

Case No. VBU-0039

November 30, 1999

DEPARTMENT OF ENERGY

OFFICE OF HEARINGS AND APPEALS

Decision of the Director

Name of Case: Edward J. Seawalt

Date of Filing: November 2, 1999

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Edward J. Seawalt (the complainant) appeals the dismissal of his complaint against Contract Associates, Inc. (the Contractor) under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. The program prohibits a DOE contractor from retaliating against an employee for disclosing certain information (a protected disclosure). As explained below, I have determined that Mr. Seawalt's appeal should be granted in part and his complaint 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 recently revised the program. 64 Fed. Reg. 12,862 (March 15, 1999).

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 violation of a law, rule, or regulation. 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 an alleged retaliatory act. 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 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 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 1, 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 wrongful disclosures to LANL. On June 11, 1999, the complainant filed a counterclaim, including one for retaliatory constructive discharge.

C. The Part 708 Complaint

The complainant filed his Part 708 complaint on August 3, 1999. In his complaint, he alleges that the Contractor retaliated against him for his disclosures. He maintains that these alleged retaliations gave him no choice but to resign. Accordingly, he claims that he was constructively discharged. In addition, the complainant cites the Contractor's May 1999 state court action against him as a retaliation.

The complainant seeks various types of relief. 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 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.

D. The Dismissal

On October 19, 1999, the DOE employee concerns office at Albuquerque dismissed the complaint, based on lack of jurisdiction. The 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. Dismissal letter at 1 (citing 10 C.F.R. § 708.17(c)(3)). The 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.

E. The Appeal

On November 2, 1999, the OHA received the complainant's appeal. The complainant contends that the DOE employee concerns office erred in dismissing his appeal. The Contractor filed comments opposing the appeal, essentially arguing that the dismissal letter was correct.

II. Analysis

It is undisputed that if a complainant is pursuing a "complaint" under state law, the complainant may not pursue a Part 708 complaint. Section 708.17, which provides for dismissals of complaints, provides in relevant part:

(c) Dismissal for lack of jurisdiction or other good cause is appropriate if:

....

(3) You filed a complaint under State or other applicable law with respect to the same facts as alleged in a complaint under this part: or

10 C.F.R. § 708.17(c)(3). The dispute on appeal is whether the complainant's counterclaims are "complaints" under state law within the meaning of Section 708.17.

Although Part 708 does not define the word "complaint," Section 708.15 describes what constitutes the

pursuit of a remedy under state or other applicable law. Section 708.15, entitled “What happens if an employee files a complaint under this part and also pursues a remedy under State or other applicable law?” provides in relevant part:

(a) You may not file a complaint under this part if, with respect to the same facts, you choose to pursue a remedy under State or other applicable law, including final and binding grievance-arbitration procedures, unless:

....

(c) You are considered to have filed a complaint under State or other applicable law if you file a complaint, or other pleading, with respect to the same facts in a proceeding established or mandated by State or other applicable law, whether you file such a complaint before, concurrently with, or after you file a complaint under this part.

....

10 C.F.R. § 708.15(a), (c) (emphasis added). As explained below, I have concluded that Section 708.15 does not preclude a Part 708 complaint where the complainant is pursuing a counterclaim in another forum.

Initially, I note that the word “complaint” is not further defined in the regulations. In other words, the regulations do not specify that the word “complaint” includes a counterclaim. A counterclaim is different from a complaint, especially because it does not have the element of voluntariness. Section 708.15(a) indicates that only a voluntary pursuit of a remedy in another forum bars a Part 708 complaint: Section 708.15(a) states that a Part 708 complaint is barred where the complainant “choose[s] to pursue” a remedy in another forum. In this case, the complainant did not “choose” to pursue a remedy in state court; rather, the complainant was forced into that forum by the Contractor’s action against him. Accordingly, the complainant’s counterclaims do not preclude a Part 708 complaint.

In reaching this conclusion, I have considered and rejected the Contractor’s contention that a counterclaim is a “complaint, or other pleading” within the meaning of Section 708.15(c). The Contractor cites Section 708.15(c), which states that a complaint includes “a complaint or other pleading, with respect to the same facts in a proceeding established or mandated by State or applicable law.” The Contractor argues that the word “mandated” indicates that a pleading need not be voluntary in order to bar a Part 708 complaint. The word “mandated,” however, refers to a “proceeding,” not a “pleading,” and, therefore, does not mean that a counterclaim is a pleading precluding consideration of a Part 708 complaint. Moreover, the Contractor’s interpretation of Section 708.15(c) is inconsistent with Section 708.15(a), which, as indicated above, precludes a Part 708 complaint where the complainant “choose[s] to pursue” a remedy elsewhere. The Contractor has not even attempted to reconcile its interpretation of Section 708.15(c) with the language of Section 708.15(a), which clearly contemplates that a complainant’s pursuit of another remedy be voluntary. Finally, the Contractor’s concern that, at some future point, the impact of one proceeding on the other might need be considered, does not provide a basis for concluding that the Part 708 complaint should be dismissed.

The conclusion that the complainant’s state court counterclaims do not warrant dismissal of his Part 708 complaint is consistent with the purpose of Part 708, which is to protect contractor employees who make protected disclosures. If a contractor could file a state court action against an employee based on the employee’s protected disclosures and then cite the employee’s response as the basis for dismissal of a Part 708 complaint, a contractor could easily negate an employee’s Part 708 protections. Indeed, such a rule would encourage retaliatory lawsuits - retaliations than can have a far greater impact on an employee than employment-related retaliation such as demotion or discharge. This would give too much power to the contractor. Accordingly, it would be contrary to the purpose of Part 708 to preclude Part 708 jurisdiction based on a complainant’s state court counterclaims.

Having concluded that the complainant's state court counterclaims do not warrant dismissal of his Part 708 complaint, I address the two other issues mentioned in the dismissal letter, i.e., that Part 708 could not provide a remedy to the employee with respect to the Contractor's state court action and that the complaint was untimely with respect to the constructive discharge claim.

The dismissal letter correctly concluded that Part 708 could 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).

Although the dismissal letter correctly concluded that the complaint was filed over 90 days after the February 1, 1999 alleged constructive discharge, it is not clear that the complaint should be dismissed for this reason. Section 708.14(d) provides in relevant part:

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). Accordingly, Part 708 provides for consideration of whether the employee had "good reason" for not filing within the 90 period and permits discretionary acceptance of the complaint.

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.

I have concluded that the dismissal should be remanded to the DOE employee concerns office for full consideration of the issue whether the constructive discharge claim should be accepted despite its untimeliness. As indicated above, Section 708.14(d) provides that the complainant show "any good reason" for untimeliness to the office where he files his complaint, and for that office's "discretion" in determining whether to accept the untimely complaint. The dismissal letter does not directly consider whether good reason existed for the untimeliness; indeed, it is unclear whether the complainant raised that issue to the office. Accordingly, it is appropriate to remand the issue to the DOE employee concerns office so that it can request any additional information it deems appropriate and consider whether good reason exists for the untimeliness.

III. Conclusion

As indicated above, I have ruled that the complainant's counterclaims in the Contractor's state court action do not bar his Part 708 complaint. In addition, I have concluded that the complaint should be remanded to the DOE employee concerns office for its consideration of the complainant's contention that he has presented good reason for the acceptance of his untimely constructive discharge claim.

It Is Therefore Ordered That:

(1) The appeal filed by Edward J. Seawalt is hereby granted in part and his Part 708 complaint is hereby remanded to the DOE 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: November 30, 1999