IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

State of North Dakota by and through the North Dakota Department of Environmental Quality, Plaintiff, vs. United States Department of Labor et al., Defendants.	Case No. 1:24-cv-00256

ORDER GRANTING MOTIONS TO DISMISS

INTRODUCTION

[¶ 1] THIS MATTER comes before the Court upon three motions. Josh Seerup ("Mr. Seerup") filed a general Motion to Dismiss and the Department of Labor ("DOL") filed a Motion to Dismiss for Lack of Jurisdiction and a Motion to Dismiss for Failure to State a Claim on April 10, 2025.[1] Doc. Nos. 12, 14. North Dakota filed a Response to all motions on May 12, 2025. Doc. No. 20. DOL filed a Reply on June 11, 2025. Doc. No. 23. A hearing on the motions was held on October 1, 2025. Doc. No. 32. For the reasons set forth below, the Motions to Dismiss are **GRANTED**.

BACKGROUND

I. Statutory Framework

[¶ 2] The Safe Drinking Water Act ("SDWA") and several other environmental laws have whistleblower provisions. 42 U.S.C. §§ 300j-9(i)(1)(C), 300f(12); see also Clean Air Act 42 U.S.C. § 7622(a); Clean Water Act, 33 U.S.C. § 1367(a); Solid Waste Disposal Act, 42 U.S.C. § 6971(a).

[1] Mr. Seerup joins completely in DOL's arguments.

If an employee believes they were retaliated against, they may file a complaint with the Secretary of Labor. 42 U.S.C. § 300j-9(i)(2)(A). The Secretary has delegated the responsibility of receiving and investigating retaliation complaints to the Occupational Safety and Health Administration ("OSHA"). 85 Fed. Reg. 58393 (Sept. 18, 2020). OSHA investigates and then issues a determination either dismissing the complaint or ordering relief for retaliation. 29 C.F.R. § 24.105(a). Either party may object within thirty days for a de novo hearing before a DOL Administrative Law Judge ("ALJ"). See id. § 24.106(a). At that time, the determination of the agency is stayed. Id. § 24.106(b). The complainant and the employer/respondent are parties to the case and OSHA may intervene and join the proceeding at any time in its discretion. See id. § 24.108(a). After the ALJ proceedings are complete, the ALJ's determination is subject to discretionary review by the Administrative Review Board, whose determination is in turn subject to discretionary review by the Secretary of Labor. See id. § 24.110; 85 Fed. Reg. 13186-01 (Mar. 6, 2020). After this review process is exhausted, final judicial review is available directly to the United States Court of Appeals without petitioning a United States District Court. See 42 U.S.C. § 300j-9(i)(3)(A); 29 C.F.R. § 24.112(a).

II. Facts in the Complaint

[¶ 3] Mr. Seerup was an employee of the North Dakota Department of Environmental Quality ("NDDEQ") from 2014–2024. Between January and March of 2022, during an EPA audit, Mr. Seerup emailed the EPA regional coordinator regarding North Dakota's enforcement of SDWA. The coordinator forwarded the emails to Mr. Seerup's supervisor and commented that they contained inappropriate questions for Mr. Seerup's position. In July 2022, Mr. Seerup received a written warning for these emails. He was also admonished for failing to attend a conference in October 2021. Mr. Seerup filed a retaliation complaint with OSHA a few days later. OSHA

investigated by sending written notice and requesting a response, which North Dakota provided in August while also alleging sovereign immunity. OSHA determined sovereign immunity did not attach to the matter in November 2022 and issued a determination of retaliation in August 2023. North Dakota objected to the ruling on September 13, 2023. On September 19, 2023, the case was docketed before DOL ALJ Christopher Larsen and set a hearing for March 2025. OSHA joined as a party to the suit on September 25, 2023. Doc. No. 14-4.

III. Facts in the Response to the Motion to Dismiss

[¶ 4] In June 2023, NDDEQ met with Crystal Smith, the OSHA investigator assigned to the case. During that meeting "Smith represented that one particular sentence in the written warning may give rise to an alleged violation and offered the DEQ could redact that sentence to resolve the complaint." Doc. No. 20. Mr. Seerup stated he would only settle for monetary damages, complete removal of the written warning, and a neutral reference for future employment. Doc. No. 20-6. Eventually, OSHA's determination was issued and mirrored Mr. Seerup's terms and not the representation made by the OSHA investigator. Doc. No. 14-1.

IV. Procedural History

[¶ 5] North Dakota filed the present Complaint against Mr. Seerup and the United States, through its agencies and officials ("DOL"), on December 19, 2024, seeking declaratory judgment that the OSHA investigation and the ALJ case violate North Dakota's sovereign immunity and seeking injunctive relief against further investigation by OSHA, further proceedings before the ALJ, and further complaints from Mr. Seerup. Doc. No. 1. The next day, NDDEQ filed a motion to stay the ALJ proceedings pending the resolution of this case, which the ALJ granted on January 17, 2025. Doc. Nos. 14-6, 14-7.

DISCUSSION

[¶ 6] DOL moves to dismiss the OSHA investigation under lack of subject matter jurisdiction and the rest of the claims under failure to state a claim. See Fed. R. Civ. P. 12.

I. OSHA Investigation

[¶ 7] DOL argues the claim against the OSHA investigation is moot since the investigation finished in August 2023. Doc. No. 15, p. 11. Contrary to the Complaint, North Dakota in its Response states it "does not dispute that OSHA has the authority to conduct an investigation . . . [and] clarifies that it does not seek injunctive relief from this Court from the investigation, which the State agrees is already completed." Doc. No. 20, ¶ 16.

[¶ 8] Federal agencies have the authority to investigate "unconsenting States" for alleged violations of federal law "upon its own initiative or upon information supplied by a private party." Fed. Mar. Comm'n v. S.C. S. Ports Auth., 535 U.S. 743, 768 (2002). Therefore, either because the issue is moot or because the argument has been abandoned or because of Ports, all claims for relief pertaining to the OSHA investigation fail and are, therefore, **DISMISSED**. The Motion to Dismiss for Lack of Jurisdiction is **GRANTED**.

II. State Immunity

[¶ 9] DOL argues North Dakota is not immune from the DOL ALJ proceedings because OSHA is a party to the proceedings and, therefore, there is no viable claim contained in the Complaint. Doc. No. 15, p. 13. North Dakota argues the proceedings violate the state's sovereign immunity from suits by private persons because the agency is a nominal party and seeks different relief from the private party. Doc. No. 20, ¶ 23.

A. Legal Standard

[¶ 10] Rule 12(b)(6) of the Federal Rules of Civil Procedure mandates the dismissal of a claim if there has been a failure to state a claim upon which relief can be granted. To survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citation modified). A plaintiff must show that success on the merits is more than a "sheer possibility." Id. A complaint is sufficient if its "factual content . . . allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. The Court must accept all factual allegations as true, excepting legal conclusions or formulaic recitations of elements. Id. at 681.

[¶ 11] "Specific facts are not necessary; a plaintiff need only allege sufficient facts to provide fair notice of the claim and its basis." Delker v. MasterCard Int'l, Inc., 21 F.4th 1019, 1024 (8th Cir. 2022) (citation modified) (quoting Erickson v. Pardus, 551 U.S. 89, 93 (2007)). However, a plaintiff must set forth "grounds of his entitlement to relief." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). A complaint does not "suffice if it tenders naked assertions devoid of further factual enhancement." Iqbal, 556 U.S. at 678 (citation modified). Dismissal will not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts" entitling him to relief. Ulrich v. Pope Cnty., 715 F.3d 1054, 1058 (8th Cir. 2013) (quoting Hafley v. Lohman, 90 F.3d 264, 266 (8th Cir. 1996)).

B. Past Whistleblower Cases

[¶ 12] In the early 2000s, district courts in Connecticut, Ohio, Florida, and Rhode Island held that whistleblower suits against a state were barred by sovereign immunity. See Conn. Dep't of Env't Prot. v. OSHA, 138 F. Supp. 2d 285 (D. Conn. 2001); Ohio Env't Prot. Agency v. U.S. Dep't of

Labor, 121 F. Supp. 2d 1155 (S.D. Ohio 2000); Florida v. United States, 133 F. Supp. 2d 1280 (N.D. Fla. 2001); Rhode Island v. United States, 115 F. Supp. 2d 269 (D.R.I. 2000). In 2002, the Supreme Court held that Article I prohibited Congress from allowing private suits against states through ALJ proceedings. Ports, 535 U.S. at 764 ("[I]t would be quite strange to prohibit Congress from exercising its Article I powers to abrogate state sovereign immunity in Article III judicial proceedings but permit the use of those same Article I powers to create court-like administrative tribunals where sovereign immunity does not apply."). However, the Ports Court also held that "States, in ratifying the Constitution, did surrender a portion of their inherent immunity by consenting to suit brought by . . . the Federal Government." Id. at 752.

[¶ 13] After Ports, the First Circuit directly addressed the issue of retaliation claims in R.I. Dep't of Env't Mgmt. v. United States. See 304 F.3d 31 (1st Cir. 2002). The question was whether an injunction barring ALJ proceedings from whistleblower complaints also barred the agency from joining the cases as a party. Id. at "We think [Ports] fairly disposes of any argument . . . that, as a general proposition, a state's traditional immunity from suit does not extend to administrative proceedings initiated and prosecuted by private citizens." Id. at 45–46. Relying on the Eighth Circuit opinion in Mille Lacs Band of Chippewa Indians v. Minnesota, the court stated, "[I]f the United States joins a suit after it has been initiated by otherwise-barred private parties and seeks the same relief as the private parties, this generally cures any . . . sovereign immunity defect." Id. at 53 (citing Mille Lacs Band, 124 F.3d 904, 913 (8th Cir. 1997)). In Mille Lacs Band the federal government joined as an intervenor and had a right to continue the case even if the Tribe chose not to pursue it. 124 F.3d at 913.

[¶ 14] The Second Circuit has also ruled on this issue. See Conn. Dep't of Env't Prot. v. OSHA, 356 F.3d 226 (2d Cir. 2004). "When the federal government becomes a party in an administrative

adjudication, the adjudication is transformed from a prohibited suit by a private party against a state to a permitted one by the federal government." Id. at 234. In that case, a judge issued a preliminary injunction against OSHA from intervening as a party. Id. After Ports was decided, the Second Circuit held the injunction was overbroad and OSHA could not be barred by sovereign immunity claims from intervening in a whistleblower case. Id.

C. Nominal Party

[¶ 15] In this case, North Dakota argues DOL does not seek the same relief as Mr. Seerup because a representative of OSHA suggested a possible resolution, but after Mr. Seerup objected, OSHA issued a determination and requested alternative relief.

[¶ 16] First, these facts are not included in the Complaint. See Doc. Nos. 1; 20-7. It is inappropriate to try and supplement insufficient factual allegations in a memorandum responding to a motion to dismiss. Hawse v. Page, 7 F.4th 685, 691 (8th Cir. 2021). Second, the email submitted is a follow-up email to a verbal conversation. There is nothing in the record detailing that verbal conversation. Third, that entire exchange was part of settlement negotiations. Doc. Nos. 20-7; 20-8. Under Federal Rule of Evidence 408, any communications or actions taken while negotiating resolution are not admissible to prove impeachment or contradiction. The Rule provides exceptions for proving witness bias or prejudice, defending against a charge of undue delay, or proving obstruction to criminal proceedings. Fed. R. Evid. 408. The present case does not meet any of these exceptions. The conversation between OSHA's representative and North Dakota's representative qualify as settlement negotiations. Therefore, any statements by OSHA's representative are inadmissible as evidence in this case. Lastly, any statements by a representative before the final determination are irrelevant. OSHA's final determination states the relief OSHA ultimately sought. That relief is the same as Mr. Seerup. Therefore, the parties seek the same relief

and the suit does not violate sovereign immunity. See Mille Lacs Band, 124 F.3d at 913 (highlighting the need for the government and private parties to seek the same relief).

[¶ 17] At oral argument North Dakota highlighted the timing of the election of party status, arguing OSHA needed to elect when the determination was made. Ohio Env't Prot. Agency states a case "passes constitutional muster only if the Department of Labor itself elects to join the action at the time the case is referred to the Office of Administrative Law Judges." 121 F. Supp. 2d at 1166. However, that court also noted, "The regulations further provide that 'the Assistant Secretary may participate as a part or participate as amicus curiae at any time in the proceedings.' Consequently, the Department of Labor enjoys discretion to join as a party at any stage of the case." Id. at 1166 n.7 (citation omitted). Further, this district court case came before Ports and before the more persuasive circuit cases from the First and Second Circuits. See R.I. Dep't of Env't Mgmt., 304 F.3d at 53 (holding the United States can join after a suit has been initiated by a private party); Conn. Dep't of Env't Prot., 356 F.3d at 234 (holding OSHA could not be barred from joining a suit after it was commenced).

[¶ 18] The case was docketed with the DOL ALJ on September 19, 2023, and OSHA elected party status less than a week later on September 25, 2023. See Doc. No. 14-4. This action "transformed . . . a prohibited suit by a private party against a state [in]to a permitted one by the federal government." Conn. Dep't of Env't Prot., 356 F.3d at 234. Therefore, all claims challenging the ALJ proceedings are **DISMISSED**.

III. Injunction

[¶ 19] North Dakota asks for an injunction against Mr. Seerup from bringing future complaints to OSHA against NDDEQ. Doc. No. 1. OSHA argues this is precluded by Ports. Doc. No. 15, p. 19.

Ports held agencies can investigate "upon its own initiative or upon information supplied by a private party." 535 U.S. at 768. This idea forms the basis of the need for whistleblower retaliation suits. The Court has no evidence Mr. Seerup abused the whistleblower reporting system or that this relief is warranted in any way. Therefore, all claims seeking to proscribe the future actions of Mr. Seerup are **DISMISSED**.

IV. Order for Relief

[¶ 20] North Dakota also argues that the relief sought by OSHA exceeds the agency's authority and is otherwise unlawful. Doc. No. 20, ¶¶ 27–29. DOL argues this matter is not available for nonstatutory review. Doc. No. 23, p. 8.

[¶ 21] Nonstatutory judicial review is only allowed within a narrow exception of the court's ruling in Leedom v. Kyne, 358 U.S. 184 (1958). Nuclear Regulatory Commission v. Texas, 605 U.S. 665, 681 (2025). The agency's action must be "entirely in excess of its delegated powers and contrary to a specific prohibition in a statute." Id. (citation modified). Further, ultra vires review is absent where there is "meaningful and adequate opportunity for judicial review." Id. (citation omitted).

[¶ 22] A charge of violation of sovereign immunity is available for nonstatutory review. See R.I. Dept., 304 F.3d at 43 ("Rhode Island's claim satisfies the specific limitations placed on nonstatutory review in the wake of Kyne; it satisfies other considerations of equity generally implicated by such claims; and it involves a constitutional right that is amenable to resolution by a federal district court."). However, the Court has determined there is no viable claim of violating sovereign immunity above.

[¶ 23] Any remaining ultra vires challenge concerning OSHA's requested relief falls under other grounds and is still subject to meaningful judicial review in the United States Court of Appeals. See 42 U.S.C. § 300j-9(i)(3)(A). Therefore, the Court declines to review these claims.

CONCLUSION

[¶ 24] Therefore, these claims fail as a matter of law and the Motions to Dismiss (Doc. Nos. 12, 14) are **GRANTED**. The Complaint is **DISMISSED with prejudice**.

[¶ 25] **IT IS SO ORDERED**.

DATED October 21, 2025.

Daniel M. Traynor, District Judge
United States District Court