Case No. VBZ-0047

August 30, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Motion for Summary Judgment

Name of Case: Edward J. Seawalt

Date of Filing: August 23, 2000

Case Number: VBZ-0047

This decision will consider a Motion for Summary Judgment that Contract Associates, Inc., ("the contractor") filed on August 23, 2000. The contractor moves to deny a complaint filed by Edward J. Seawalt ("Mr. Seawalt" or "the complainant") under the Department of Energy's (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. Mr. Seawalt's complaint has been set for a hearing under Office of Hearings and Appeals (OHA) Case No. VBH-0047.

I. Background

The Department of Energy established its Contractor Employee Protection Program to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste, and abuse" at DOE's Government-owned or -leased facilities. Criteria and Procedures for DOE Contractor Employee Protection Program, 57 Fed. Reg. 7533 (1992). Its primary purpose is to encourage contractor employees to disclose information that they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers. The Part 708 regulations prohibit discrimination by a DOE contractor against its employee because the employee has engaged in certain protected activity, including when the employee has

> (1) Disclosed to an official of DOE, to a member of Congress, or to the contractor (including any higher tier contractor), information that the employee in good faith believes evidences—
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> (i) A violation of any law, rule, or regulation;
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> (ii) A substantial and specific danger to employees or public health or safety; or
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> (iii) Fraud, mismanagement, gross waste of funds, or abuse of authority;

57 Fed. Reg. at 7542 (1992).(1)

The complainant was an employee of the contractor, which was a subcontractor to the University of California, the managing and operating contractor for the DOE's Los Alamos National Laboratory (LANL). From May 1998 to February 1999, the complainant worked onsite at LANL, on a special project

in a high security area involving the upgrade of furniture in interior offices to meet strict safety standards that required a reduction in the amount of exposed combustible material in the offices. The complainant alleges that during this time he engaged in activity protected under Part 708. On February 1, 1999, the complainant resigned his position with the contractor.

II. The Contractor's Motion for Summary Judgment

In its motion, the contractor argues that

> Seawalt's complaint fails for each of the following reasons:
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> 1. Seawalt did not make a disclosure regarding safety concerns.
> 2. Seawalt did not reasonably believe the safety concerns represent specific and substantial dangers.
> 3. Contract Associates did not retaliate against Seawalt.
> 4. Seawalt has not been damaged by Contract Associates.
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> Accordingly, Contract Associates is entitled to summary judgment against Seawalt dismissing his complaint.

Motion at 1.

The Part 708 regulations do not include procedures and standards governing summary judgment motions. I note that the Federal Rules of Civil Procedure provide that such a motion shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Though the Federal Rules do not govern this proceeding, they may be used for analogous support, and Rule 56 presents a logical framework for evaluating the motion before me. Thus, I will not grant the motion absent a showing by the contractor that, upon the undisputed facts in the record, it is entitled to prevail as a matter of law.

In addition, prior cases of this office instruct that such a motion should only be granted if it is supported by "clear and convincing" evidence. Fluor Daniel Fernald, 27 DOE ¶ 87,532 at 89,163 (1999) (motion to dismiss should only be granted where there are clear and convincing grounds for dismissal); see also Boeing Petroleum Services, 24 DOE ¶ 87,501 at 89,005 (1994) (dismissal is "the most severe sanction that we may apply" and should be used sparingly). For the reasons discussed below, because I do not find clear and convincing evidence that the contractor is entitled at this point in the proceeding to prevail as a matter of law, I will deny the motion for summary judgment.

A. Whether Mr. Seawalt Did Not Engage in Activity Protected Under Part 708

The contractor contends in its motion that to "prevail on his 708 complaint, Seawalt must first prove he disclosed safety problems to LANL. Seawalt cannot do so. Contrary to the allegations of his complaint, Seawalt's testimony establishes that it was LANL who first reported safety concerns with the [office furniture] to Seawalt." Motion at 8. The contractor cites a July 11, 2000 deposition taken of Mr. Seawalt.

It is true that the July 11 deposition contains testimony by Mr. Seawalt that contradicts certain facts alleged in his complaint. For example, in his complaint Mr. Seawalt states, "I discovered that some of the product had warning labels which stated 'do not stack over 53 inches.'" Complaint at 3. In the excerpt of the July 11 deposition provided by the contractor, Mr. Seawalt testified that LANL personnel had seen the warning labels before he did. Transcript of July 11 Deposition at 76. However, Mr. Seawalt's complaint does not allege that he disclosed the existence of the warning labels to LANL. Moreover, there are at least

several other potentially protected activities alleged in Mr. Seawalt's complaint.

For example, Mr. Seawalt alleges that he "reported to Contract Associates that they had not followed the plans and specifications for the [furniture], . . ." Complaint at 3. He also alleges that he advised a LANL official that he was instructed by the president of Contract Associates to complete paperwork necessary to escort the president and another individual into a secure area at LANL, but to conceal from LANL the true reason for entering the secure area. Id. Mr. Seawalt states he was concerned that this was a violation of security regulations. Id.

In addition, in a November 30, 1998 letter to a LANL official, Mr. Seawalt opined that Haworth, the manufacturer of the office furniture,

> should have assembled the mock up at the factory and discovered the problem and not ship it to the client for possible injury and then 'cover up' a problem that was discovered during the installation. . . . . It's my recommendation that the existing 'prototype' furniture is removed from [LANL] and Haworth considers it a gift that [LANL] does not pursue the liability issue. . . . I truly feel that Haworth and Contract Associates have been dishonest in presenting this solution to both the DOE and [LANL] and have placed it in our facility in hopes we will accept the cost of them developing a prototype that they will profit from.

I make no finding here that these or any of Mr. Seawalt's other activities were protected under Part 708, as that is not the purpose of this decision. It is sufficient here to note only that I do not find undisputed facts upon which I can conclude that Mr. Seawalt did not engage in any protected activity.(2)

B. Whether Contract Associates Did Not Retaliate Against Mr. Seawalt

Part 708 prohibits reprisals by DOE contractors, specifically stating that a contractor "may not discharge or in any manner demote, reduce in pay, coerce, restrain, threaten, intimidate, or otherwise discriminate against any employee" because the employee has engaged in protected activity. 57 Fed. Reg. at 7542.

The contractor argues that it "did not take any action against Seawalt to force [his] resignation, such as using intimidation, threats, or coercion." Motion at 9. The contractor cites Mr. Seawalt's February 4, 1999 resignation letter, in which he states, "To be blamed for the failure of the project by the company that I represented gave me no choice but to remove myself from [Contract Associates] immediately." Letter from Edward J. Seawalt to Karen Ruben, Contract Associates, Inc. (February 4, 1999). The contractor also cites portions of Mr. Seawalt's July 11, 2000 deposition in which he describes in more detail the circumstances under which he felt he had been unfairly blamed. Transcript of July 11 Deposition at 196, 204, 206. The contractor concludes that Mr. Seawalt's "resignation was prompted merely by the president of Contract Associates criticizing his job performance in a conversation with the LANL contract administrator . . . . Absent other action, an employee's decision to resign because he objects to comments made by his employer does not establish retaliation." Motion at 10 (citing Matthew J. Rooks, 27 DOE ¶ 87,511 (2000)).

First, I do not find support in the Rooks decision for the proposition set forth by the contractor. The Hearing Officer in Rooks found that "the evidence does not support the conclusion that [the employer's] comments can be reasonably construed as the type of intimidation that would reasonably cause [the complainant] to resign." Rooks, 27 DOE at 89,278. The finding of the Hearing Officer was clearly based on the evidence presented in that case, and contrary to the contention of the contractor, implicitly allowed for the possibility as a general proposition that an employer's comments can be reasonably construed as the type of intimidation that would reasonably cause an employee to resign.

Moreover, the evidence highlighted by the contractor arguably shows only that Mr. Seawalt considered being unfairly blamed for the failure of a project to be the "last straw" that caused him to resign. This

interpretation is supported by the investigator's notes of her interview with Mr. Seawalt, in which he recounted a number of other events leading to his resignation. Investigator's Notes of June 15, 2000 Telephone Interview with Edward Seawalt. Again, I do not conclude here that the contractor took actions that forced Mr. Seawalt to resign. I simply cannot find that undisputed facts support a conclusion that the contractor did not retaliate against Mr. Seawalt, and therefore the contractor's motion cannot be granted on that basis.

C. Whether Mr. Seawalt Has Not Been Damaged by Contract Associates

Finally, the contractor contends that "Seawalt cannot establish that he is entitled to any relief from Contract Associates because he is unable to show that he was damaged by the alleged retaliation." Motion at 10. The contractor cites determinations by the OHA Director in decisions on two jurisdictional appeals filed by the complainant. Edward J. Seawalt, 27 DOE ¶ 87,541 (1999); Edward J. Seawalt, 27 DOE ¶ 87,558 (2000). In the first decision, the OHA Director described Mr. Seawalt as seeking

> 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 damages for emotional distress and the costs of defending the state court action. Finally, the complainant seeks to have the DOE seek relief against the Contractor for the alleged delay in the project attributable to the safety concerns.
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> . . . [Part 708 does not] provide a remedy for a retaliatory state court action against an employee. Part 708 provides for employment-related relief and the recovery of the costs of pursuing a Part 708 complaint. Part 708 does not provide remedies for other negative actions that an employer can take. For example, Part 708 would not protect an employee against a fraud action brought by the employer. Indeed, much of the complainant's requested relief is beyond the scope of Part 708 (damages for emotional distress, repayment of the cost of defending the state court lawsuit, and a DOE action against the Contractor for the delay in the project).

Edward J. Seawalt, 27 DOE ¶ 87,541 at 89,199, 89,201; see also Edward J. Seawalt, 27 DOE ¶ 87,558 at 89,323 (Mr. Seawalt seeks "relief that is beyond the scope of Part 708.").

Regarding relief in the form of any differential between Mr. Seawalt's prior pay and benefits and his pay and benefits at his new job, the contractor presents persuasive evidence that the complainant suffered no loss in pay due to his resignation from Contract Associates. In the July 11, 2000 deposition, Mr. Seawalt testified that his new employer matched the salary that he was making at Contract Associates, and made his hiring "retroactive and picked up the missing days that I would have been unemployed." Transcript of July 11 Deposition at 179, 181.

However, as the contractor notes in its motion, Mr. Seawalt claims that he suffered two weeks of lost pay at his new job because he had to undergo surgery and had not accumulated the necessary medical leave. Motion at 11. But the contractor points to testimony that Mr. Seawalt's annual salary increased by $2,000 in June 1999, and argues that this increase "is more than enough to cover the lost two weeks of pay." I disagree with this argument's unstated premise. The contractor offers no logical reason why the complainant's salary increase should be used to offset his other damages, and I cannot find one based upon the facts before me. Thus, the extent of potential damages suffered by the complaint due to alleged retaliation is an issue of fact that clearly remains in dispute.

For the reasons stated above, I do not find undisputed facts in the record upon which I can conclude that

the contractor is entitled to prevail as a matter of law. I will therefore deny the present motion.

It Is Therefore Ordered That:

(1) The Motion for Summary Judgment filed by Contract Associates on August 23, 2000, Case No. VBZ-0047, is hereby denied.

(2) This is an Interlocutory Order of the Department of Energy. This Order may be appealed to the Director of OHA upon issuance of a decision by the Hearing Officer on the merits of the complaint.

Steven Goering

Staff Attorney

Office of Hearings and Appeals

Date: August 30, 2000

(1) Revisions to Part 708 took effect on April 14, 1999, including substantive changes to the scope of activity protected under 10 C.F.R. § 708.5. Criteria and Procedures for DOE Contractor Employee Protection Program, 64 Fed. Reg. 12862, 12863 (March 15, 1999). However, because the complainant's alleged protected activity and the retaliation alleged by the complainant took place prior to these revisions, I will apply the prior version of section 708.5 to this case. Linda D. Gass, 27 DOE ¶ 87,525 at 89,140-41 (1999) ("[T]o the extent that 10 C.F.R. § 708.5 defines the scope of employee disclosures that are protected from contractor retaliation, Part 708 clearly regulates the 'primary conduct' and affects the 'substantive rights' of the parties, and is thus subject to the presumption against retroactivity under well-established case law."); cf. Salvatore Gionfriddo, 27 DOE ¶ 87,544 at 89,224 (1999); Fluor Daniel Fernald, 27 DOE ¶ 87,532 at 89,164 (1999).

(2) I do not need to address the contractor's second argument in support of its motion, that Seawalt did not reasonably believe his safety concerns represented specific and substantial dangers, Motion at 8-9, because as a basis for summary judgment the argument is premised on the assumption that the only protected activity alleged by the complainant was a disclosure of a "substantial and specific danger to employees or public health or safety." 10 C.F.R. § 708.5(a)(1)(ii). In fact, other disclosures alleged by the complainant arguably fall under subsections (i) and (iii) of 10 C.F.R. § 708.5(a)(1).