generally* Record, *Jayko v. Alexis Herman, et al.*, C.A. No. 1:00CV02932 (D.D.C.).

232. *Id.*

233. Jayko v. Ohio EPA, 99-CAA-5, at 8 (Dep't of Labor Oct. 2, 2000) (recommended decision and order and prelim. order, A.L.J.), *available at* http://www.oalj.dol.gov/public/arb/decsn/01_009.caa.pdf.

234. *See* statutes cited *supra* note 162.

235. 42 U.S.C. § 6971(b) (1994). The other whistleblower statutes each contain similar provisions stipulating that the parties must be afforded the opportunity for a public hearing prior to the conclusion of the SOL's investigation. *See* statutes cited *supra* note 162.

236. *See* 29 C.F.R. § 24 (2000).

237. *Id.* § 24.4-5.

238. *Id.* § 24.4(d)(2).

239. *Id.* § 24.6.

240. *Id.* § 24.7.

"participate as a party or participate as an *amicus curiae* . . . in the proceedings."[241] The *Ellis Fishel* court stated that OALJ proceedings related to a whistleblower complaint filed under the ERA were not barred by Sovereign Immunity.[242] It is important to note that these regulations, which provide for a hearing before the OALJ, were established before the ruling in *Ellis Fishel* had come into question.[243] However, the trend amongst the district courts has been to require that the Assistant Secretary for OSHA take over the prosecution of any OALJ hearings against a state.[244]

Given the fact that the SOL is under a nondiscretionary duty to investigate whistleblower complaints under the seven statutes and determine whether a violation occurred, the regulations regarding public hearings must be read to require that the Assistant Secretary participate as a party to the OALJ hearings of a state employee's complaint.[245] Unless the Assistant Secretary for OSHA participates as a party in the OALJ proceedings, the rulings of the three district courts would bar state employees from being afforded the opportunity for a public hearing. However, until the parties are afforded the opportunity for a public hearing of the complaint, the DOL cannot terminate its investigation and issue a final order in accordance with the whistleblower statutes.[246] Given the decisions of the *Florida*, *Rhode Island*, and *Ohio* courts, the failure of the Assistant Secretary for OSHA to participate in OALJ proceedings concerning a state employee's whistleblower complaint undermines the Secretary's authority to issue a final order. Thus, the only way to square the regulations regarding the DOL's hearings before the OALJ[247] with the SOL's nondiscretionary duty to provide for the opportunity for a public hearing of a whistleblower complaint is to require that the Assistant Secretary for OSHA participate in the OALJ hearings as a party in the case of any state employee whistleblower claims.

State employee whistleblowers may also avoid Eleventh Amendment problems by naming the individual wrongdoers and

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241. *Id.* § 24.6(f)(1).

242. *See* Ellis Fischel State Cancer Hosp. v. Marshall, 629 F.2d 563, 567 (8th Cir. 1980).

243. *See, e.g.*, Florida v. U.S., 133 F. Supp. 2d 1280, 1288 (N.D. Fla. 2001) (disagreeing with the holding of the decision in *Ellis Fishel*).

244. The courts in *Macktal v. Secretary of Labor*, 923 F.2d 1150, 1153 (5th Cir. 1991), *Carolina Power & Light Co. v. Department of Labor*, 43 F.3d 912, 914 (4th Cir. 1995), and *Beliveau v. United States Department of Labor*, 170 F.3d 83, 86 (1st Cir. 1999), all determined that the Secretary must, unless a settlement is reached, fully investigate a whistleblower claim and arrive at a final order.

245. *See id.*

246. *See* statutes cited *supra* note 162.

247. 29 C.F.R. § 24.6-7 (2000).

managers in their complaint. The district court in Florida specifically noted that Dr. Shafey's complaint could "go forward to the extent it seeks prospective relief . . . against the individual respondents in their official capacities, or to the extent it seeks relief against the individual respondents in their individual capacities."[248] In *Ohio*, Jayko filed a motion to amend his complaint to make individual wrongdoers and the state decision makers individual parties to the proceeding after the State of Ohio had obtained its injunction against Jayko's proceeding directly against the state. That motion was never ruled upon, as the case was settled.[249]

In the event that a state employee finds that the DOL's investigation and adjudication of their claim is barred under the Eleventh Amendment or the defense of State Sovereign Immunity, the employee may still pursue other avenues of relief. The *Florida* court explicitly recognized the fact that a state employee's claims of speech based discrimination may go forward if they seek prospective relief from the individuals responsible for the discrimination in their official or individual capacities.[250] Employees of state and local governments are protected under Section 1 of the Civil Rights Act of 1871.[251] This law prohibits the violation of constitutional rights under "color of law."[252] In the case of discrimination against state employee whistleblowers, the *Florida* district court made it clear that such action "often, perhaps almost always, violates not only the whistleblower provisions but also the First Amendment."[253] Actions under 42 U.S.C. § 1983 provide for a tort-styled remedy for wrongfully discharged whistleblowers, allowing a person to

248. Florida v. United States, 133 F. Supp. 2d 1280, 1291 (N.D. Fla. 2001); *appeal docketed*, No. 12380-HH (11th Cir. May 1, 2001).

249. *See* Mot. to Amend Compl., Jayko v. Ohio Envtl. Prot. Agency, 99-CAA-5 (Dep't of Labor Oct.2, 2000) (on file with author).

250. *Florida*, 133 F. Supp. 2d at 1291.

251. 42 U.S.C. § 1983 (1994); *see also id.* § 1986 (a person is liable under the Civil Rights Act (CRA) for failing to "assist" or "protect" victims of § 1985 violations). Courts have sustained public employee actions under the CRA of 1871. *See* E. Ohio Reg'l Waste Water Auth. v. Charvat, 246 F.3d 607 (6th Cir. 2001).

252. 42 U.S.C. § 1983 specifically provides that "[e]very person who, under color of any statute . . . subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ."

253. *Florida*, 133 F. Supp. 2d at 1291 (citing Pickering v. Bd. of Educ., 391 U.S. 563 (1968)).

be "compensated fairly for injuries caused by the violation of his legal rights."[254]

State government employees alleging discrimination in retaliation for protected speech under § 1983 are entitled to a jury trial,[255] the full array of tort damages,[256] and attorney fees.[257] They are also entitled to injunctive relief,[258] including the same broad preenforcement injunctive relief available to federal employees.[259] An action under the statute allows an aggrieved employee to seek all injunctive relief necessary to prevent the violation of First Amendment rights,[260] including the right to blow the whistle on his or her state employer.[261]

Actions under § 1983 for retaliatory discharge are adjudicated under the principles set forth in *Pickering* and its progeny.[262] The definition of adverse action applicable for § 1983 actions is quite broad.[263] Retaliation claims may be cognizable under the First Amendment even when the conduct does "not deprive a claimant of 'liberty or property interests.'"[264] Furthermore, as the *Florida* district court noted, state immunity under the Eleventh Amendment and the doctrine of Sovereign Immunity does not "foreclose an action against a state official, in his or her official capacity, seeking solely prospective relief."[265] Under *Ex parte Young*, a federal court has jurisdiction over a suit against a state official to enjoin official actions violating federal law, even if the state itself may be immune from

254. Heck v. Humphrey, 512 U.S. 477, 483 (1994); *see also* Carey v. Piphus, 435 U.S. 247, 257-58 (1978) (discussing the applicability of common law tort rules of damages in § 1983 cases); KOHN, *supra* note 1, at 119-39.

255. *See* City of Monterey v. Del Monte Dunes, 526 U.S. 687, 707-11 (1999) (Scalia, J., concurring). In a concurring opinion, Justice Scalia summarized the respective role of judge and jury in § 1983 retaliatory discharge cases: "[i]n cases alleging retaliatory discharge of a public employee in violation of the First Amendment, judges determine whether the speech that motivated the termination was constitutionally protected speech, while juries find whether the discharge was caused by that speech." *Monterey*, 526 U.S. at 731.

256. *Carey*, 435 U.S. at 257-59.

257. 42 U.S.C. § 1988.

258. *See* Am. Postal Workers Union v. United States Postal Serv., 595 F. Supp. 403, 409 (D. Conn. 1984); Fujiwara v. Clark, 703 F.2d 357, 361 (9th Cir. 1983).

259. *See* Harman v. City of N.Y., 140 F.3d 111, 122 n.5 (2d Cir. 1998); Castle v. Colonial Sch. Dist., 933 F. Supp. 458, 460-61 (E.D. Pa. 1996); Will v. Mich. Dep't of State Police, 491 U.S. 58, 71 n.10 (1989); Bd. of County Comm'rs v. Brown, 520 U.S. 397, 403-04 (1997) (stating that a municipality may be liable if "policy" or "custom" caused plaintiff's injury).

260. United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 480 (1995).

261. Sanjour v. EPA, 56 F.3d 85, 93-94 (D.C. Cir. 1995) (en banc).

262. *Bd. of County Comm'rs*, 520 U.S. at 402-15.

263. Wagner v. Tex. A&M Univ., 939 F. Supp. 1297, 1314 (S.D. Tex. 1996).

264. *Id.*

265. Florida v. United States, 133 F. Supp. 2d 1280, 1284 (N.D. Fla. 2001); *accord Ex parte* Young, 209 U.S. 123, 136-38 (1908).

suit.[266] State officials can be sued for prospective injunctive relief, despite the Eleventh Amendment bar to suits against the state itself, in order to "vindicate" the federal interest in ending "continuing violation[s] of federal law."[267]

Another possible solution to this problem lies at the state level. Many states have implemented statutory protections for public-employee whistleblowers.[268] Some state laws have explicitly waived sovereign immunity and allow whistleblowers to sue the state or municipal entities for which they worked directly, without having to litigate Eleventh Amendment or sovereign immunity issues.

VI. CONCLUSION

When Congress enacted the environmental whistleblower protection provisions it clearly understood the integral role state EPAs played in the overall mission of protecting America's environment. In order to ensure that the employees of state agencies could freely blow the whistle on violations of federal law by the states, Congress carefully crafted statutes to empower the SOL to conduct a timely and thorough investigation of state employee whistleblower complaints, thus ensuring proper enforcement of the environmental protection laws. Employees who fulfill the congressional mandate to protect the environment by blowing the whistle on their employers' failure to comply with federal environmental laws are

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266. *See* Quern v. Jordan, 440 U.S. 332, 337 (1979).

267. Green v. Mansour, 474 U.S. 64, 68 (1985).

268. *See, e.g.*, ALASKA STAT. § 39.90.100 (Michie 2000); CAL. GOV'T CODE § 126.53 (West 1997); COLO. REV. STAT. § 24-50.5-103 (1997); CONN. GEN. STAT. ANN. § 31-51m (West 1997); D.C. CODE ANN. § 1-616.12 (1999); GA. CODE ANN. § 45-1-4 (2001); HAW. REV. STAT. ANN. § 378-61 (Michie 1999); 820 ILL. COMP. STAT. ANN. 130/116 (1999); IND. CODE ANN. § 22-8.1.1-38.1 (Michie 1997); KAN. STAT. ANN. § 75-2973 (1997); LA. REV. STAT. ANN. § 46:440.3 (West 1999); ME. REV. STAT. ANN. TIT. 26, § 831 (West 1988); MD. CODE ANN., STATE PERS. & PENS. § 5-301 (1997); MASS. ANN. LAWS CH. 149, § 185 (Law. Co-op. 1999); MICH. COMP. LAWS § 15.362 (2001); N.H. REV. STAT. ANN. § 275-E:2 (1999); N.M. STAT. ANN. § 50-9-25 (Michie 1978); N.Y. LAB. LAW § 740 (McKinney 1988); N.C. GEN. STAT. § 95-241 (2000); OHIO REV. CODE ANN. § 4113.52 (West 2001); 43 PA. STAT. ANN. § 1423 (2001); R.I. GEN. LAWS § 28-50-4 (2000); S.C. CODE ANN. § 8-27-30 (Law. Co-op. 1997); TEX. GOV'T CODE ANN. § 554.101 (Vernon 2001); TENN. CODE ANN. § 50-6-108 (2001); 10 VT. CODE ANN. § 123 (1988); WASH. REV. CODE ANN. § 42.41.040 (West 2000); W. VA. CODE ANN. § 6C-1-3 (Michie 2000); STEVEN M. KOHN, CONCEPTS AND PROCEDURES IN WHISTLEBLOWER LAW 21-77 (2001) (providing a state-by-state analysis of whistleblower protections).

The district court also found that despite the fact that it was the OEPA, and not Jayko, that requested the ALJ hearings in response to the findings of the Assistant Secretary for OSHA, such action did not constitute a waiver of the state's sovereign immunity. Because the Assistant Secretary's order would have become final and binding upon the OEPA had the state failed to file an appeal, the court ruled that the OEPA's actions fell short of the sort of voluntary action that is necessary on behalf of a state to constitute a waiver of its immunity.

protected from employment discrimination through their ability to sue for a writ of mandamus to force the SOL to comply with its nondiscretionary duty to protect them.

In *Marshall*, the Eighth Circuit correctly decided that Sovereign Immunity could not bar agency proceedings related to the investigation of state employee whistleblower claims. Consequently the decisions of the three district courts discussed herein have misconstrued the statutes and congressional intent in ruling that all administrative hearings related to the investigation of state employee whistleblower claims are barred under the doctrine of Sovereign Immunity. The *Rhode Island* court's decision effectively stripped the employees of RIDEM of the protection afforded them by Congress for fulfilling their congressionally mandated duty to report noncompliance with federal environmental laws. Further, the court gave them no relief from the injuries caused by RIDEM's retaliation against them for blowing the whistle. In *Ohio*, similarly abhorrent results were narrowly avoided when, within days of the case being thrown out, the Assistant Secretary for OSHA chose to intervene in the DOL administrative proceedings related to Jayko's claims.

It is evident that the manner in which the district courts have applied the doctrine of Sovereign Immunity cannot be reconciled with a strict reading of the whistleblower statutes. Although state whistleblower complainants may mitigate the damage done to their statutory protections by these decisions, by initiating suits under Section 1983, using the doctrine of *Ex parte Young*, naming individual agency officials as defendants, and seeking writs of mandamus to allow for ALJ hearings, the inexpensive and expeditious procedures set forth by the SOL to protect State employee whistleblowers have been clearly undermined by the rulings of the district courts.