

Case No. VBU-0047

April 17, 2000

DEPARTMENT OF ENERGY

OFFICE OF HEARINGS AND APPEALS

Decision of the Director

Name of Case: Edward J. Seawalt

Date of Filing: March 20, 2000

Case Number: VBU-0047

Edward J. Seawalt (the Complainant) appeals the second dismissal of his whistleblower complaint. In a prior decision, I remanded the first dismissal for consideration of whether good reason existed for the Complainant's late filing of his complaint. [Edward J. Seawalt](#), 27 DOE ¶ ____ (1999) (Seawalt). As explained below, I have determined that the Complainant has shown good reason for the late filing of his complaint and, therefore, that the complaint should be remanded for further processing.

I. Background

A. The DOE Contractor Employee Protection Program

The DOE Contractor Employee Protection Program is set forth at 10 C.F.R. Part 708. The DOE's new Part 708 regulations are set forth at 64 Fed. Reg. 12862 (1999) (interim final rule), amended, 64 Fed. Reg. 37396 (1999), amended and finalized, 65 Fed. Reg. 6314 (2000). See also 65 Fed. Reg. 9201 (2000) (technical correction). Under those regulations, the DOE's Office of Hearings and Appeals (OHA) is responsible for investigating complaints, conducting hearings, and considering appeals on these matters. A copy of the regulations, as well as OHA decisions, can be found at the OHA's web site <<http://www.oha.doe.gov>>.

Part 708 prohibits contractors from retaliating against contractor employees who engage in protected conduct. Protected conduct includes disclosing information that the employee believes reveals a substantial and specific danger to employees (a protected disclosure). If a contractor retaliates against an employee for making a protected disclosure, the employee can file a complaint. The employee must establish, by a preponderance of the evidence, that the employee made a protected disclosure and the disclosure was a contributing factor to the alleged retaliation. If the employee makes the required showings, the burden shifts to the contractor to establish by clear and convincing evidence that it would have taken the same action in the absence of the employee's disclosure. If the employee prevails, the OHA may order employment-related relief such as reinstatement and back pay.

Under Part 708, the DOE office initially receiving the complaint may dismiss the complaint for lack of jurisdiction or other good cause. 10 C.F.R. § 708.17. The complainant may appeal such a dismissal to the OHA Director. 10 C.F.R. § 708.18.

B. Factual Background

The Complainant was an employee of Contract Associates, Inc. (the Contractor). The Contractor, in turn, was a subcontractor to the University of California, the managing and operating contractor for the DOE's Los Alamos National Laboratory (LANL).

Prior to February 1999, the Complainant reported to a LANL official safety concerns about a product that the Contractor was installing at LANL. On February 1, 1999, the Complainant resigned his position with the Contractor.

On May 6, 1999, the Contractor filed a state court action against the Complainant, based, in part, on what the Contractor alleged were his defamatory disclosures to LANL. The Contractor also alleged that the Complainant refused to recognize his status as an employee and engaged in various actions that ultimately resulted in the Contractor's loss of its LANL contract to a competitor. In June 1999, the Complainant filed counterclaims, including one for retaliatory constructive discharge.

C. Procedural History

On August 3, 1999, the Complainant filed his Part 708 complaint with the cognizant DOE employee concerns office (the DOE Office). The Complainant alleges that his February 1999 resignation was a constructive discharge. In addition, the Complainant alleges that the Contractor's May 1999 state court action was a further retaliation. The Complainant seeks employment-related relief in the form of any differential between his prior pay and benefits and his current pay and benefits at his new job. The Complainant also seeks other relief that is beyond the scope of Part 708. [Seawalt](#), 27 DOE at ____ (Part 708 does not include damages for emotional distress, repayment of the cost of defending the state court action, and DOE action against the Contractor for delay in the project).

In October 1999, the DOE Office dismissed the complaint, based on lack of jurisdiction. The DOE Office found that the Complainant's state court counterclaims constituted pursuit of a remedy under state law and, therefore, precluded consideration of his Part 708 complaint. The DOE Office also opined that Part 708 could not provide relief with respect to the Contractor's pending state court action against the Complainant, and that the complaint was untimely with respect to the constructive discharge claim.

The Complainant appealed the October 1999 dismissal to the OHA. The Complainant argued that (i) his state court counterclaims did not preclude a Part 708 complaint, (ii) his complaint was timely because it was filed within 90 days of the Contractor's state court action against him, and (iii) if his complaint was untimely he had good reason for the late filing.

In November 1999, I issued the [Seawalt](#) decision, granting the appeal in part. [Seawalt](#) held that the Complainant's filing of the state court counterclaims did not preclude his Part 708 complaint. However, [Seawalt](#) agreed with the DOE office that the complaint was untimely, because the state court action was not a retaliation within the meaning of Part 708 and because the complaint was filed more than 90 days after the February 1999 alleged constructive discharge. Nonetheless, [Seawalt](#) noted that, on appeal, the Complainant had argued that the Contractor's filing of the state court action provided good reason for his late filing. [Seawalt](#) stated:

On appeal, the complainant contends that he had good reason for not filing a complaint within 90 days of the constructive discharge. The complainant contends that he did not know, until the Contractor's filing of the state action, of the full extent of the alleged contractor retaliation. The complainant's contention, in essence, is that the highly negative impact of the Contractor's court action, and its close proximity to the alleged constructive discharge, provides good reason for allowing him to pursue his untimely constructive discharge claim. In addition, the complaint suggests that health considerations may have been a factor in the delay.

[Seawalt](#), 27 DOE at _____. Accordingly, [Seawalt](#) remanded the complaint so that the DOE Office could have an opportunity to consider the Complainant's assertion that good reason existed for the late filing of

the complaint.

On remand, the DOE Office received comments from the parties on the issue of whether good reason existed for the late filing. On March 7, 2000, the DOE Office dismissed the complaint a second time, stating that in its judgment no good reason existed to warrant accepting the late filing. On March 20, 2000, the Complainant filed the instant appeal. The Contractor filed comments, arguing that the appeal is untimely and, in any event, without merit.

II. Analysis

A. Whether The Instant Appeal Is Timely

The Contractor argues that the appeal is untimely because it was filed 11 days after the Complainant's receipt of the DOE office's dismissal letter. The Contractor correctly notes that under the regulations, a complainant has 10 days from receipt of the dismissal to file an appeal. See 10 C.F.R. § 708.18(a).

The Complainant's appeal is timely. The Complainant received the DOE Office dismissal letter on March 9, 2000. Because the tenth day after receipt was Sunday, March 19, 2000, the appeal was due the next day, Monday, March 20, 2000. See 10 C.F.R. § 1003.5(a)(1) (if last day of time period falls on weekend day or federal holiday, submission is due on the next day that is not a weekend day or federal holiday). The appeal was filed on Monday, March 20, and, therefore, is timely.

B. Whether Good Reason Exists for the Late Filing of the Complaint

It is undisputed that the DOE may accept an untimely complaint for processing if the complainant establishes "good reason" for the late filing. It is also undisputed that the Contractor's state court action is based, in part, on the alleged protected disclosures. As explained below, the filing of such an action provides "good reason" for the late filing.

The issue in this appeal is one of first impression. The revised Part 708 regulations contain a new provision with respect to the timeliness of complaints, which provides as follows:

If you do not file your complaint during the 90-day period, the Head of the Field Element or EC Director (as applicable) will give you an opportunity to show any good reason you may have for not filing within that period, and the official may, in his or her discretion, accept your complaint for processing.

10 C.F.R. § 708.14(d). Because this regulation is new, there are no cases interpreting it. The prior Part 708 rule on timeliness did not expressly provide for a "good reason" or "good cause" exception, but the Deputy Secretary decisions recognized the possibility of such an exception. See Therese A. Quintana-Doolittle, 27 DOE ¶ 88,035 (1999); Susan W. Hyer, 27 DOE ¶ 88,032 (1999); Matthew J. Sollender, 27 DOE ¶ 88,031 (1999). Those decisions upheld the dismissal of the complaints involved, but none involved the unusual situation presented in this case – a contractor's filing of a state court action against a former employee. Accordingly, I now turn to an analysis of whether the situation presented in this case provides good reason to accept the late Part 708 complaint.

An employee's decision whether to file a Part 708 complaint depends in part on the extent of the negative consequences flowing from a disclosure. A state court action against an employee based on the employee's disclosures has immediate negative consequences (in the sense that the employee must prepare to defend against the action) and potential future negative consequences (e.g., the payment of damages to the contractor). For this reason, when such an action is filed reasonably promptly after the deadline for filing a Part 708 complaint, the action may provide good reason for accepting a late complaint. Such an action is akin to a "changed circumstance" that can warrant reconsideration of a prior order. See generally 10 C.F.R. § 1003.55(b)(2)(iii).(1)

In this case, the Contractor's state court action provides good reason for accepting the Complainant's untimely constructive discharge complaint. It is undisputed that the Contractor's state court action is based in part on the employee's disclosures, and that the action was filed less than a week after the due date for the Complainant's Part 708 complaint. It is also undisputed that the Complainant filed his Part 708 complaint within 90 days of the filing of the state court action. Under these circumstances, good reason exists for the late filing, and the complaint is being remanded to the DOE Office for further processing.

III. Conclusion

As indicated above, I have ruled that the filing of the state court action in this matter provides good reason for the late filing of the complaint. Accordingly, I have concluded that the complaint should be remanded to the DOE Office for further consideration.

It Is Therefore Ordered That:

(1) The appeal filed by Edward J. Seawalt is hereby granted and his Part 708 complaint is hereby remanded to the DOE's employee concerns office for further processing consistent with this decision and order.

(2) This decision is the final decision of the Department of Energy unless, by the 30th day after receiving the appeal decision, a party files a petition for Secretarial review.

George B. Breznay

Director

Office of Hearings and Appeals

Date: April 17, 2000

(1) Although the contractor may believe that its court action is meritorious and that the Part 708 complaint is not meritorious, consideration of any such arguments is not appropriate in the preliminary procedural context of determining if good cause exists for a late filing. In this decision, I address only whether a state court action based in part on alleged protected disclosures can constitute good reason for extending the time to file a Part 708 complaint.