APPENDIX TABLE OF CONTENTS

APPENDIX TABLE OF CONTENTS – Continued

[DO NOT PUBLISH]

In the
United States Court of Appeals
For the Eleventh Circuit

No. 22-11770
Non-Argument Calendar

JAMES W. TINDALL,

Petitioner,

versus

U.S. DEPARTMENT OF LABOR
ADMINSTRATIVE REVIEW BOARD,

Respondent.

Petition for Review of a Decision of the
Department of Labor
Agency No. ARB-2022-0030

(Filed Mar. 31, 2023)

Before NEWSOM, GRANT and DUBINA, Circuit Judges.

PER CURIAM:

Petitioner James W. Tindall, proceeding *pro*se, seeks review of the Administrative Review Board's ("ARB") order affirming and adopting the Administrative Law Judge's ("ALJ") dismissal of an

administrative complaint he brought pursuant to the anti-retaliation provision of the federal Taxpayer First Act ("TFA"), 26 U.S.C. § 7623(d).

Tindall argues to this court that the ARB acted arbitrarily and capriciously when it adopted the ALJ's factual summary as it contained incorrect definitions from the dismissal of his claims by the Occupational Safety and Health Administration ("OSHA") and as it incorrectly limited his complaint to between himself and the United States Department of the Treasury ("Treasury"). Tindall further argues that the ARB erred by recognizing the existence of federal sovereign immunity and, alternatively, by finding that it was not waived by the TFA; the "ultra vires" exception; the Administrative Procedures Act ("APA"), 5 U.S.C. § 702; or the Constitution.

For ease of reference, we will address each point in turn.

I.

The anti-retaliation provision of the TFA protects employees who have provided information or taken certain other actions relating to an alleged underpayment of tax, tax fraud, or any violation of the internal revenue laws. 26 U.S.C. § 7623(d). Under the law, an employer cannot retaliate against such an "employee" for engaging in lawful activity protected by the TFA. 26 U.S.C. § 7623(d)(1). The TFA also allows an employee who alleges discharge or other reprisal in violation of the foregoing to file an administrative

complaint with the Secretary of Labor. 26 U.S.C. 7623(d)(1), (2).

OSHA is responsible for receiving and investigating anti-retaliation complaints under the TFA. *See* Sec'y's Order No. 8-2020 (May 15, 2020), 85 Fed. Reg. 58,393 (Sept. 18, 2020); *see also* Interim Final Rule, Procedures for the Handling of Retaliation Complaints Under the Taxpayer First Act (TFA), 87 Fed. Reg. 12575 (March 7, 2022), codified at 29 C.F.R. Part 1989 (effective March 7, 2022). The ARB, in turn, is responsible for issuing final agency decisions in cases arising under the anti-retaliation provisions of TFA. *See* Sec'y's Order No. 1-2020 (Feb. 21, 2020), 85 Fed. Reg. 13,186 (Mar. 6, 2020); *see also* 29 C.F.R. 1989.110(a).

Following an OSHA determination, an aggrieved complainant may request a hearing before an ALJ. 29 C.F.R. 1989.106. The ALJ may hear the case or decide the case on a dispositive motion if appropriate. *See* 29 C.F.R. 1989.107 (incorporating the DOL ALJ rules of procedure at 29 C.F.R. Part 18). Any party who desires review of an ALJ decision, including judicial review, must appeal the ALJ's decision administratively to the ARB, and once the ARB's decision becomes final, it may file a petition for review to a United States appellate court. *See* 29 C.F.R. 1989.109, 1989.110, 1989.112.

We review the DOL's actions in accordance with APA standards, meaning that we conduct a *de novo* review of the DOL's legal conclusions and review factual findings for substantial evidence in the agency record. *Stone & Webster Const., Inc. v. U.S. Dep't of Lab.*, 684

F.3d 1127, 1132 (11th Cir. 2012). We will only overturn the ARB's findings if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or if the findings were made "without observance of procedure required by law." *Id.* (quoting 5 U.S.C. § 706(2)(A), (D)).

"[W]e may affirm on any ground that finds support in the record." *Long v. Comm'r of Internal Revenue Serv.*, 772 F.3d 670, 675 (11th Cir. 2014).

II.

Here, we conclude from the record that Tindall's alleged factual errors are without merit. First, even if OSHA applied an incorrect definition of "employer" and "person" in its original findings, this error was corrected by the ALJ. Second, the ALJ correctly found that Tindall had brought his administrative complaint against the Treasury. While Tindall identified, in his administrative complaint, two employees of the Treasury, he did so in the context of explicitly stating that he sought assistance in investigating the "threats of retaliation by the US Department of the Treasury and the National Advocate's Office for the ongoing willful refusal by the IRS Whistleblower Office to comply with their obligations under §7623(a)." Thus, we conclude that the ALJ acted reasonably by determining that Tindall's suit was brought against the Treasury alone, and the ARB did not act arbitrarily or capriciously in accepting the facts laid out within the ALJ's opinion. As such, we deny Tindall's petition in this respect.

III.

Sovereign immunity shields the federal government and its agencies from suit, absent a waiver of that immunity. *F.D.I.C. v. Meyer*, 510 U.S. 471, 475, 114 S. Ct. 996, 1000 (1994). "Sovereign immunity is jurisdictional," and absent a waiver of the immunity, the court lacks "jurisdiction to entertain the suit." *Id.* A waiver of sovereign immunity must be "unequivocally expressed," and an expressed waiver will be strictly construed. *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 33-34, 112 S. Ct. 1011, 1014-15 (1992) (quotation marks omitted). "Any ambiguities in the statutory language are to be construed in favor of immunity, so that the Government's consent to be sued is never enlarged beyond what a fair reading of the text requires. . . . Ambiguity exists if there is a plausible interpretation of the statute that would not authorize money damages against the Government." *Davila v. Gladden*, 777 F.3d 1198, 1209 (11th Cir. 2015) (quoting *F.A.A. v. Cooper*, 566 U.S. 284, 290, 132 S. Ct. 1441, 1448 (2012)).

Under the TFA, "no employer . . . may . . . threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment . . . in reprisal for" engaging in a protected whistleblower activity. 26 U.S.C. § 7623(d)(1). Under the TFA's enforcement provision, "a person who alleges discharge or other reprisal by any person in violation of paragraph (1) may seek relief under paragraph (3) by . . . filing a complaint with the Secretary of Labor." 26 U.S.C. § 7623(d)(2).

The TFA does not define the terms "employer" or "person." However, 26 U.S.C. § 7701(a)(1) states that, "where not otherwise distinctly expressed or manifestly incompatible with the intent thereof," a "person" is defined for the purpose of Title 26 as "an individual, a trust, estate, partnership, association, company, or corporation." 26 U.S.C. § 7701(a)(1). Additionally, there is a well-established presumption that the term "person" does not include the sovereign unless there is an "affirmative showing of statutory intent to the contrary." *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 780-81, 120 S. Ct. 1858, 1866-67 (2000).

As an initial matter, we conclude that Tindall's argument that the doctrine of sovereign immunity is inapplicable to the federal government and its agencies is meritless. It is well established that sovereign immunity shields the federal government and its agencies from suit unless unequivocally waived by an act of Congress. *Meyer*, 510 U.S. at 475, 114 S. Ct. at 1000; *Nordic Val., Inc.*, 503 U.S. at 33-34, 112 S. Ct. at 1014-15.

Here, the ARB correctly found that Congress did not unequivocally waive sovereign immunity through the passage of the TFA. First, the TFA does not define the term "employer," making it unclear whether Congress intended for the substantive provision of the TFA to apply to federal agencies such as the Treasury. However, assuming *arguendo*, as the ALJ did below, that the Treasury was an "employer" under the TFA, the statute still does not unequivocally waive sovereign

immunity as the enforcement provision allows complaints only against a "person." It is well-established that the term "person" does not include the sovereign unless there is an "affirmative showing of statutory intent." *Vt. Agency of Nat. Res.*, 529 U.S. at 781, 120 S. Ct. at 1866-67. In this case, as Congress did not choose to define the term for the purposes of the TFA, the general definition of "person" for Title 26 applies, which does not include the federal government or its agencies. 26 U.S.C. § 7701(a)(1). As such, we conclude that Congress did not unequivocally waive sovereign immunity through the TFA. Therefore, we deny Tindall's petition in this respect as well.

IV.

Issues not raised in an appellant's initial brief are deemed abandoned, and we will not address the issues absent extraordinary circumstances. *United States v. Campbell*, 26 F.4th 860, 873 (11th Cir. 2022) (*en banc*), *cert. denied*, 143 S. Ct. 95 (2022).

Under the "ultra vires" exception, a suit for specific relief may be brought against an officer of the United States acting outside of the scope of his authority or in ways forbidden by the sovereign. *Larson v. Domestic & Foreign Com. Corp.*, 337 U.S. 682, 689, 69 S. Ct. 1457, 1461 (1949). However, an alleged mistake in the exercise of a delegated power is insufficient; rather, relief is proper only where the officer lacked delegated power. *Id.* at 690, 69 S. Ct. at 1461. As such, an aggrieved individual must set out in his complaint the statutory

limitation on which he relies. *Id.* Additionally, the "ultra vires" exception does not apply where a suit would "expend itself on the public treasury" or compel the government to act. *Dugan v. Rank*, 372 U.S. 609, 620, 83 S. Ct. 999, 1006 (1963).

Here, we conclude that the ARB correctly found that the "ultra vires" exception was inapplicable to Tindall's administrative complaint. First, as discussed above, Tindall brought his complaint against the Treasury, not an individual Treasury employee, making the exception inapplicable. Additionally, while asserting numerous abuses by offices of the Treasury and the DOL, Tindall does not argue in his initial brief that the "ultra vires" exception applied to his administrative complaint because it was brought against individual officers of the Treasury. As such, the issue is abandoned. *Campbell*, 26 F.4th at 873. Finally, even if Tindall's administrative complaint and initial brief had named an individual employee of the Treasury, he sought declaratory relief that would compel the government to act, which falls outside the scope of the "ultra vires" exception. *Dugan*, 372 U.S. at 620, 83 S. Ct. at 1006. Accordingly, we deny Tindall's petition in this respect as well.

V.

Section 702 of the APA provides a limited waiver of sovereign immunity allowing for "judicial review" of administrative actions in "a court of the United States" where the relief sought is non-monetary. 5 U.S.C.

§ 702. Because neither the ALJ nor the ARB is a "court of the United States," the ARB correctly found that the APA's waiver of sovereign immunity did not apply to Tindall's administrative proceedings. Thus, under the plain language of the statute, the waiver of sovereign immunity for judicial review is inapplicable. Therefore, we deny Tindall's petition in this respect as well.

VI.

Absent a valid waiver of sovereign immunity, federal agencies are immune from lawsuits for First or Fifth Amendment violations. *See*, *e.g.*, *Meyer*, 510 U.S. at 475, 114 S. Ct. at 1000 (absent a valid waiver of sovereign immunity, federal agencies are immune from lawsuits for due process violations under the Fifth Amendment); *McCollum* v. *Bolger*, 794 F.2d 602, 607-08 (11th Cir. 1986) (holding that federal employees may not sue their employers for violations of their First or Fifth Amendment rights, and dismissing claims for lack of subject-matter jurisdiction and on sovereign immunity grounds); *United States v. Timmons*, 672 F.2d 1373, 1380 (11th Cir. 1982) (upholding dismissal of Fifth Amendment claims on the basis of sovereign immunity). Further, the Constitution provides no waiver of sovereign immunity for Tindall's claims. Accordingly, we deny Tindall's petition in this respect as well.

Based on the aforementioned reasons, we conclude that Tindall's arguments are meritless, and we deny his petition for review.

PETITION FOR REVIEW DENIED.

U.S. Department of Labor Administrative Review Board
200 Constitution Ave. NW [SEAL]
Washington, DC 20210-0001

In the Matter of:

JAMES W. TINDALL, ARB CASE NO. 2022-0030

COMPLAINANT, ALJ CASE NO. 2021-TAX-00005

v. DATE: May 16, 2022

UNITED STATES DEPARTMENT OF THE TREASURY,

RESPONDENT.

Appearances:

For the Complainant:
James W. Tindall; *pro se*; *Marietta, Georgia*

For the Respondent:
Kimberly S. Barsa, Esq. and Jordan L. Thomas, Esq.; *Internal Revenue Service Office of Chief Counsel*; Washington, District of Columbia

Before: James D. McGinley, *Chief Administrative Appeals Judge* and Stephen M. Godek, *Administrative Appeals Judge*

DECISION AND ORDER

PER CURIAM. James W. Tindall (Complainant) filed a complaint under the Taxpayer First Act of 2019[1] (TFA or TAX), and its implementing regulations,[2] alleging that his employer, the Internal Revenue Service, a bureau of the Department of the Treasury (Respondent), unlawfully discriminated against him under TFA's whistleblower protection provisions.[3] An Administrative Law Judge (ALJ) found that Complainant failed to prove that the TFA contains an explicit waiver of sovereign immunity as to whistleblower claims against the United States. Complainant appealed the ALJ's decision to the Administrative Review Board (Board). We affirm.

The Secretary of Labor has delegated to the Board the authority to issue agency decisions in this matter.[4] The Board reviews an ALJ's conclusions of law de novo.[5]

Upon review of the ALJ's Decision and Order Dismissing Complaint for Lack of Subject Matter

---

[1] The procedures set forth at 29 C.F.R. § 1989 apply until the Occupational Safety and Health Administration promulgates procedures specific to the TFA. *See* 26 U.S.C. § 7623(d)(2)(B)(i).

[2] 29 C.F.R. § 1989 (2021).

[3] 26 U.S.C. § 7623(d)(1).

[4] Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 85 Fed. Reg. 13186 (Mar. 6, 2020).

[5] *See Garza v. Saulsbury Indus.*, ARB No. 2018-0036, ALJ No. 2016-WPC-00002, slip op. at 3 (ARB June 29, 2020) (citations omitted).

Jurisdiction, we conclude that it is a well-reasoned ruling based on the applicable law. The Supreme Court has held "that a waiver of sovereign immunity must be 'unequivocally expressed' in statutory text."[6] Relevant in the current case, the anti-retaliation provision of TFA prohibits any "employer" from retaliating against any employee,[7] while the enforcement section of TFA states that that "[a] person who alleges discharge or other reprisal by any person" may seek relief.[8] The statute does not explicitly define "employer" or "person."[9]

On March 22, 2022, the Department of Labor (Department) published an interim final regulation explaining that "[a] person who believes they have been discharged or otherwise retaliated against by any person in violation of TFA may file" a complaint.[10] The Department defined "person" as "mean[ing] an individual, partnership, company, corporation, association (incorporated or unincorporated), trust, or estate."[11] The Department did not identify the Department of Treasury or any other governmental entities as a "person"

---

[6] *FAA v. Cooper*, 566 U.S. 284, 290 (2012) (quoting *Lane v. Pena*, 518 U.S. 187, 192 (1996)).

[7] 26 U.S.C. § 7623(d)(1).

[8] 26 U.S.C. § 7623(d)(2).

[9] *See Peck v. U.S. Dep't of Lab., Admin. Rev. Bd.*, 996 F.3d 224, 230-32 (4th Cir. 2021) (rejecting the argument that "employer" and "person" should be given be the same meaning under the Energy Reorganization Act of 1974's (ERA) anti-retaliation and remedy provisions).

[10] 29 C.F.R. § 1989.103(a).

[11] 29 C.F.R. § 1989.101.

from whom relief may be sought under TFA's anti-retaliation provision. The Board is bound by the Department's regulations.[12]

Complainant failed to demonstrate that the whistleblower provision of TAX contains an unequivocal expression of intent to waive sovereign immunity. Accordingly, we **AFFIRM**, **ADOPT**, and **ATTACH** the ALJ's Decision and Order Dismissing Complaint for Lack of Subject Matter Jurisdiction.[13]

SO ORDERED.[14]

---

[12] Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 85 Fed. Reg. 13186, 13187 (Mar. 6, 2020) ("The Board shall not have jurisdiction to pass on the validity of any portion of the Code of Federal Regulations that has been duly promulgated by the Department of Labor and shall observe the provisions thereof . . . "); *Stouffer Foods Corp. v. Dole*, No. 7:89-2149-3, 1990 WL 58502, * 1 (D. S. C. Jan. 23, 1990) (citations omitted) ("Defendant's [[Department of Labor] administrative law judges are bound by Executive Order 11246 and its implementing regulations; they have no jurisdiction to pass on their validity.").

[13] In affirming the ALJ's Order, we reject the Complainant's argument on appeal that the ALJ erred by concluding neither the waiver of sovereign immunity in the Administrative Procedure Act or the ultra vires exception to sovereign immunity were applicable to the current case.

[14] In any appeal of this Decision and Order that may be filed, we note that the appropriately named party is the Secretary, Department of Labor (not the Administrative Review Board).

U.S. Department of Labor
Office of Administrative Law Judges 800 K Street, NW
Washington, DC 20001-8002
(202) 693-7350
(202) 693-7365 (FAX)

[SEAL]

Issue Date: 04 March 2022

OALJ Case No.: 2021-TAX-00005
OSHA Case No. 4-5070-21-125

In the Matter of

JAMES W. TINDALL,
Complainant,

v.

UNITED STATES DEPARTMENT OF THE TREASURY,
Respondent.

Appearances:

James W. Tindall, In Pro Per
Marietta, Georgia
For the Complainant

Jennifer D. Auchterlonie, Esq.
Office of Chief Counsel
Internal Revenue Service
U.S. Department of the Treasury
Washington, District of Columbia
For the Respondent

Sarah J. Starrett, Esq.
Office of the Solicitor
U.S. Department of Labor
Washington, District of Columbia
For Amicus Curiae

DECISION AND ORDER DISMISSING COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION

Complainant James W. Tindall, representing himself, is suing the United States Department of the Treasury ("Treasury"). The case stems from a request he filed with the Taxpayer Advocate Service[1] seeking assistance in collecting a 2019 whistleblower award. Complainant avers that Treasury employees responded to this request by threatening to investigate him. He alleges this violates the Taxpayer First Act of 2019 ("TAX" or "TFA"),[2] 26 U.S.C. § 7623(d).[3]

Background and Procedural History

Complainant initiated the above captioned action when he filed a complaint with the Department of Labor's Occupational Safety and Health Administration ("OSHA") on June 4, 2021. On July 23, 2021, the

---

[1] The Taxpayer Advocate Service is an independent organization within the Internal Revenue Service for taxpayers seeking help in resolving problems that they have not been able to resolve by themselves. *See* "We're your voice at the IRS," TAXPAYER ADVOCATE SERVICE, www.taxpayeradvocate.irs.gov (last visited Feb. 28, 2022).

[2] The TFA prohibits retaliation by employers for lawful acts of their employees in providing information to or assisting the federal government in an investigation relating to underpayment of taxes or other violation of the internal revenue laws. 26 U.S.C. § 7623(d)(1).

[3] The procedures set forth at 29 C.F.R. § 1979 apply until the Occupational Safety and Health Administration promulgates procedures specific to the TFA. *See* 26 U.S.C. § 7623(d)(2)(B)(i).

Secretary of Labor, acting through an OSHA Regional Administrator, dismissed the complaint after concluding that Treasury is "a federal agency and is NOT a person within the meaning of 29 U.S.C. § 652(4)" and "Complainant is a current federal employee . . . [of the] US Department of Treasury; and therefor (sic) NOT an employee within the meaning of 29 U.S.C. § 652(6)." [emphasis in original].[4] Complainant appealed by filing a letter with the Office of Administrative Law Judges ("OALJ") on July 24, 2021, and OALJ docketed the case the same day.

Based on OSHA's determination letter, there appeared to be a question of whether Congress has waived Treasury's sovereign immunity under the TFA, making the relief Complainant seeks available. In other words, absent an express waiver of sovereign immunity by Congress, Treasury may be shielded from suit, to include an administrative adjudication such as this one.[5] Accordingly, prior to addressing the merits of

---

[4] The OSHA investigator cited to 29 U.S.C. § 652(5) in the findings determination letter. That section provides that "[t]he term 'employer' means a person engaged in a business affecting commerce who has employees, but does not include the United States (not including the United States Postal Service) or any State or political subdivision of a State." It appears the OSHA investigator used definitions as set forth in the Occupational Safety and Health Act of 1970 and not the TFA. The term "employer" does not appear to be defined in the TFA, and there are no current regulations specific to the TFA. While the procedures set forth in 29 CFR 1979 apply until then, the definitions in that regulation appear to be specific to AIR-21.

[5] *See Fed. Mar. Comm'n v. State Ports Auth.*, 535 U.S. 743, 761 (2002).

Complainant's allegations, on September 8, 2021 I issued *Notice of Docketing and Order to Show Cause Why Matter Should Not Be Dismissed for Lack of Subject Matter Jurisdiction* ("OTSC").[6] Complainant filed his response on September 17, 2021 ("Comp. Br."), and Respondent on October 14, 2021 ("Resp. Br."). The Solicitor of Labor filed a brief as amicus curiae on November 8, 2021 ("Am. Br."). On November 14, 2021, Complainant filed *Rebuttal to Respondent's Response to Order to Show Cause and Brief for the Solicitor of Labor* ("Reb.").

For the reasons more fully explained below, I conclude Congress has not unequivocally waived the Department of the Treasury's sovereign immunity under the TFA. Finding no other basis upon which to vest this tribunal with jurisdiction, Complainant's June 4, 2021 complaint must be dismissed.

---

[6] OALJ docketed the case identifying Complainant as "Whit Tindall," the name in the June 4, 2021 complaint, the July 23, 2021 OSHA findings, and July 24, 2021 appeal letter, and the September 8, 2021 OTSC also identified Complainant as such. On September 10, 2021, Complainant moved to correct the case caption by substituting his correct legal name of "James W. Tindall" and replacing the Department of Treasury ("Treasury") as the named Respondent with the Department of Labor ("DOL"). Complainant asserts that because "DOL's dismissal of Complainant's complaint never addressed the actual conduct by Treasury but resulted from the DOL's improper definition of employer," DOL is the proper Respondent. I disagree. OSHA's dismissal of the complaint does not make it a party to these proceedings. Accordingly, that part of the Motion to substitute "James W. Tindall" for "Whit Tindall" is GRANTED and that part of the motion to substitute the DOL for Treasury is DENIED.

Summaries of the Parties' Positions

Complainant, a revenue agent with the Internal Revenue Service ("IRS"), a bureau of the Department of the Treasury, alleges that Treasury agents violated the employee protection provisions of the TFA when they threatened to investigate him after he filed a complaint with the Taxpayer Advocate Service requesting assistance in collecting a 2019 whistleblower award.[7] While appearing to acknowledge that sovereign immunity generally shields federal agencies from being sued, Complainant posits that the waiver of sovereign immunity for Treasury can be found in the text of the TFA itself. (Comp. Br. at 13-18). Complainant also advances two alternative theories in support of a waiver of sovereign immunity in this case: the ultra vires exception to sovereign immunity (Comp Br. at 9) and the Administrative Procedure Act exception to sovereign immunity (Comp. Br. at 11). Complainant seeks an order from this tribunal compelling the IRS to pay him the whistleblower award.

Counsel for the Respondent avers that no federal court has yet examined whether sovereign immunity bars a complaint against a federal agency under the

---

[7] The IRS administers two award programs that pay individuals who provide information to the IRS regarding tax violations, 26 U.S.C. § 7623(a) and § 7623(b). It appears Complainant applied for awards under both programs and received an award under Section § 7623(a). Complainant appealed the denial of the Section 7623(b) award, and the payment of his award under 7623(a) has apparently been withheld pending the outcome of the appeal. It is this refusal to pay that appears to form the basis of the instant retaliation action.

TFA's anti-retaliation provisions. Accordingly, Respondent urges this tribunal look to similar whistleblower retaliation statutes for guidance. (Resp. Br. at 3-5). Respondent submits that the Administrative Review Board's ("ARB") decision in *Peck v. Nuclear Regulatory Commission* is instructive.[8] In *Peck* the ARB denied a complaint filed against the Nuclear Regulatory Commission under the Energy Reorganization Act's ("ERA") whistleblower protection provisions, concluding that as "the whistleblower protection provisions of the ERA do not contain an unequivocal expression of intent to waive sovereign immunity, the United States has not waived sovereign immunity for ERA whistleblower claims [against the Nuclear Regulatory Commission ("NRC")]."[9] The United States Court of Appeals for the Fourth Circuit affirmed the ARB's order in *Peck*.[10] Respondent submits the ARB and the Fourth Circuit's analysis in *Peck* applies here. Like the ERA's anti-retaliation enforcement provisions, 26 U.S.C. § 7623(d) limits suits to those against a "person," and the Department of Treasury is not a "person," absent an affirmative showing to the contrary. Complainant has not done so, and this tribunal lacks jurisdiction. (Resp. Br. at 5). Respondent also avers that this case does not fall within the ultra vires or APA exceptions to sovereign immunity.

---

[8] ARB No. 17-062 (Dec. 19, 2019).

[9] *Peck*, ARB No. No. 17-062, at 12.

[10] *Peck v. U.S. Dep' of Labor*, 996 F.3d 224 (4th Cir. 2021).

Counsel for the Solicitor of Labor, as amicus curiae, submits that, while the TFA prohibits retaliation by "employers," the remedies section only authorizes complaints against "persons" and the relevant definitions do not include the United States or its departments and agencies. Consistent with ARB and federal court precedent addressing similarly constructed statutes, as Congress has not unequivocally waived the Department of the Treasury's sovereign immunity, the complaint must be dismissed. (Am. Br. at 1). As to Complainant's assertion that the APA waives Treasury's sovereign immunity, while Section 702 of the APA does provide for judicial review of agency action, ARB precedent has held this provision inapplicable to administrative proceedings such as this one. (Am. Br. at 15). Finally, as to Complainant's argument the ultra vires exception grants jurisdiction here, while courts have recognized lawsuits against federal employees acting in their individual capacity or when acting outside the scope of their official authority, this complaint was not filed in a court and does not name any individual Treasury officer or employee. (Am. Br. at 16).

Discussion

Waiver Of Sovereign Immunity in the Taxpayer First Act

Sovereign immunity shields a federal agency from suit absent a waiver by the U.S. government,[11] and the

[11] "The government is not liable to suit unless it consents thereto, and its liability in suit cannot be extended beyond the

waiver must be established by the statute itself.[12] In other words, Congress must unequivocally waive sovereign immunity to allow suit against a federal agency. *See, e.g., United States v. Mitchell*, 445 U.S. 535, 538 (1980). This sovereign immunity inquiry must focus on the enforcement provision of the statute and not simply the substantive provisions. In other words, even if a statute proscribes a federal agency from acting in a particular manner, that same agency is immune from being sued for such violations unless the statute clearly and unambiguously authorizes it.

As is relevant here, the TFA provides that "[n]o employer, . . . may . . . threaten, harass, or in any other manner discriminate against an employee . . . in reprisal for" engaging in a protected activity. 26 U.S.C. § 7623(d)(1)(A). Any person alleging such reprisal "by any person" may seek relief through the DOL complaint process. 26 U.S.C. § 7623(d)(2)(A).

Assuming, but not deciding, that Treasury is an "employer" and subject to the TFA's anti-retaliation proscriptions, sovereign immunity is not waived unless the TFA's remedial provision clearly and unequivocally allows for a suit against the Treasury. It is here that Complainant fails to demonstrate that Congress

---

plain language of the statute authorizing it." *Price v. United States*, 174 U.S. 373, 375-76 (1899).

[12] *United States v. Nordic Village Inc.*, 503 U.S. 30, 37 (1992) ("[L]egislative history has no bearing on the ambiguity point . . . the 'unequivocal expression' of elimination of sovereign immunity that we insist upon is an expression in statutory text.").

has unequivocally eliminated the Department of the Treasury's sovereign immunity.

Complainant posits that the clear and unequivocal waiver of sovereign immunity comes from the fact that the statute prohibits employers from retaliating against an employee for engaging in TFA-protected activity. In other words, Complainant submits the only prerequisite to jurisdiction is an employer-employee relationship. For jurisdiction to be established, as Complainant argues, it is sufficient to show that the Department of the Treasury employs Complainant.

Complainant mistakenly conflates two distinct sections of the TFA: the section on retaliation, which does prohibit employers from retaliating against an employee for engaging in TFA protected activity, and a separate enforcement section that authorizes any person alleging such reprisal [under § 7623(d)(1)(a)] "**by any person**" may seek relief through the DOL complaint process. 26 U.S.C. § 7623(d)(2)(A) (emphasis added). Assuming, but not deciding, the TFA's prohibitions against retaliation apply to Treasury as Complainant's "employer," inclusion as a regulated entity does not waive sovereign immunity from suit to enforce alleged violations. The TFA authorizes such actions only against a "person" and the case law clearly supports a finding that "person" in this instance does not include Treasury.

In *Peck v. Nuclear Regulatory Commission*,[13] the ARB denied a complaint filed under the ERA's whistleblower protection provisions, a similarly constructed statute as the TFA,[14] concluding that sovereign immunity is not waived where the NRC was not specifically included in the remedy section of the statute, in spite of the agency being enumerated elsewhere in a list of covered employers.[15] The ARB held that the term "person" as used in the enforcement section of the ERA anti-retaliation provisions "is a term of art that generally excludes the federal government," absent a specific showing to the contrary. *Peck*, ARB No. 17-062, at 5.

The United States Court of Appeals for the Fourth Circuit affirmed the ARB's order in *Peck* in a published decision issued on April 30, 2021.[16] The Fourth Circuit found the ERA contains no explicit waiver of sovereign immunity with respect to whistleblower claims against the United States, to include those against the NRC, and the NRC's inclusion as a regulated entity in the substantive provisions of the statute was not sufficient

---

[13] ARB No. 17-062 (Dec. 19, 2019).

[14] The ERA generally protects employees in the nuclear power industry who speak out about nuclear power hazards. The procedural regulations implementing the ERA are found at 29 C.F.R. Part 24. The ERA provides that "any employee who believes that he has been discharged or otherwise discriminated against by any person may file a complaint with the Secretary of Labor." 42 U.S.C. §5881(b)(1).

[15] *Peck*, ARB No. 17-062, at 12.

[16] "Waiving sovereign immunity is a legislative, not a judicial, prerogative. And the legislature has not exercised that prerogative here." *Peck*, 996 F.3d at 234.

to find Congress waived sovereign immunity for purposes of enforcement. *Peck*, 996 F.3d at 230. The Fourth Circuit's analysis in *Peck* applies equally here. There is no explicit waiver of sovereign immunity in the text of the TFA, the Treasury is not included in any provisions defining "person," and it is not mentioned in the remedy provisions.[17]

Complainant is employed by the IRS, a bureau of the Department of the Treasury. He is suing Treasury for actions he alleges violate the anti-retaliation provisions of the TFA. Assuming, but not deciding, that Treasury is an "employer" subject to the Act's proscriptions prohibiting retaliation against its employees, it is not a "person" for purposes of the Act's enforcement provisions that would allow Complainant to proceed with this administrative action seeking relief for such violations.

---

[17] The TFA refers, in different provisions, to "employer," "person," and "employee prevailing," but does not define "employer" or "person." The TFA provides, in pertinent part, that "[n]o **employer**, or any officer, employee, contractor, subcontractor, or agent of such employer, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment (including through an act in the ordinary course of such employee's duties) in reprisal for" engaging in a protected activity. 26 U.S.C. § 7623(d) (emphasis added). The provisions on enforcement action allow a person alleging reprisal "by **any person**" to seek relief through the **DOL** complaint process. 26 U.S.C. § 7623(d)(2)(A) (emphasis added). Finally, the remedies section specifies only that remedies apply to "[a]n **employee prevailing**." 26 U.S.C. § 7623(d)(3) (emphasis added).

Ultra Vires Exception To Sovereign Immunity

An exception to federal sovereign immunity, an ultra vires claim requires a Complainant to allege a government official acted without legal authority or failed to perform a purely ministerial act. Thus, the exception only applies where a claim is brought against a government employee and not the sovereign. *See generally Larson v. Domestic & Foreign Com. Corp.* 337 U.S. 682, 689 (1949). Assuming, but not deciding, that the ultra vires exception applies to administrative proceedings such as this, Complainant names only the Department of the Treasury and not an individual employee. Accordingly, I reject the argument that ultra vires exception to sovereign immunity applies here.

The Administrative Procedure Act Exception to Sovereign Immunity

The Administrative Procedure Act does provide for judicial review of an agency action in a court of the United States seeking relief other than for money damages.[18] However, the ARB has held this provision

[18] Section 702 of the Administrative Procedure Act provides, in pertinent part, that "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to **judicial review** thereof. **An action in a court of the United States** seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party." 5 U.S.C. § 702 (emphasis added).

inapplicable to administrative proceedings. In *Mull v. Salisbury Veterans Admin. Med. Ctr.*, ARB No. 09-107, ALT No. 2008-ERA-008 (ARB Aug. 31, 2011), the ARB held that Section 702 of the APA "applies only to the judiciary and is not applicable to administrative agency tribunals."[19] *Mull*, ARB No. 09-107, slip op. at 5.

Administrative law judges of the U.S. Department of Labor are bound by ARB precedent that is directly applicable and not reversed or superseded. The ARB's holding in *Mull* is on point, has the force of law, and is controlling in this matter. The APA exception to sovereign immunity is inapplicable in this administrative proceeding brought against the Department of the Treasury under the provisions of 26 U.S.C. § 7623(d), and I reject Complainant's argument to the contrary.

ORDER

Congress has not unequivocally waived the Department of the Treasury's sovereign immunity under the TFA. Finding no other basis upon which to vest this tribunal with jurisdiction, Complainant's June 4, 2021 complaint must be dismissed. Accordingly, as this tribunal lacks jurisdiction, the above captioned complaint filed by James W. Tindall against the United States

---

[19] *See generally Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) (declaring that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

Department of the Treasury under 26 U.S.C. § 7623(d), and pending before the United States Department of Labor, is hereby DISMISSED.

SO ORDERED:

[SEAL]

Digitally signed by STEPHEN R. HENLEY
DN: CN=STEPHEN R. HENLEY, OU=ADMINISTRATIVE LAW JUDGE, O=US DOL Office of Administrative Law Judges, L=Washington, S=DC, C=US
Location: Washington D C

STEPHEN R. HENLEY
Chief Administrative Law Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 22-11770-DD

JAMES W. TINDALL,

Petitioner,

versus

U.S. DEPARTMENT OF
LABOR ADMINSTRATIVE
REVIEW BOARD,

Respondent.

Petition for Review of a Decision of the
Department of Labor

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Filed Jun. 1, 2023)

BEFORE: NEWSOM, GRANT, and DUBINA, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc.

(FRAP 35) The Petition for Panel Rehearing is also denied. (FRAP 40)

Constitutional & Statutory Provisions

U.S. Const., Article III, Sec. 2:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State, between Citizens of different States, between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Const., 1st Amendment:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const., 5th Amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put

in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const., 10th Amendment:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

26 U.S.C. §3401(c):

"Employee"

For purposes of this chapter, the term "employee" includes an officer, employee, or elected official of the United States, a State, or any political subdivision thereof, or the District of Columbia, or any agency or instrumentality of any one or more of the foregoing. The term "employee" also includes an officer of a corporation.

26 U.S.C. §3401(d):

"Employer"

For purposes of this chapter, the term "employer" means the person for whom an individual performs or performed any service, of whatever nature, as the employee of such person, except that

(1) if the person for whom the individual performs or performed the services does not have control of the payment of the wages for such

services, the term "employer" (except for purposes of subsection (a)) means the person having control of the payment of such wages, and

(2) in the case of a person paying wages on behalf of a nonresident alien individual, foreign partnership, or foreign corporation, not engaged in trade or business within the United States, the term "employer" (except for purposes of subsection (a)) means such person.

26 U.S.C. §7623(a):

(a) IN GENERAL

The Secretary, under regulations prescribed by the Secretary, is authorized to pay such sums as he deems necessary for

(1) detecting underpayments of tax, or

(2) detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws or conniving at the same, in cases where such expenses are not otherwise provided for by law. Any amount payable under the preceding sentence shall be paid from the proceeds of amounts collected by reason of the information provided, and any amount so collected shall be available for such payments.

26 U.S.C. §7623(b):

(b) AWARDS TO WIHSTLEBLOWERS

(1) IN GENERAL

If the Secretary proceeds with any administrative or judicial action described in

subsection (a) based on information brought to the Secretary's attention by an individual, such individual shall, subject to paragraph (2), receive as an award at least 15 percent but not more than 30 percent of the proceeds collected as a result of the action (including any related actions) or from any settlement in response to such action (determined without regard to whether such proceeds are available to the Secretary). The determination of the amount of such award by the Whistleblower Office shall depend upon the extent to which the individual substantially contributed to such action.

(2) AWARD IN CASE OF LESS SUBSTANTIAL CONTRIBUTION

(A) In general

In the event the action described in paragraph (1) is one which the Whistleblower Office determines to be based principally on disclosures of specific allegations (other than information provided by the individual described in paragraph (1)) resulting from a judicial or administrative hearing, from a governmental report, hearing, audit, or investigation, or from the news media, the Whistleblower Office may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds collected as a result of the action (including any related actions) or from any settlement in response to such action (determined

without regard to whether such proceeds are available to the Secretary), taking into account the significance of the individual's information and the role of such individual and any legal representative of such individual in contributing to such action.

(B) Nonapplication of paragraph where individual is original source of information

Subparagraph (A) shall not apply if the information resulting in the initiation of the action described in paragraph (1) was originally provided by the individual described in paragraph (1).

(3) REDUCTION IN OR DENIAL OF AWARD

If the Whistleblower Office determines that the claim for an award under paragraph (1) or (2) is brought by an individual who planned and initiated the actions that led to the underpayment of tax or actions described in subsection (a)(2), then the Whistleblower Office may appropriately reduce such award. If such individual is convicted of criminal conduct arising from the role described in the preceding sentence, the Whistleblower Office shall deny any award.

(4) APPEAL OF AWARD DETERMINATION

Any determination regarding an award under paragraph (1), (2), or (3) may, within 30 days of such determination, be appealed to the Tax Court (and the Tax

Court shall have jurisdiction with respect to such matter).

(5) APPLICATION OF THIS SUBSECTION

This subsection shall apply with respect to any action

(A) against any taxpayer, but in the case of any individual, only if such individual's gross income exceeds $200,000 for any taxable year subject to such action, and

(B) if the proceeds in dispute exceed $2,000,000.

(6) ADDITIONAL RULES

(A) No contract necessary

No contract with the Internal Revenue Service is necessary for any individual to receive an award under this subsection.

(B) Representation

Any individual described in paragraph (1) or (2) may be represented by counsel.

(C) Submission of information

No award may be made under this subsection based on information submitted to the Secretary unless such information is submitted under penalty of perjury.

26 U.S.C. §7623(d):

(d) CIVIL ACTION TO PROTECT AGAINST RETALIATION CASES

(1) ANTI-RETALIATION WHISTLEBLOWER PROTECTION FOR EMPLOYEES

No employer, or any officer, employee, contractor, subcontractor, or agent of such employer, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment (including through an act in the ordinary course of such employee's duties) in reprisal for any lawful act done by the employee

(A) to provide information, cause information to be provided, or otherwise assist in an investigation regarding underpayment of tax or any conduct which the employee reasonably believes constitutes a violation of the internal revenue laws or any provision of Federal law relating to tax fraud, when the information or assistance is provided to the Internal Revenue Service, the Secretary of the Treasury, the Treasury Inspector General for Tax Administration, the Comptroller General of the United States, the Department of Justice, the United States Congress, a person with supervisory authority over the employee, or any other person working for the employer who has the authority to investigate, discover, or terminate misconduct, or

(B) to testify, participate in, or otherwise assist in any administrative or judicial action taken by the Internal Revenue Service relating to an alleged underpayment of tax or any violation of the internal revenue laws or any provision of Federal law relating to tax fraud.

(2) ENFORCEMENT ACTION

(A) In general

A person who alleges discharge or other reprisal by any person in violation of paragraph (1) may seek relief under paragraph (3) by

(i) filing a complaint with the Secretary of Labor, or

(ii) if the Secretary of Labor has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant, bringing an action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy.

(B) Procedure

(i) In general

An action under subparagraph (A)(i) shall be governed under the rules

and procedures set forth in section 42121(b) of title 49, United States Code.

(ii) Exception

Notification made under section 42121(b)(1) of title 49, United States Code, shall be made to the person named in the complaint and to the employer.

(iii) Burdens of proof

An action brought under subparagraph (A)(ii) shall be governed by the legal burdens of proof set forth in section 42121(b) of title 49, United States Code, except that in applying such section

(I) "behavior described in paragraph (1)" shall be substituted for "behavior described in paragraphs (1) through (4) of subsection (a)" each place it appears in paragraph (2)(B) thereof, and

(II) "a violation of paragraph (1)" shall be substituted for "a violation of subsection (a)" each place it appears.

(iv) Statute of limitations

A complaint under subparagraph (A)(i) shall be filed not later than 180 days after the date on which the violation occurs.

(v) Jury trial

A party to an action brought under subparagraph (A)(ii) shall be entitled to trial by jury

(3) REMEDIES

(A) In general

An employee prevailing in any action under paragraph (2)(A) shall be entitled to all relief necessary to make the employee whole.

(B) Compensatory damages

Relief for any action under subparagraph (A) shall include

(i) reinstatement with the same seniority status that the employee would have had, but for the reprisal,

(ii) the sum of 200 percent of the amount of back pay and 100 percent of all lost benefits, with interest, and

(iii) compensation for any special damages sustained as a result of the reprisal, including litigation costs, expert witness fees, and reasonable attorney fees.

(4) RIGHTS RETAINED BY EMPLOYEE

Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law, or under any collective bargaining agreement.

(5) NONENFORCEABILITY OF CERTAIN PROVISIONS WAIVING RIGHTS AND REMEDIES OR REQUIRING ARBITRATION OF DISPUTES

(A) Waiver of rights and remedies

The rights and remedies provided for in this subsection may not be waived by any agreement, policy form, or condition of employment, including by a predispute arbitration agreement.

(B) Predispute arbitration agreements

No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this subsection.

26 U.S.C. §7701(a)(28):

Other Terms

Any term used in this subtitle with respect to the application of, or in connection with, the provisions of any other subtitle of this title shall have the same meaning as in such provisions.

29 U.S.C. §652:

§652. Definitions

For the purposes of this chapter

(1) The term "Secretary" means the Secretary of Labor.

(2) The term "Commission" means the Occupational Safety and Health Review Commission established under this chapter.

(3) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between a State and any place outside thereof, or within the District of Columbia, or a possession of the United States (other than the Trust Territory of the Pacific Islands), or between points in the same State but through a point outside thereof.

(4) The term "person" means one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of persons.

(5) The term "employer" means a person engaged in a business affecting commerce who has employees, but does not include the United States (not including the United States Postal Service) or any State or political subdivision of a State.

(6) The term "employee" means an employee of an employer who is employed in a business of his employer which affects commerce.

(7) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, and the Trust Territory of the Pacific Islands.

(8) The term "occupational safety and health standard" means a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or

appropriate to provide safe or healthful employment and places of employment.

(9) The term "national consensus standard" means any occupational safety and health standard or modification thereof which (1) has been adopted and promulgated by a nationally recognized standards-producing organization under procedures whereby it can be determined by the Secretary that persons interested and affected by the scope or provisions of the standard have reached substantial agreement on its adoption, (2) was formulated in a manner which afforded an opportunity for diverse views to be considered and (3) has been designated as such a standard by the Secretary, after consultation with other appropriate Federal agencies.

(10) The term "established Federal standard" means any operative occupational safety and health standard established by any agency of the United States and presently in effect, or contained in any Act of Congress in force on December 29, 1970.

49 U.S.C. §42121(b)(1) through (4):

(b) DEPARTMENT OF LABOR COMPLAINT PROCEDURE.—

(1) FILING AND NOTIFICATION.—

A person who believes that he or she has been discharged or otherwise discriminated against by any person in violation of subsection (a) may, not later than 90 days after the date on which such violation occurs, file (or

have any person file on his or her behalf) a complaint with the Secretary of Labor alleging such discharge or discrimination. Upon receipt of such a complaint, the Secretary of Labor shall notify, in writing, the person named in the complaint and the Administrator of the Federal Aviation Administration of the filing of the complaint, of the allegations contained in the complaint, of the substance of evidence supporting the complaint, and of the opportunities that will be afforded to such person under paragraph (2).

(2) INVESTIGATION; PRELIMINARY ORDER.—

(A) In general.—

Not later than 60 days after the date of receipt of a complaint filed under paragraph (1) and after affording the person named in the complaint an opportunity to submit to the Secretary of Labor a written response to the complaint and an opportunity to meet with a representative of the Secretary to present statements from witnesses, the Secretary of Labor shall conduct an investigation and determine whether there is reasonable cause to believe that the complaint has merit and notify, in writing, the complainant and the person alleged to have committed a violation of subsection (a) of the Secretary's findings. If the Secretary of Labor concludes that there is a reasonable cause to believe that a violation of subsection (a) has occurred, the Secretary shall

accompany the Secretary's findings with a preliminary order providing the relief prescribed by paragraph (3)(B). Not later than 30 days after the date of notification of findings under this paragraph, either the person alleged to have committed the violation or the complainant may file objections to the findings or preliminary order, or both, and request a hearing on the record. The filing of such objections shall not operate to stay any reinstatement remedy contained in the preliminary order. Such hearings shall be conducted expeditiously. If a hearing is not requested in such 30-day period, the preliminary order shall be deemed a final order that is not subject to judicial review.

(B) Requirements.—

(i) Required showing by complainant.—

The Secretary of Labor shall dismiss a complaint filed under this subsection and shall not conduct an investigation otherwise required under subparagraph (A) unless the complainant makes a prima facie showing that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint.

(ii) Showing by employer.—

Notwithstanding a finding by the Secretary that the complainant has made the showing required under clause (i), no investigation otherwise required under subparagraph (A) shall be conducted if the employer demonstrates, by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

(iii) Criteria for determination by secretary.—

The Secretary may determine that a violation of subsection (a) has occurred only if the complainant demonstrates that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint.

(iv) Prohibition.—

Relief may not be ordered under subparagraph (A) if the employer demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

(3) FINAL ORDER.—

(A) Deadline for issuance; settlement agreements.—

Not later than 120 days after the date of conclusion of a hearing under paragraph (2), the Secretary of Labor shall issue a final order providing the relief prescribed by this paragraph or denying the complaint. At any time before issuance of a final order, a proceeding under this subsection may be terminated on the basis of a settlement agreement entered into by the Secretary of Labor, the complainant, and the person alleged to have committed the violation.

(B) Remedy.—If, in response to a complaint filed under paragraph (1), the Secretary of Labor determines that a violation of subsection (a) has occurred, the Secretary of Labor shall order the person who committed such violation to—

(i) take affirmative action to abate the violation;

(ii) reinstate the complainant to his or her former position together with the compensation (including back pay) and restore the terms, conditions, and privileges associated with his or her employment; and

(iii) provide compensatory damages to the complainant.

If such an order is issued under this paragraph, the Secretary of Labor, at the request of the complainant, shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys' and expert witness fees) reasonably incurred, as determined by the Secretary of Labor, by the complainant for, or in connection with, the bringing the complaint upon which the order was issued.

(C) Frivolous complaints.—If the Secretary of Labor finds that a complaint under paragraph (1) is frivolous or has been brought in bad faith, the Secretary of Labor may award to the prevailing employer a reasonable attorney's fee not exceeding $1,000.

(4) REVIEW.—

(A) Appeal to court of appeals.—

Any person adversely affected or aggrieved by an order issued under paragraph (3) may obtain review of the order in the United States Court of Appeals for the circuit in which the violation, with respect to which the order was issued, allegedly occurred or the circuit in which the complainant resided on the date of such violation. The petition for review must be filed not later than 60 days after the date of the issuance of the final order of the Secretary of Labor. Review shall conform

to chapter 7 of title 5, United States Code. The commencement of proceedings under this subparagraph shall not, unless ordered by the court, operate as a stay of the order.

(B) Limitation on collateral attack.—

An order of the Secretary of Labor with respect to which review could have been obtained under subparagraph (A) shall not be subject to judicial review in any criminal or other civil proceeding.