

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 27 August 2008

Case No. 2008-CAA-00005

In the Matter of

DIANA LOVE,

Complainant,

v.

**UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,**

Respondent.

Appearances: Michael D. Kohn, Esquire
Kohn, Kohn & Colapinto, LLP
Washington, DC
For the Complainant

Joanna M. DeLucia, Esquire
U.S. Environmental Protection Agency
Office of General Counsel
Washington, DC
For the Respondent

ORDER OF DISMISSAL

On August 7, 2008, the Office of Administrative Law Judges (OALJ) received a filing entitled "Appeal of Constructive Denial" from the Complainant. The Complainant stated that she was initiating the appeal because over six months had passed since she filed a complaint against the United States Environmental Protection Agency alleging violations of the whistleblower provisions of the Clean Air Act, 42 U.S.C. § 7622, the Solid Waste Disposal Act, 42 U.S.C. § 6971, the Safe Drinking Water Act, 42 U.S.C. § 300j-9, and the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9610. The Complainant stated that the Occupational Safety and Health Administration had not issued a determination on the complaint, and that the delay had resulted in a loss of access to witnesses, emotional upset and increased litigation expense

on the part of the Complainant. In support, the Complainant cited *Plumley v. Bureau of Federal Prisons*, 1986-CAA-6 (ALJ Dec. 31, 1986).

On August 18, 2008, the undersigned issued an Order directing the parties to brief the issue of whether grounds existed for a finding of a constructive denial of the complaint by OSHA. Both the Complainant and the Respondent filed timely briefs.

There are only two ALJ decisions on constructive denial of a whistleblower complaint based on the investigative agency's failure to issue a timely decision. In *Plumley v. Bureau of Federal Prisons*, *supra*, then Deputy Chief Judge E. Earl Thomas found that there had been a constructive denial of the complaint when the Wage and Hour Administration exceeded the regulatory time period for investigating a complaint by over four months, even considering a 30 day extension.

About ten years later, I recognized in *Newton v. State of Alaska*, 1996-TSC-10 (ALJ Oct. 25, 1996), that "at some point ... inaction [by the investigatory agency] must be acknowledged as a constructive denial of the complaint." I declined, however, to find that a constructive denial had occurred when only a little more than three months had elapsed since the filing of the complaint. I also held that the complainant could renew his motion if further efforts to resolve or expedite this matter were unsuccessful, but conditioned such a motion on a showing of prejudice.

In 2003, then Associate Chief Judge Thomas M. Burke, was presented with the issue of constructive denial in a case arising out of a labor condition application appeal, which arises under Department of Labor immigration-related regulations. *Goel v. Indotronix International Corp.*, 2002-LCA-27 (ALJ Jan. 24, 2003). Citing *Plumley* and *Newton*, Judge Burke held that "[i]n a situation where the Administrator unreasonably delays a determination, such inaction has been held to be a constructive denial, triggering jurisdiction within this Office" Judge Burke, however, held that in the case before him "the actions of the Administrator do not equate to a constructive denial because the delay is found to be unintentional and not unreasonable." Judge Burke took into account that the Wage and Hour Division Administrator had averred that the delay was due to circumstances beyond Wage and Hour's control and that it began an investigation and would issue a determination as quickly as possible. In light of assurances by the Administrator, Judge Burke declined to find that a constructive denial had been effectuated, but gave leave to the complainant to renew his motion if further efforts to resolve or expedite the matter were unsuccessful.

In the instant case, several of the Complainant's arguments are well-taken. Congress clearly anticipated that whistleblower investigations by the Department of Labor would be prompt so that appropriate remedies, such as reinstatement, can be timely effectuated for complainants with meritorious claims. Moreover, the Complainant may have a valid concern that some EPA officials may depart government service with the imminent change in administration, and therefore soon may be difficult to compel as witnesses.

Nonetheless, the statutory and regulatory schemes clearly contemplate an investigation prior to a hearing before an ALJ. Moreover, given the paucity of caselaw on this subject, it is clear that docketing a whistleblower case before OALJ for hearing prior to OSHA's completion of its investigation and issuance of a determination is an unusual procedure which appears to have only actually been invoked once. Thus, I decline to adopt the Complainant's recommendation of a bright-line rule permitting the initiation of a hearing process before OALJ when a determination by OSHA is not issued within 90 days of the filing of the complaint.

In the instant case, counsel for EPA averred that OSHA represented to her that "the initial determination in this matter has already been submitted and approved, and is expected to be issued by the Philadelphia Regional Office of OSHA shortly."

Based on this representation, it appears that OSHA's issuance of a determination is imminent. Thus, a finding of a constructive denial is not warranted at this time.

Based on the foregoing, the Complainant's motion for the initiation of the ALJ hearing process prior to OSHA's issuance of writing findings under 29 C.F.R. § 24.105 in this matter is **DENIED**. This ruling, however, is without prejudice for the Complainant to renew her motion if further efforts to resolve or expedite this matter are unsuccessful.

SO ORDERED.

A

JOHN M. VITTON
Chief Administrative Law Judge