

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, Sc.

SUPERIOR COURT

(FILED – SEPTEMBER 23, 2003)

THERESA MITCHELL

:

v.

:

P.C. No. 02-6968

:

:

STATE OF RHODE ISLAND,

:

DEPARTMENT OF CORRECTIONS

:

**DECISION**

**LANPHEAR, J.** Before the court is defendant’s motion to dismiss Count II of the Complaint, on grounds of sovereign immunity.

Theresa Miller, an employee of the Rhode Island Department of Corrections instituted this action in December, 2002. In her complaint she alleges, *inter alia*, that her employer discriminated against her due to her race and disability. Ms. Mitchell claims she was not promoted within the department because of her race and her work-related injury. The complaint lists two alleged statute-based causes of action. Count I alleges a violation of the Rhode Island Fair Employment Practices Act (R.I.G.L. §§ 28-5-1 *et seq*) and Count II alleges a violation of the Rhode Island Civil Rights Act (R.I.G.L. §§ 42-112-1, *et seq.*)

In response, the Department filed a motion to dismiss. As a result of several continuances, this complaint has gone unanswered for seven months. The motion to dismiss only focuses on Count II of the complaint and claims that the cause of action is improper as the state has sovereign immunity.

Waivers of sovereign immunity cannot be implied but must be unequivocally expressed. United States v. Mitchell, 445 U.S. 535, 538, 63 L.Ed.2d 607, 613, 100 S.Ct.

1349, 1351 (1980). A state is not deemed to have waived its immunity unless the waiver is “stated by the most express language, or by such overwhelming implication from the text as will leave no room for any other reasonable construction.” Edelman v. Jordan, 415 U.S. 651, 673, 39 L.Ed.2d 662, 678, 94 S.Ct. 1347, 1351 (1974). The Rhode Island Supreme Court has recently reviewed the standard for waiver in Pellegrino v. Rhode Island Ethics Commission, 788 A.2d 1119 (R.I. 2002):

This Court has held that the "Legislature is presumed not to have relinquished any part of the state's sovereign power unless [its] intent to do so [has been] 'clearly expressed or arises by necessary implication from the [relevant] statutory language.'" International Depository, Inc. v. State of Rhode Island, 603 A.2d 1119, 1122 (R.I.1992) (quoting Andrade v. State, 448 A.2d 1293, 1295 (R.I.1982)). "A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." Kawananakoa v. Polyblank, 205 U.S. 349, 353, 27 S.Ct. 526, 527, 51 L.Ed. 834, 836 (1907) (Holmes, J.). 788 A.2d 1119. Pellegrino at 1123-1124.<sup>1</sup>

Indeed the state has, on occasion, waived its statutory immunity. The Governmental Tort Liability Act, R.I.G.L. 9-31-1 et seq. is one example. It is noteworthy that the Rhode Island General Assembly expressly permitted actions against the state for alleged Fair Employment Practice Act violations. R.I.G.L. §28-5-6(7)(i).

While the state is specifically subject to suit under the Fair Employment Practices Act, the Rhode Island Civil Rights Act is not as clear. Plaintiff urges the court to interpret the Civil Rights Act liberally, alleging the purpose of the act was to extend liability into areas which had been excluded under its federal counterpart at 42 U.S.C. §§ 1981 *et. seq.* While the Rhode Island Supreme Court has held the state act “provides broad protection against all forms of discrimination in all phases of employment” and

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<sup>1</sup> There is no express language in the Rhode Island Civil Rights Act, R.I.Gen.Laws chapter 42-112.

was intended to “ensure that nothing in the [federal] Civil Rights Act would infringe upon the rights provided to victims of past and present discrimination”, Ward v. Pawtucket, 639 A.2d 1379 at 1381 and 1382 (R.I., 1994), the Court never reached the issue of waiver of statutory immunity, as the decision focused on exhaustion of administrative remedies.

In Folan v. State Department of Children, Youth and Families, 723 A.2d 287 (R.I., 1999) the high court discussed the exclusivneess of the Rhode Island Workers’ Compensation Act (R.I.Gen. Laws chapter 28-29) vis-a-vis the Rhode Island Civil Rights Act but did not reach the waiver of statutory immunity issue.

A waiver of statutory immunity will not be inferred.<sup>2</sup> The immunity of the sovereign from suit is not waived for actions under the Rhode Island Civil Rights Act. R.I.Gen. Laws §42-112-1, *et seq.* Accordingly, defendant’s motion to dismiss Count II of the complaint is granted.

Counsel shall prepare an appropriate order.

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<sup>2</sup> Rhode Island attorneys may be reluctant to search for the legislative intent of the Rhode Island General Assembly, but should consider doing so. Recently, the legislature has made great strides in documenting their actions and making their records public. Committee clerks take written records of committee votes. House and Senate Journals explicitly record all votes and proposed amendments. Much of this is referenced by the General Assembly on the internet. Sessions of the Senate, House of Representatives and some committees are recorded on videotape. The General Assembly addressed the question posed in this motion in its attempts to enact bills numbered 01 H-5815 and 01 S-195 just recently.