Case No. LWZ-0026

DECISION AND ORDER OF

THE DEPARTMENT OF ENERGY

Motions to Dismiss

Names of Petitioners: Boeing Petroleum Services, Inc.

DynMcDermott Petroleum Operations Company

Dates of Filing: March 24, 1994

March 25, 1994

Case Numbers: LWZ-0026

LWZ-0027

This determination will consider two Motions to Dismiss filed by Boeing Petroleum Services, Inc. (Boeing) and DynMcDermott Petroleum Operations Company (DynMcDermott) on March 24 and 25, 1994, respectively. In the Motion filed by Boeing, the firm seeks the dismissal of the underlying complaint and hearing request filed by Mr. Francis M. O'Laughlin (O'Laughlin) under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. O'Laughlin's present request for a hearing pursuant to section 708.9 of those provisions was filed with the Office of Hearings and Appeals (OHA) on January 10, 1994. Francis M. O'Laughlin v. Boeing Petroleum Services, Inc., OHA Case No. LWA-0005. In the Motion filed by DynMcDermott, the firm seeks the dismissal of DynMcDermott as a party in the O'Laughlin proceeding.

I. Background

The Department of Energy's Contractor Employee Protection Program was established 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. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers. Thus, contractors found to have discriminated against an employee for such a disclosure will be directed by the DOE to provide relief to the complainant. The DOE Contractor Employee Protection Program regulations, which are codified as Part 708 of Title 10 of the Code of Federal Regulations and became effective on April 2, 1992, establish administrative procedures for processing complaints of this nature.

From March 1987 until his resignation on May 15, 1992, O'Laughlin was employed by Boeing, the then management and operating (M&O) contractor for the DOE's Strategic Petroleum Reserve (SPR) Office located in New Orleans, Louisiana. In January 1990, O'Laughlin was appointed to the position of Integrated Logistics Systems (ILS) Manager, a subgroup of the Engineering Directorate, which was responsible for a number of logistics functions including: (1) Logistics Engineering, which entailed oversight of the Logistics Service Support Analysis (LSSA) program; and, (2) Maintenance Management Information Systems (MMIS), which reported the status of preventive maintenance of SPR facilities. However, in late 1990 or early 1991, notification was given by the Boeing Project Manager to the various managers that a reorganization was planned which involved, inter alia, moving many logistics functions to a newly formed Material Directorate under the management of an individual designated as the Material Director. In addition, it was determined that other ILS functions should be splintered among other Directorates. In particular, the reorganization called for moving the MMIS preventive maintenance reporting function to the previously existing Operations and Maintenance (O&M) Directorate within Boeing.

During April and May 1991, when implementation and potential impacts of the planned reorganization were being discussed, O'Laughlin voiced and documented his objections to the dispersal of the ILS functions, particularly with regard to the transfer of preventive maintenance reporting to the O&M Directorate. O'Laughlin advised Boeing management that transfer of the preventive maintenance function was not prudent and would result in inefficiency since it amounted to having the O&M Directorate report on itself.1 In addition, O'Laughlin expressed concern that splintering logistics functions from the ILS might result in Boeing not meeting LSSA program milestones established by agreement with the DOE, and indeed might constitute a violation of a pertinent DOE Order, SPRO Order 4000.1B, Strategic Petroleum Reserve Integrated Logistics Support Policy.

According to O'Laughlin, two acts of reprisal were taken against him by Boeing. First, although preliminary drafts of the proposed Material Directorate organization chart specified O'Laughlin as the Logistics Manager, who would report directly to the Material Director upon reorganization, O'Laughlin did not receive this position. Instead, on May 13, 1991, the day after the office was

physically restructured under the reorganization, O'Laughlin was surprised to learn upon trying to locate his new office that he would not be the Logistics Manager, but would be the ILS Manager, reporting to the Logistics Manager. The second act of alleged reprisal occurred on August 15, 1991, when O'Laughlin was issued a Corrective Action Memo which informed him that he had been demoted from his management position. O'Laughlin was then transferred from his position as ILS Manager to the function of Policy Compliance, a demotion that entailed a reduction in annual salary of approximately $4,000.

Beginning in August 1991, O'Laughlin initiated attempts of informal resolution of the adverse personnel action through internal Boeing procedures. These attempts having been unsuccessful, however, O'Laughlin filed a complaint with the SPR Office pursuant to 10 C.F.R. Part 708 on April 1, 1992. That complaint was forwarded to DOE's Office of Contractor Employee Protection (OCEP) on April 3, 1992, but was initially dismissed by OCEP on April 10, 1992, for failure to state an actionable claim under Part 708. In reaching this determination, OCEP found that O'Laughlin's complaint did not reveal that he had made disclosures that related to actual or potential health or safety issues or that his disclosure contributed to the adverse personnel actions taken against him. On May 8, 1992, O'Laughlin filed for review with the Deputy Secretary of DOE and submitted an amended complaint asserting that his disclosures involved issues of health and safety, as well as possible waste, mismanagement, and the violation of a DOE Order. On August 30, 1992, the Deputy Secretary reinstated the complaint, and afforded an opportunity for attempts at informal resolution. During the interim, O'Laughlin submitted his resignation to Boeing, which became effective on May 15, 1992.

Then, having been informed by the SPR Office that attempts at informal resolution had failed, OCEP performed an on-site investigation of the matter during the period February 28 through March 5, 1993, and issued a Report of Investigation and a Proposed Disposition on December 16, 1993. The Proposed Disposition, which relied upon the findings in the Report of Investigation, concluded that O'Laughlin's communications regarding the ILS reorganization did not present disclosures relating to health and safety protected under Part 708; it further concluded that the adverse personnel actions taken against him were not the result of any protected disclosure.2 Accordingly, OCEP proposed to deny O'Laughlin's request for relief under Part 708.

During the deliberative stage of the OCEP proceeding, a change of the M&O contractor occurred at the SPR. On March 31, 1993, Boeing ceased operations in that capacity and, on April 1, 1993, DynMcDermott assumed the SPR M&O contract. As the succeeding M&O contractor, DynMcDermott has generally hired the employees formerly employed by Boeing with the exception of high management officials.

On January 2, 1994, O'Laughlin submitted his request for a hearing pursuant to 10 C.F.R. ' 708.9 to OCEP. On January 10, OCEP transmitted that request, together with the investigative file, to the OHA, and requested that a Hearing Officer be appointed. On February 10, 1994, procedures and a briefing schedule were established for the hearing in this case under ' 708.9(b). The hearing is presently set for May 18 and 19, 1994, in New Orleans, Louisiana.3 Noting that O'Laughlin had requested reinstatement among the remedies he sought in compensation for the alleged whistleblower reprisals,4 we determined that DynMcDermott should also be served with the Proposed Disposition and Report of Investigation, and provided the firm an opportunity to file a pre-hearing brief on the same basis as the other parties in the proceeding. Letter from Fred L. Brown, Deputy Assistant Director, OHA, to John A. Poindexter, General Counsel, DynMcDermott, January 31, 1994.

On March 24, 1994, Boeing filed its pre-hearing brief which included the present Motion to Dismiss. DynMcDermott similarly filed a pre-hearing brief in the form of a Motion to Dismiss on March 25, 1994. In his pre-hearing brief, also filed on March 25, 1994, O'Laughlin reasserts his claim and request for relief under Part 708. On April 8, 1994, Boeing and O'Laughlin filed respective Responses to the pre-hearing briefs of the other parties.

II. Analysis

A. Boeing's Motion To Dismiss

In its Motion to Dismiss the O'Laughlin complaint, Boeing lists five reasons in support of its motion. Boeing Motion to Dismiss; Boeing Memorandum in Support of Motion to Dismiss. First, Boeing states that the complaint does not state a claim cognizable under 10 C.F.R. Part 708 because the allegations of protected disclosure and reprisal occurred prior to the effective date of the regulation. Second, Boeing claims that the information allegedly submitted to it regarding safety concerns resulting from a proposed reorganization does not constitute a disclosure under section 708.5. Third, Boeing submits that the complaint is untimely, since it was filed more than 60 days after the alleged reprisal and more than 60 days following the termination of internal company grievance procedures. Fourth, Boeing alleges that the disclosure does not describe a substantial and specific danger to employees or to public health or safety. Finally, Boeing states that no disclosure of a safety concern was ever expressed. The first and third reasons can be analyzed together since the underlying issue concerns the time requirements imposed by the regulations. We will discuss reasons 2, 4, and 5 together since they deal with the issue of the content and relevance of the alleged disclosure, and whether that content was entitled to protection under Part 708. For the reasons below, we have determined that Boeing's Motion to Dismiss must be denied.

1. Timeliness of the Complaint

A complaint must be filed within 60 days after the alleged discriminatory act occurred or within 60 days after the complainant knew, or should have known of the alleged discriminatory act, whichever is later. 10 C.F.R. ' 708.6 (d). This 60-day period is tolled while an employee attempts resolution through internal company grievance procedures, and begins to run again the day following termination of such dispute resolution efforts. Id. According to Boeing, the O'Laughlin claim should be dismissed because the alleged retaliatory acts occurred prior to the effective date of the regulation and there is no specific language in the statute to give it retroactive effect. Further, Boeing contends that the complaint should be dismissed for being filed more than sixty days after the alleged retaliatory action occurred.

We note here that the DOE Contractor Employee Protection Program regulations do not expressly provide for the submission of motions to dismiss based upon an allegation that the underlying complaint was untimely or an allegation that the retaliatory events occurred prior to the effective date of the regulation. The regulations do, however, allow the Director of the Office of Contractor Employee Protection (Director) to make a determination of the timeliness of the complaint prior to its acceptance or rejection. 10 C.F.R. ' 708.8 (a) (2). In addition, the regulations provide for the extension of all time frames with the approval of the Secretary or her designee. 10 C.F.R. ' 708.15; see also Sandia National Laboratories and L & M Technologies, 23 DOE & 82,502 (1993) (Sandia). It is also clear that DOE will not tolerate frivolous or meritless complaints, and has given the Director broad discretion to dismiss such actions early in the process. 57 Fed. Reg. 7539 (Mar. 3, 1992). Therefore, although DOE established a specific timetable for this administrative procedure5, ample opportunity exists for the appropriate official to relax these guidelines in order to further the underlying policy, which is to encourage contractor employees to disclose practices which are unsafe, unlawful, fraudulent or wasteful. 57 Fed. Reg. 7533 (March 3, 1992).

In the present case, we find that the Part 708 60-day filing period was tolled pending final resolution by Boeing of O'Laughlin's employee grievance which he filed subsequent to receiving the Corrective Action Memo and demotion in August 1991. On December 3, 1991, the Boeing human resources director rejected O'Laughlin's appeal. O'Laughlin wrote to the company again on March 3, 1992 requesting advice on the company appeal process. Addendum to O'Laughlin Reply to Pre-hearing Brief. After one month had passed without a reply, O'Laughlin wrote to Boeing's parent company on April 3, 1992 requesting its involvement. Id. O'Laughlin filed this complaint on April 1, 1992. In view of these actions, we find that the Director has not abused her discretion by accepting this complaint. In fact, we agree with the Director that the complainant actively pursued redress within Boeing until notification on April 29, 1992 by the Human Resources Manager of the parent company (Boeing Inc.) that no further appeal procedures existed. See Proposed Disposition, Francis M. O'Laughlin v. Boeing Petroleum Services, Inc., Case No. SPRO-92-0001 (December 15, 1993) at 4. Thus, the filing period was tolled beyond the April 2, 1992 effective date of Part 708.

Boeing contends that the complainant's attempts to obtain relief through the parent company cannot be considered a part of the appeal process. We disagree. It is not DOE's policy to discourage employees from seeking any means of resolution possible within the overall corporate structure in which they operate. Moreover, an employee of a subsidiary could reasonably make inquiries at the parent company in an attempt to find resolution of an employment (or personnel) issue involving the subsidiary, since the parent company may well have some authority over the personnel activities of a subsidiary. 18A Am. Jur. 2d Corporations ' 773 (1985) (describing the relationship between a parent company and its subsidiary as one in which one party owns and has custody of the other, as in the relationship between parent and child or warden and prisoner). Moreover, the underlying policy of the regulations directs us to encourage reasonable attempts at internal company resolution before an employee embarks upon the costly and time-consuming process of a formal administrative hearing. See 57 Fed Reg. 7538 (March 3, 1992); 10 C.F.R. ' 708.6 (c). This is not an attempt to "unilaterally create out of thin air an adjunct procedure" (Boeing Memorandum III. at 2), but rather a reasonable effort by a subsidiary company employee to seek to be heard by an organization he considers the supreme authority within his corporate environment.

2. Content and Relevance of the Disclosure

Boeing alleges that the disclosures made by the complainant are not of the type contemplated by DOE as requiring protection under section 708.5. Memorandum in Support of Motion to Dismiss at II, IV and V. Boeing contends that O'Laughlin's disclosures were so speculative and limited in impact as to be "meaningless for purposes of performing corrective action." Id., at IV. Boeing frames the pertinent issues in this matter as ". . . whether the complainant disclosed to management a `substantial and specific safety risk' about the reorganization," and ". . . whether senior management heard and understood that a safety objection was being raised." Boeing Response to Pre-Hearing Memorandum at I; Memorandum in Support of Motion to Dismiss at V. Boeing therefore argues that O'Laughlin's claim is legally insufficient since O'Laughlin's communications in objecting to the Boeing reorganization had only a theoretical connection with health and safety, and the record reveals "utterly no knowledge or perception on [Boeing management's] part of [O'Laughlin's] objections being safety driven . . . ." Id.

A motion to dismiss is appropriate only where there are clear and convincing grounds for dismissal, and no further purpose will be served by resolving disputed issues of fact or law on a more complete record. See M&M Minerals Corporation, 10 DOE & 84,021 (1982). OHA considers dismissal "the most severe sanction that we may apply," and has stated that it will be used sparingly. See Sandia, 23 DOE & 82,502 (1993) (reserving use of a motion to dismiss only to prevent a miscarriage of justice). Based upon this standard, we are unpersuaded that O'Laughlin's claim should be dismissed at this point in the proceedings.

O'Laughlin continues to maintain that "[his] concern regarding this [reorganization] issue was not given serious attention by the Material Director and most certainly did involve Health and Safety," and that Boeing management "knew or should have known." O'Laughlin Pre-Hearing Brief at 2, 3; Appendix "A" at 4. We therefore do not consider the present complaint to be frivolous. We agree that O'Laughlin bears the burden of proving that his communications constituted a protected disclosure under 10 C.F.R. ' 708.9(d). We further believe, however, that he should be afforded that opportunity. The asserted state of mind of Boeing management in perceiving the substance of O'Laughlin's objections to the reorganization is certainly not determinative of whether a health and safety concern was adequately communicated. It is apparent that substantial disputed issues of fact remain concerning the nature, content and reasonable interpretation of O'Laughlin's communications, and we therefore find that the interests of all the parties will best be served by proceeding with the requested hearing.

B. DynMcDermott's Motion to Dismiss

In its Motion to Dismiss, DynMcDermott argues that it is not a proper party to the O'Laughlin proceeding. DynMcDermott points out that the firm never employed O'Laughlin since it assumed the SPR M&O contract on April 1, 1993, nearly a year after O'Laughlin resigned from Boeing, and consequently was not involved in any of the circumstances surrounding the O'Laughlin Part 708 complaint.

DynMcDermott further argues in support of its dismissal from the proceeding that: (1) in order to be a proper party under Part 708, one must be or have been the employer of the complainant; (2) Part 708 does not impose liability on a party that did not commit a proscribed act; (3) DynMcDermott cannot be considered a "proper party" to the proceeding since the firm cannot give effect to the "reinstatement" remedy sought by O'Laughlin when he was never employed by DynMcDermott; (4) the inclusion of DynMcDermott in the proceeding will only duplicate litigation costs while serving no fruitful purpose; (5) reinstatement is only one of the available remedies under Part 708, and is not appropriate under the present circumstances where O'Laughlin voluntarily resigned from his position; and (6) requiring DynMcDermott to employ O'Laughlin would unduly interfere with the firm's contractual right to evaluate all of the employees it assumed from Boeing, during the 12-month phase-in period of the new M&O contract with DOE (see 48 C.F.R. ' 970.5204-56(c)). In its pre-hearing brief, Boeing concurs with DynMcDermott that "DynMcDermott is not in a position to grant [O'Laughlin] the relief contemplated in [Part] 708, especially as it relates to reinstatement to his previous job [and t]here is no reason for them to be made a party." Boeing Pre-Hearing Brief at 4.

Nonetheless, reinstatement remains one of the remedies sought by O'Laughlin, in addition to back pay, expunging of his personnel records, and reimbursement of costs and fees. O'Laughlin's present requests for relief are set forth in Appendix "B" of his pre-hearing brief. Although somewhat confusing and ostensibly contradictory, O'Laughlin states as follows with respect to reinstatement:

The following is the relief that I seek:

1. Reinstatement to my former position with title, management level, and commensurate salary based on previous history of performance prior to the establishment of the [Boeing] Material Directorate, or, equivalent position.

. . . .

4. If reinstatement is not desired by DynMcDermott, I am seeking reimbursement of future lost wage and benefits on my reduction in salary (September 1991) and subsequent constructive discharge (May 1992).

With regard to liability for the relief requested, O'Laughlin states that "[Boeing] is totally responsible for any monetary relief, however, DynMcDermott should be held accountable for reinstatement." O'Laughlin Pre-Hearing Brief, Appendix "D". O'Laughlin argues that DynMcDermott should be held to share liability since there is a substantial continuity of business operations from Boeing to DynMcDermott, which uses the same facilities and employs substantially the same work force. O'Laughlin Response at 2, citing Kolosky v. Anchor Hocking Corp., 585 F. Supp. 746 (W.D. Pa. 1983).

We have carefully considered the matter of DynMcDermott's joinder in this proceeding. It is clear that DynMcDermott, which succeeded Boeing as M&O contractor nearly a year after O'Laughlin's resignation, in no way participated in the actions forming the basis of the present complaint. Thus, the parties concur, and we agree also, that DynMcDermott's joinder in this proceeding is necessary and proper only to the extent that reinstatement is a potential remedy available to O'Laughlin were his claim to be successful on the merits. We do not endorse, nor need we necessarily reach, the arguments in opposition to joinder advanced by DynMcDermott in its present motion. For the reasons below, however, we have determined that reinstatement is not a remedy which is properly available to O'Laughlin in this case, and DynMcDermott's motion for dismissal will therefore be granted.

We must initially reject O'Laughlin's reliance on Kolosky, supra, as a basis for extending liability to DynMcDermott in this case. That case concerns situations in which a successor corporation may be held liable for a discriminatory act or practice of its predecessor under Title VII of the Civil Rights Act, 42 U.S.C. ' 2000e-5(g), on the basis that the successor corporation has purchased the assets of the corporation and essentially constitutes a continuation of the predecessor corporation. See Kolosky, 585 F. Supp. at 748, citing EEOC v. MacMillan Bloedel Containers, Inc., 503 F.2d 1086, 1091 (6th Cir. 1974); see also Trujillo v. Longhorn Manufacturing Co., Inc., 694 F.2d 221, 224-25 (10th Cir. 1982). No such corporate nexus exists between Boeing and DynMcDermott in this case. DynMcDermott operates the same facilities as did Boeing because the DOE owns those facilities and, similarly, DynMcDermott has taken on nearly all of the former Boeing employees not as a result of any dealings with Boeing but as a condition of assuming the M&O contract with the DOE.

Instead, this case is substantially similar to the circumstances confronted by the court in Holley v. Northrop Worldwide Aircraft Services, Inc., 835 F.2d 1375 (11th Cir. 1988), which held that a worker (Holley) who had proven an illegal retaliatory discharge (Fair Labor Standards Act, 29 U.S.C. ' 215(a)(3)) by his employer (Northrop) was not entitled to reinstatement after the government contract under which he had been employed was terminated. Indeed, the court denied any relief for the period following the termination of the contract. Although Northrop recommended its employees to the new contractor (which in fact retained 75% of the former Northrop employees), the court found that "Holley presented nothing more than circumstantial and inconclusive evidence to support the proposition that the employment decisions made by the new company were influenced by Northrop's recommendation." 835 F.2d at 1377. The decision in Holley was followed by the court in Blackburn v. Martin, 982 F.2d 125 (4th Cir. 1992), a case brought under the employee protection (whistleblower) provisions of the Energy Reorganization Act of 1974, 42 U.S.C. ' 5851(c), holding that though the complainant has proven a retaliatory discharge, "liability ends when the contract under which the employee worked is terminated." 982 F.2d at 129.

Thus, as a general matter, we do not believe that reinstatement is an appropriate remedy under Part 708 where, as here, there is a new M&O contractor that has no connection with the firm actually employing the complainant or the circumstances surrounding the discharge of the complainant, and the retention of employees by the new contractor is not directly influenced by the former contractor but merely a condition of assuming the M&O contract. Nonetheless, we remain keenly aware of the strong policy dictates underlying Part 708, favoring full protection of contractor employees that have been wrongfully discharged as a result of a protected disclosure. Therefore, we might exercise our equitable authority under Part 708 to order the reinstatement of a

wrongfully discharged employee under particular circumstances.6 However, even assuming O'Laughlin's claim were meritorious, we do not believe that this remedy is appropriate in this case.

O'Laughlin has requested reinstatement to a management position equivalent to that which he occupied prior to the Boeing reorganization, in which he had extensive authority over SPR logistics functions. DynMcDermott indicates that it has a "different organizational structure" (DynMcDermott Pre-Hearing Brief at 5) from Boeing and consequently there is no assurance that such a position exists. However, even assuming its existence, arguendo, it is clear that a management position of this capacity is singular in nature and the reinstatement of O'Laughlin would therefore require the displacement of an innocent employee, independently selected by DynMcDermott. Under these circumstances, reinstatement is a disfavored remedy. See, e.g., Edwards v. Department of Corrections, 615 F. Supp. 804, 811 (M.D. Ala. 1985).7

Finally, O'Laughlin has now conditionally relinquished his request for reinstatement, stating that "[i]f reinstatement is not desired by DynMcDermott, I am seeking reimbursement of future lost wage and benefits . . . ." O'Laughlin Pre-Hearing Brief, Appendix "B". It is certainly unmistakable from DynMcDermott's submission that it does not "desire" to reinstate O'Laughlin. Though ordering future lost wages (or front pay) is not among the remedies specified under Part 708,8 we take note that O'Laughlin is amenable to receiving monetary compensation in lieu of reinstatement. Therefore, in fashioning any relief which may be ordered were O'Laughlin successful on the merits of this case, we will consider whether O'Laughlin is entitled to any additional back pay9 in lieu of reinstatement, having determined that reinstatement is not an available remedy in this case.

It Is Therefore Ordered That:

(1) The Motion to Dismiss filed by Boeing Petroleum Services, Inc. on March 24, 1994, is hereby denied.

(2) The Motion to Dismiss filed by DynMcDermott Petroleum Operations Company on March 25, 1994, is hereby granted.

(3) This is an Interlocutory Order of the Department of Energy.

Fred L. Brown

Deputy Assistant Director

Office of Hearings and Appeals

Date:

1As will be explored in greater detail in considering Boeing's Motion to Dismiss, a critical factual issue in this case is whether, and the extent to which, O'Laughlin's communications to Boeing management disclosed matters relating to health and safety.

2OCEP states that although information relating to O'Laughlin's alleged disclosures regarding possible waste, mismanagement, and violation of a DOE Order was also examined, OCEP did not assert jurisdiction under Part 708 on the basis of these alleged disclosures. Notwithstanding, OCEP found in the Proposed Disposition that "[O'Laughlin]'s continued disagreement with the reorganization did not constitute disclosures of possible waste or mismanagement that merit protection under Part 708, had jurisdiction under that criteria been asserted in this case." Proposed Disposition at 15.

3Section 708.9(b) provides that hearings conducted under Part 708 "will normally be held . . . within 60 days from the date the complaint file is received by the Hearing Officer . . . ." However, upon initial contact, O'Laughlin informed the OHA Hearing Officer in this case that he would not be available within the 60-day time frame since he was about to begin 90 days of previously scheduled duty with the U.S. Naval Reserve. O'Laughlin therefore requested, and the Hearing Officer approved, an extension of time for the convening the hearing until after the completion of his duty assignment in May 1994.

4OCEP states in the Report of Investigation that during the attempted informal resolution of the matter, O'Laughlin sought the following remedies: (1) reinstatement to his prior position, (2) back pay and benefits, and (3) removal from his personnel files of any reference to the events and personnel actions surrounding the complaint. Report of Investigation at 5-6.

5 The preamble to Part 708 states that the reason for adopting a time limit for the filing of a complaint under this program was to ensure that investigations would not be rendered "more difficult as memories grow dimmer with the passage of time." 57 Fed. Reg. 7537 (March 3, 1992).

6Thus, we reject DynMcDermott's position that it is beyond the scope of the DOE's authority under Part 708 to order the reinstatement by a succeeding M&O contractor of an employee found to have been wrongfully discharged by the previous M&O contractor as a result of a protected disclosure. The DOE procurement contracts executed after the effective date of Part 708, such as DynMcDermott's contract, generally incorporate a provision requiring full compliance with all pertinent health and safety regulations, including Part 708. See 10 C.F.R. ' 708.2(a); 48 C.F.R. (DEAR) ' 970.5204-2. DynMcDermott argues that imposition of reinstatement would infringe upon its right under its M&O contract with DOE to conduct evaluation of employees the firm was required to employ during the 12-month period following its assumption of the contract. DynMcDermott Pre-Hearing Brief at 7 citing 48 C.F.R. (DEAR) ' 970.5204-56(a)(2)(c). However, merely requiring DynMcDermott to reinstate an employee under condition that it could temporarily treat the employee as a new employee subject to evaluation would hardly amount to a serious infringement of its contractual rights. In any event, the DOE has sovereign authority to modify contracts to effectuate overriding regulatory policies adopted in the public interest. See Winstar Corporation v. United States, 994 F.2d 797 (Fed. Cir. 1993).

7Boeing further asserts that, in any event, O'Laughlin has waived his right to reinstatement, and is entitled to only limited back pay, since he voluntarily resigned from his position in May 1992. Indeed, there is ample support for Boeing's position that an employee, although discriminated against, is not entitled to reinstatement where there was no actual or constructive discharge from employment. See, e.g., Maney v. Brinkley Municipal Waterworks and Sewer Department, 802 F.2d 1073, 1075 (8th Cir. 1986); Derr v. Gulf Oil Corp., 796 F.2d 340 (10th Cir. 1986). However, O'Laughlin maintains that his resignation was precipitated by being "belittled and harassed by management personnel" and therefore did in fact constitute a "constructive discharge", thus entitling him to reinstatement and back pay. O'Laughlin Response to Boeing Pre-Hearing Brief at 4. Since this is a factual matter that is in dispute, it is premature for us to rule upon whether O'Laughlin has established the existence of circumstances amounting to a "constructive discharge" from his position.

8Section 708.10(c) specifies the following remedies where a Part 708 violation is determined: "[The initial agency decision may include an award of reinstatement, transfer preference, back pay, and reimbursement to the complainant up to the aggregate amount of all reasonable costs and expenses (including attorney and expert witness fees) reasonably incurred by the complainant in bringing the complaint upon which the decision was based."

9The amount of any back pay that O'Laughlin is entitled to, assuming his complaint were determined to be meritorious, is a matter in dispute. As noted above, Boeing contends that the pertinent period for purposes of calculating this remedy should terminate as of May 15, 1992, since O'Laughlin "voluntarily" resigned on that date, while O'Laughlin contends that his termination from employment constituted a "constructive discharge". It is therefore conceivable in this case, depending upon the determinations reached, that the back pay period that O'Laughlin might be awarded could terminate on the date of his resignation or the date the Boeing contract terminated. It is also within our authority, however, to extend the back pay period to the date of issuance of a final determination in this matter if O'Laughlin has not obtained other employment.