



U.S. Department of Justice

Civil Rights Division

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December 5, 2011

John Ley, Clerk of the Court  
U.S. Court of Appeals for the Eleventh Circuit  
56 Forsyth Street, N.W.  
Atlanta, GA 30303

Re: *United States v. Alabama Dep't of Mental Health*, No. 10-15976-DD

Dear Mr. Ley:

At oral argument in this case on November 17, 2011, the Court requested Defendant-Appellant Alabama Department of Mental Health (ADMH) to file a supplemental letter brief addressing whether the Fourth Circuit's decision in *Chao v. Virginia Department of Transportation*, 291 F.3d 276 (2002), is contrary to its position in this case. The Court also afforded the United States, Plaintiff-Appellee, the opportunity to file a response. ADMH has filed a supplemental letter brief, and the United States submits this letter brief in reply.

1. In *Chao*, the Fourth Circuit held that Virginia's sovereign immunity did not bar an action brought by the Secretary of Labor alleging that the Virginia Department of Transportation (VDOT) had violated the overtime and record-keeping provisions of the Fair Labor Standards Act. See 291 F.3d at 280-282. Seeking to avoid established precedent that the Eleventh Amendment does not prevent the United States from suing a State, VDOT argued that: (1) the

Secretary's suit for back wages was in essence a private suit, which would be barred by the State's sovereign immunity; (2) the Secretary was not asserting a national interest in that case, but was merely asserting a private interest in recovering back wages on behalf of the VDOT inspectors; and (3) the Secretary was not the real party in interest, but was only acting on behalf of the inspectors to avoid the Eleventh Amendment prohibition. *Id.* at 280-281. The Fourth Circuit rejected each of these contentions, and held that Virginia's sovereign immunity did not bar the Secretary's suit. *Id.* at 282. In so holding, the court noted that the suit "is being litigated by lawyers within, and is under the full control of, the Executive Branch," *id.* at 281, and that "the Federal Government has deemed the case of sufficient importance to take action against the State," *id.* at 282 (internal quotation marks, brackets, and citation omitted).

Similarly, in *United States v. Mississippi Department of Public Safety (MDPS)*, 321 F.3d 495, 499 (2003), the Fifth Circuit held that the Eleventh Amendment did not bar the United States from maintaining an action against the Mississippi Department of Public Safety alleging that it had violated the Americans with Disabilities Act by dismissing a law enforcement trainee because of his disability. In so holding, the court rejected MDPS's contention that "sovereign immunity should be recognized to protect states from cases \* \* \* in which the federal government seeks to circumvent the safeguards of the Eleventh Amendment and obtain personal relief for private individuals." *Id.* at 498.

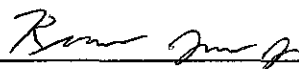
As in *Chao* and *MDPS*, the United States brought this USERRA action in the name of the federal government on behalf of an individual employee, was in complete control of the litigation of the case, and sought to advance an important national interest. Accordingly, ADMH's position is directly at odds with these cases.

2. In its letter brief, ADMH does not contend that the holdings of these cases are incorrect. Rather, it asserts that these cases are distinguishable because they do not involve "a statute that, like USERRA, makes DOJ the attorney for an individual and thus puts DOJ attorneys under his or her control." ADMH Letter Br. 3. This argument fails because its premise is incorrect. As the United States argued in its Brief as Appellee and at oral argument, in the USERRA cases it brings against a State or State agency, it does not act as the attorney for the individual and is not under the individual's control in conducting the litigation. Rather, as USERRA provides, suits against the States are "brought in the name of the United States as the plaintiff in the action." 38 U.S.C. 4323(a)(1). Only in USERRA cases in which the defendant is not a State or State agency does the Attorney General "appear on behalf of, and act as attorney for, the person on whose behalf the complaint is submitted." *Ibid.* Moreover, the record in this case belies any suggestion that the United States was acting as Mr. Hamilton's attorney, or that it was in any way under his control in conducting this litigation. See United States Br. 19-20.

The federal government's role in this USERRA case accordingly is no different from its role in *Chao*,<sup>1</sup> *MDPS*, or many other civil rights cases it litigates on behalf of victims of discrimination. The Court should therefore reject ADMH's contention that this case is barred by the Eleventh Amendment.

Respectfully submitted,

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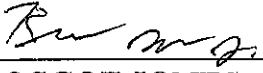
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<sup>1</sup> In a footnote at the conclusion of its Eleventh Amendment analysis in *Chao*, the Fourth Circuit stated an additional reason why "VDOT's reliance on *New Hampshire [v. Louisiana]*, 108 U.S. 76, 2 S. Ct. 176 (1883),] or other cases describing suits by entities other than the Federal Government is misplaced": *i.e.*, "[t]he Federal Government's superior position in the constitutional structure \* \* \* suggests that the limits of the States' consent to suit by other States do not coincide with the limits of the State's consent to suit by the United States." 291 F.3d 282-283 n.4; see ADMH Letter Br. 3-4. Because the United States is the party controlling this USERRA litigation – and not merely the nominal plaintiff – it is unnecessary for this Court to address the question whether the States' consent to suit by the United States is coextensive with their consent to suit by other States, in order to resolve the Eleventh Amendment question in this case.

Case No.: 10-15976

*United States v. Alabama Department of Mental Health*  
**CERTIFICATE OF INTERESTED PERSONS AND  
CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, counsel for Appellee United States of America certifies that the Certificate of Interested Persons And Corporate Disclosure Statement filed with this Court on March 22, 2011, by Appellant Alabama Department of Mental Health with its Brief As Appellant, is correct.

  
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ROSCOE JONES, JR.  
Attorney


Dated: December 5, 2011

## CERTIFICATE OF SERVICE

I hereby certify that on December 5, 2011, the original and six copies of the  
REPLY LETTER BRIEF FOR THE UNITED STATES AS APPELLEE were  
served by Federal Express on the Clerk of the Court. I also certify that a copy of  
the foregoing brief was served by Federal Express on the following:

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