

# Decisions of the United States Court of International Trade

Slip Op. 07–129

FORMER EMPLOYEES OF FISHER & COMPANY, INC., Plaintiffs, UNITED STATES DEPARTMENT OF LABOR, Defendant.

Before: WALLACH, Judge  
Court No.: 06–00403

[Defendant’s Motion to Dismiss for Lack of Jurisdiction is DENIED and Defendant’s denial of certification is AFFIRMED.]

Dated: August 23, 2007

*Steven D. Schwinn*, Associate Professor, University of Maryland School of Law<sup>1</sup>; and *Kristine Grigorian*, Student Attorney, Clinical Law Program, University of Maryland School of Law, for Plaintiffs Former Employees of Fisher & Company, Inc.

*Peter D. Keisler*, Assistant Attorney General; *Jeanne E. Davidson*, Director, Department of Justice, Civil Division, Commercial Litigation Branch (*Joan M. Stentiford*); and *Frank Buckley*, Office of the Solicitor, U.S. Department of Labor, Division of Employment and Training Legal Services, of Counsel, for Defendant United States Secretary of Labor.

## OPINION

**Wallach, Judge:**

### I INTRODUCTION

Plaintiffs, Former Employees of Fisher & Company, Inc., challenge the U.S. Department of Labor’s (“Labor”) denial of Linda Willhott’s petition for Trade Adjustment Assistance (“TAA”) certification regarding her termination from Fisher & Company, Inc. on August 9,

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<sup>1</sup>Plaintiffs are represented by a clinical law program at University of Maryland School of Law and their law professor, Steven D. Schwinn, who since the filing of this case, has notified the court that he will in the future be an associate professor at the John Marshall School of Law. Given the continuing unavailability of Plaintiff’s counsel, this Motion has been decided without oral argument.

2005. The court has jurisdiction pursuant to 19 U.S.C. § 2395(c) and 28 U.S.C. § 1581(d)(1). For the following reasons, although Defendant's Motion to Dismiss for Lack of Jurisdiction is Denied, the matter is deemed a motion for summary judgment, and on the merits, Defendant is entitled to summary judgment.

## II BACKGROUND

Fisher & Company, Inc. ("Fisher") is a manufacturer of automotive seat components, headquartered in Michigan. On August 9, 2005, Willhoft was among the third or fourth group to be laid off from the Fisher plant in Troy, Michigan. Willhoft Affidavit ¶¶ 2–3, Plaintiff's App. at 1. On January 6, 2006 the plant where Willhoft had worked was closed permanently. *Id.* ¶ 6.

On August 12, 2006, former employees of Fisher Dynamics in St. Clair Shores, Michigan were certified for TAA eligibility. Willhoft says that she spoke with one of those workers on August 31, 2006 and thus learned of the TAA program. *Id.* ¶ 15. On the next business day, September 5, 2006, former employees of Fisher at Troy applied for TAA certification through the state workforce office. Petition for Trade Adjustment Assistance and Alternative Trade Adjustment Assistance for Fisher & Company Employees (September 5, 2006) ("Petition"), Defendant's App. at 5. Willhoft attached her petition to that of the group and indicated that she had been laid off from Fisher for more than one year. *Id.*

Labor certified the former employees of Fisher on September 28, 2006, but limited eligibility to those who had been laid off on September 5, 2005 or later. *Notice of Determinations Regarding Eligibility to Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance*, 71 Fed. Reg. 60,761 (October 16, 2006). Thus, Willhoft, who had been laid off on August 9, 2005, was denied certification for TAA eligibility. On October 24, 2006, Willhoft initiated this suit as a *pro se* litigant by letter to the court. The Clerk of the Court deemed the letter to be the filing of a complaint. Complaint of Linda Willhoft ("Complaint"), Plaintiff's App. at 2. Plaintiffs request that the court remand its case to the Department of Labor for reconsideration of Willhoft's eligibility for TAA certification, arguing that the one-year time limit for filing petitions should be equitably tolled because Willhoft had not been informed of the TAA program and would have applied on time, had she known of the program. Complaint ¶ 1.

## III STANDARD OF REVIEW

A defendant is entitled to USCIT Rule 12(b)(1) dismissal where, accepting the factual allegations made in the Complaint to be true,

and drawing all inferences in favor of the plaintiff, it appears beyond doubt that no set of facts can be proven that would entitle plaintiff to relief. *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189, 56 S. Ct. 780, 80 L. Ed. 1135 (1936); *Forest Labs., Inc. v. United States*, 403 F. Supp. 2d 1348, 1349 (CIT 2005) (“In deciding a motion to dismiss for failure to state a claim, as well as a USCIT R. 12(c) motion for judgment on the pleadings, the Court must accept all well-pleaded facts as true and view them in the light most favorable to the nonmovant.”).

The court has exclusive jurisdiction to affirm or remand “in whole or in part” the actions of the Department of Labor with respect to the eligibility of workers for trade adjustment assistance. 19 U.S.C. § 2395(c); *see also* 28 U.S.C. § 1581(d)(1). The court will uphold Labor’s determination for TAA eligibility if it is supported by substantial evidence and is otherwise in accordance with law. 19 U.S.C. § 2395(b); *Former Employees of Federated Merchandising Group v. United States*, 2005 Ct. Intl. Trade LEXIS 19 at \*6 (CIT February 7, 2005). Additionally, the court shall consider whether the agency’s determination is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” as provided for by the Administrative Procedures Act (“APA”). 5 U.S.C. § 706. Given “the *ex parte* nature of the certification process, and the remedial purpose of the [TAA] program,” the court has noted that Labor must conduct TAA investigations “with the utmost regard for the interests of the petitioning worker.” *Former Employees of IBM Corp. v. United States*, 387 F. Supp. 2d 1346, 1351 (CIT 2005) (quoting *Abbott v. Donovan*, 7 CIT 323, 327–28 (1984) (internal quotations omitted)).

The court carries out a two-step analysis to determine whether an agency has properly interpreted and applied a statute. *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842–43, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). First, the court examines whether Congress has spoken directly on the precise issue. *Id.* If Congress has spoken and its intent is clear, the court and the agency must give effect to that objective. *Id.* However, if Congress is silent or the intent of Congress on that particular issue is ambiguous, the second step of the court’s analysis is to determine whether the agency’s interpretation is permissible construction of the statute. *Id.* at 843. “Provided the agency has acted rationally, the Court may not substitute its judgment for the agency’s.” *Rene v. Sec’y of Dep’t of Homeland Sec.*, 2007 U.S. Dist. LEXIS 15215 at \*21 n.12 (D.N.J. 2007) (citing *Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1570 (Fed. Cir. 1994)).

#### IV DISCUSSION

In Plaintiffs’ response to Defendant’s Motion to Dismiss, Plaintiffs included Willhoft’s Affidavit, attesting to facts not contained in Defendant’s Motion to Dismiss. Pursuant to Rule 12(c), when “matters

outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56.” In *NEC Elecs. U.S.A. v. United States*, 13 CIT 214, 709 F. Supp. 1171 (1989), where the defendant interposed an answer to the plaintiff’s complaint, the court treated the defendant’s motion to dismiss as one for summary judgment pursuant to Rule 12(c). A similar situation is presented here by the Plaintiffs’ submission of Willhoft’s Affidavit. Therefore, the court will treat Defendant’s Motion to Dismiss as a motion for summary judgment.

### A

#### **The Court Has Subject Matter Jurisdiction Where a Former Employee Challenges a Denial of TAA Benefits**

Defendant requests that the court dismiss Plaintiffs’ case for lack of subject matter jurisdiction. Labor states that the Government must explicitly waive its sovereign immunity in the context of a statute, and so establish a court’s jurisdiction in a suit against the Government. Defendant’s Motion to Dismiss for Lack of Jurisdiction (“Defendant’s Motion”) at 4. Defendant acknowledges that 28 U.S.C. § 1581(d) and 19 U.S.C. §§ 2395(a)–(c) grant the court jurisdiction to review Labor’s TAA certification determinations, but argues that this does not include instances where there is no case or controversy. Defendant’s Motion at 6. Because the Fisher class was certified, Labor argues, there is no case or controversy here and Plaintiffs’ suit is moot. *Id.*

Plaintiffs counter that Willhoft is not challenging the certification of her fellow former employees, but rather Labor’s rejection of her individual petition. Plaintiffs’ Memorandum of Points and Authorities in Opposition to Defendant’s Motion to Dismiss (“Plaintiffs’ Opposition”) at 5. Willhoft claims that the state workforce office told her that her petition was denied because she had applied after the one-year deadline. Complaint ¶ 2. Therefore, Plaintiffs argue, Willhoft was denied benefits pursuant to 19 U.S.C. § 2273(b)(1), and the court has subject matter jurisdiction over denials in accordance with 19 U.S.C. § 2395(a) and 28 U.S.C. § 1581(d)(1). *Id.*

The Supreme Court has stated that “a case is moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.” *Powell v. McCormack*, 395 U.S. 486, 496, 89 S. Ct. 1944, 23 L. Ed. 2d 491 (1969) (internal quotations and citations omitted). Even if a defendant addresses some of a plaintiff’s claims or injuries prior to judicial review, “the case is not moot if other consequences of defendants’ actions remain.” *NEC Corp. v. United States*, 151 F.3d 1361, 1369 (Fed. Cir. 1998); accord *Former Employees of Quality Fabricating, Inc. v. United States Dep’t of Labor*, 343 F. Supp.2d 1272, 1286–1287 (CIT 2004). The court in *NEC Corp.* found that the plaintiff’s case was not moot because even

though the agency had issued a final anti-dumping duty order, the trial court could still provide relief by granting an injunction on that order. *NEC Corp.*, 151 F.3d at 1369. In the present case, although the agency certified former employees of Fisher, Willhoft was a member of that class and her petition was denied. Plaintiffs seek a remand of Labor’s determination in her case, so that she may apply for TAA benefits. Plaintiffs’ Opposition at 1–2. Therefore, this court, like the court in *NEC Corp.*, “could still fashion a useful remedy” to the agency’s determination in the case of Willhoft. *NEC Corp.*, 151 F.3d at 1369. For these reasons, the case is not moot.

## B

### **Plaintiff is Not Entitled to Equitable Tolling in this Case Because She Failed to Exercise Due Diligence**

#### 1

#### *The Parties’ Arguments Regarding Equitable Tolling*

The Government argues that no jurisdiction exists to equitably toll the one-year deadline for filing a petition for TAA certification contained in 19 U.S.C. § 2273(b)(1) because the one-year rule is not a filing deadline that can be extended by equitable tolling, but rather a substantive requirement for receiving TAA benefits.<sup>2</sup> Defendant’s Motion at 6–7, 9; Defendant’s Reply to Plaintiff’s Opposition to Motion to Dismiss (“Defendant’s Reply”) at 6–8. Though this argument fails on the facts of this case, Plaintiff still cannot recover.

Defendant claims that as a matter of law, the agency could only certify former employees of Fisher who had been separated from the company less than one year before the petition was submitted on September 5, 2006, and Willhoft’s petition was denied because she filed more than one year after her separation from Fisher. Defendant’s Motion at 3–4, 7. Alternatively, Defendant argues that even if equitable tolling does apply to the one-year rule, Willhoft fails to establish that her petition is entitled to equitable tolling. Defendant’s Reply at 9. Labor argues that none of the circumstances to which Willhoft points amount to affirmative misconduct by the Department of Labor. *Id.* Further, Defendant argues that the court has rejected the claim that an agency’s failure to notify is a basis for extending the one-year deadline, holding that Congress did not consider it suf-

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<sup>2</sup>19 U.S.C. § 2273(b):

Workers covered by certification. A certification under this section shall not apply to any worker whose last total or partial separation from the firm or appropriate subdivision of the firm before his application under section 2291 of this title occurred—

- (1) more than one year before the date of the petition on which such certification was granted, or
- (2) more than 6 months before the effective date of this chapter.

ficient grounds for extending the deadline. *Id.* (citing *Former Employees of Westmoreland Mfg. Co. v. United States*, 10 CIT 784, 650 F. Supp. 1021 (1986)).

Plaintiffs counter that equitable tolling can be applied to statutory deadlines under TAA, including the one-year deadline in 19 U.S.C. § 2273(b)(1), because the statute contains no language prohibiting tolling of the one-year rule. Plaintiffs' Opposition at 7–8. Plaintiffs further argue that Willhoft is entitled to the benefit of equitable tolling because Labor violated its duty under 19 U.S.C. § 2275(a) to inform Willhoft about the TAA program and its deadlines.<sup>3</sup> *Id.*

Plaintiffs argue that even though Willhoft exercised due diligence in pursuing benefits for dislocated workers, she learned of the TAA program after the one-year deadline because Labor had violated its duty under 19 U.S.C. § 2275(a) to inform her about TAA. *Id.* at 7. The evidence that Plaintiffs rely on to illustrate Willhoft's due diligence arises out of her account of what transpired after she was terminated from Fisher on August 9, 2005.

Willhoft states that at the time of her termination, neither her direct supervisor nor Fisher's human resources representative told her about the TAA program or unemployment benefits, in spite of the fact that a TAA petition on behalf of former employees at Fisher Dynamics in St. Clair Shores, who handled the same automotive parts that she did, was submitted two months before she was laid off. Willhoft Affidavit ¶ 4; Complaint ¶ 1.<sup>4</sup> Willhoft claims that she learned of unemployment benefits, but not of the TAA program, through a state-run automated hotline. Willhoft Affidavit ¶ 7.

Just before her unemployment benefits were about to expire, Willhoft says that she visited a state workforce office to ask about job retraining but was told that because the automotive industry was doing so poorly, she would be unlikely to find a new job in that sector and therefore the state would not pay for classes relating to

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<sup>3</sup> 19 U.S.C. § 2275 concerns benefit information for workers:

(a) The Secretary shall provide full information to workers about the benefit allowances, training, and other employment services available under this chapter [19 U.S.C. §§ 2271 *et seq.*] and about the petition and application procedures, and the appropriate filing dates, for such allowances, training and services. The Secretary shall provide whatever assistance is necessary to enable groups of workers to prepare petitions or applications for program benefits. The Secretary shall make every effort to ensure that cooperating State agencies fully comply with the agreements entered into under section 239(a) [19 U.S.C. § 2311(a)] of this title and shall periodically review such compliance. The Secretary shall inform the State Board for Vocational Education or equivalent agency and other public or private agencies, institutions, and employers, as appropriate, of each certification issued under section 223 [19 U.S.C. § 2273] of this title and of projections, if available, of the needs for training under section 236 [19 U.S.C. § 2296] of this title as a result of such certification.

<sup>4</sup> Willhoft says that although her "pink slip" cited "lack of work" as the reason behind her termination, the actual reason was that the company's production of parts had moved to Mexico. Willhoft Affidavit ¶ 5.

automotive work. *Id.* ¶ 8. She claims that she met with three representatives of the state workforce office in the year following her termination, including Lisa Rodriguez, a Trade Adjustment Representative, and that she corresponded with her Congressman, U.S. Senator, and State Senator for assistance, but no one informed her about the TAA program. *Id.* ¶¶ 9–12, ¶ 14.

Shortly after Willhoft was laid-off from Fisher, employees remaining there were notified that they too would soon be laid off. Willhoft claims that a representative from the state workforce office, Michigan Works!, gave those employees a presentation about programs for dislocated workers, including TAA, but former employees such as herself, who had been terminated at an earlier point, were not notified of the presentation.<sup>5</sup> *Id.* ¶¶ 6, 19. Willhoft states that she finally learned of the TAA program on August 31, 2006 from a friend who had worked at Fisher Dynamics in St. Clair Shores. *Id.* ¶ 15; Plaintiff’s Opposition at 11. Plaintiffs argue that if the one-year deadline is tolled, Willhoft will qualify for TAA benefits because she meets the substantive requirements of 19 U.S.C. § 2272(b) and falls within the category of workers Congress intended to assist through TAA legislation. *Id.* at 17.

## 2

### *Equitable Tolling Can Apply in TAA Cases*

Although as a matter of law Labor can only certify former employees who have been laid off within one year of filing for TAA certification, the Supreme Court has held that statutory deadlines can be equitably tolled if Congress has expressly waived its sovereign immunity in the relevant statutory text. 19 U.S.C. § 2273(b)(1); *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 95–96, 111 S. Ct. 453, 112 L. Ed. 2d 435 (1990). Such a waiver has been granted here in 28 U.S.C. § 1581(d)(1), which grants the court exclusive jurisdiction to review the Secretary of Labor’s final determinations, and 19 U.S.C. § 2395(c), which permits the court to affirm or remand “in whole or in part” those determinations. Defendant cites cases to argue that Congress intended that the one-year requirement not be tolled, and that this court has refused to toll the deadline. Defendant’s Motion at 8; Defendant’s Reply at 6–9; *Former Employees of Westmoreland Mfg. Co. v. United States*, 10 CIT 784, 650 F. Supp. 1021 (1986); *Nelson v. United States Sec’y of Labor*, 20 CIT 896, 936 F. Supp. 1026 (1996). However, both *Westmoreland* and *Nelson* concerned the ques-

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<sup>5</sup> Although former employees who had been laid off when the Troy plant closed had been informed of TAA assistance prior to their termination, non had filed for certification prior to the September 5, 2006 filing. Plaintiffs claim that the state workforce office told Willhoft that she was the only worker in her division to call about TAA benefits, and thus if she had not called, none of the other former employees of Fisher would have received TAA certification. Complaint ¶ 2.

tion of whether the one-year deadline could be tolled so that a class could be certified, whereas here former employees of Fisher have been certified. *Westmoreland*, 10 CIT at 785; *Nelson*, 20 CIT at 897. Moreover, Defendant overlooks the significance of *Irwin*, 498 U.S. at 95–96, where the Supreme Court noted that statutory deadlines are subject to tolling, and ignores *Anderson v. Sec’y of Agric.*, 462 F. Supp. 2d 1333, 1335, n. 6 (CIT 2006), where the court found that the doctrine of equitable tolling would permit a claim brought under 19 U.S.C. § 2395.

### 3

#### *Equitable Tolling Is Not Appropriate in This Case*

The issue here, therefore, is whether the one-year requirement should be equitably tolled in Willhoft’s case. Equitable tolling is typically extended “where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period or where the complainant has been induced or tricked by his adversary’s misconduct into allowing the filing deadline to pass.” *Irwin*, 498 U.S. at 96. Those are not the only bases upon which an equitable tolling claim can be made, but federal courts generally do not permit late filings where the claimant has failed to exercise due diligence in preserving his or her legal rights. *Id.* (citing *Baldwin County Welcome Ctr v. Brown*, 466 U.S. 147, 151, 104 S. Ct. 1723, 80 L. Ed. 2d 196 (1984)).

This is not a case where a party has filed a timely, but defective, pleading. Willhoft’s petition for certification clearly acknowledged that she had been laid off for more than one year. Petition at 3 (the state workforce office attached this explanation to Willhoft’s petition: “Original petition (attached) was signed by 3 workers – however, 2 of those workers have been laid off for more than 1 year.”). Rather, Plaintiffs are essentially arguing that the state workforce office and Labor misled Willhoft by failing to inform her about the TAA program and deadlines. A similar claim was rejected by the court in *Former Employees of Sonoco Products, Co. v. Chao*, 372 F.3d 1291 (Fed. Cir. 2004).

In *Sonoco*, appellants argued that the state employment office, and thus the Government, had misled the claimant by not fully informing her of the Department of Labor’s publication procedures and the related running of the statute of limitations. *Id.* at 1298–99. The court pointed out that the claimant, Dorothy Fail, had never requested such information and thus characterized the appellants’ argument this way: “appellants assert that Fail was misled . . . because the office *did not take it upon itself*, without the request by Fail, to fully inform Fail . . .” *Id.* (emphasis added). The court in *Sonoco* found that the claimant had not acted diligently to preserve her legal interests, for she “[a]t best . . . inquired about the case while in the unemployment office three times on other business.” *Id.*

A remand request was also rejected for lack of due diligence in *Ingman v. Sec’y of Agriculture*, Slip Op. 05–119, 2005 Ct. Intl. Trade LEXIS 127 (CIT September 2, 2005), where the petitioner filed for TAA benefits late because he was waiting for Labor to send him what was “essentially a courtesy copy” of the application. *Id.* at \*15.

Similar to the claimants in *Sonoco* and *Ingman*, here the Plaintiffs are arguing that Willhoft’s petition was late because Labor failed to supply her with information which it was not required to give, and that she herself did not request. By her own admission, Willhoft’s business at her state’s workforce office was to inquire about job retraining and an extension of her unemployment insurance. Willhoft Affidavit ¶¶ 8, 11. Although the state workforce office classified her as a “dislocated worker,” and she told at least one employee there that she was among many workers laid-off at her plant, the office was required to do nothing more than “provide full information . . . about the benefit allowances, training, and other employment services available” to her. *Id.* ¶¶ 9–12; 19 U.S.C. § 2275(a). The office satisfied its duty by offering Willhoft retraining classes in a non-automotive sector, an offer which she apparently declined. Plaintiffs’ Opposition at 3. The office therefore provided the only option available to her, and was not required to discuss TAA petitions and deadlines because individuals cannot petition for TAA certification. *See, e.g., Nelson*, 20 CIT at 902 (Plaintiff’s petition for TAA certification was invalid because “one person fails to constitute a group of workers”).

Contrary to Plaintiffs’ assertion, the present case is distinguishable from that of *Former Employees of Quality Fabricating, Inc. v. United States Sec’y of Labor*, 259 F. Supp. 2d 1282 (CIT 2003), where the authorities’ affirmative instructions misled the petitioner and as a result she missed the deadline for challenging Labor’s denial of her group’s TAA petition. *Quality Fabricating*, 259 F. Supp. 2d at 1286–87. There, the claimant *relied on assurances and instructions* from the state Trade Adjustment Representative and the Department of Labor that notice of the agency’s determination would be posted on Labor’s website. *Id.* In fact, the notice was published in the Federal Register, and was not posted on the Department of Labor website until nearly two months later. *Id.* at 1284. Thus, in spite of her due diligence, which included checking the website daily, continuously emailing the agency’s regional office, visiting her Trade Adjustment Representative, reading pamphlets given to her by the Representative, calling Labor’s TAA office in Washington, and contacting her state and federal representatives, the claimant had missed her opportunity to challenge Labor’s denial. *Id.* at 1286. In contrast, here neither the Department of Labor nor its state agents gave Willhoft misleading “affirmative instructions.” *Id.* at 1288. Rather, Willhoft was given accurate responses to the information she requested. Willhoft Affidavit ¶¶ 8, 11; Plaintiffs’ Opposition at 3.

The present case can also be distinguished from *Truong v. U.S. Sec’y of Agriculture*, 461 F. Supp. 2d 1349 (CIT 2006), where the court found that the petitioner had successfully stated a case for equitable tolling by arguing that the Department of Agriculture’s Farm Service Agency did not properly notify her that her class had been recertified for benefits, as was required by 19 U.S.C. § 2401d. *Id.* at 1350, 1354. Former employees of Fisher were not certified at the time Willhoft claims that Labor should have informed her about the TAA program. Thus, the Plaintiffs incorrectly liken Willhoft’s case to that of the *Truong* claimant, arguing that the agency had a duty to inform her of TAA benefits and deadlines, pursuant to 19 U.S.C. § 2775(a). Although the agency has a duty to “provide written notice” to those whom the Secretary of Labor has reason to believe are a part of the certified group, the agency does not have a duty to provide such notice to members of a potential class that they might qualify for certification. 19 U.S.C. § 2275(b)(1) (“The Secretary shall provide written notice . . . to each worker whom the Secretary has reason to believe is covered by a certification”); *accord Sonoco* 372 F.3d at 1299 (rejecting appellants’ attempt to “impose upon the state employment office the type of affirmative obligations found in an attorney-client relationship.”).

## V CONCLUSION

For the reasons stated above, Plaintiff is not entitled to equitable tolling, and Defendant’s Motion to Dismiss for Lack of Subject Matter Jurisdiction is Denied. Defendant’s denial of TAA certification to Willhoft is affirmed.

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FORMER EMPLOYEES OF FISHER & COMPANY, INC., Plaintiffs, v.  
UNITED STATES DEPARTMENT OF LABOR, Defendant.

Before: WALLACH, Judge  
Court No.: 06-00403

### *ORDER AND JUDGMENT*

Upon consideration of Defendant’s Motion to Dismiss for Lack of Jurisdiction (“Defendant’s Motion to Dismiss”); the court having reviewed all pleadings and papers on file herein, and good cause appearing therefor, it is hereby

ORDERED ADJUDGED AND DECREED that Defendant’s Motion to Dismiss be and hereby is DENIED, and it is further

ORDERED ADJUDGED AND DECREED that Defendant’s Motion to Dismiss, having been deemed a motion for summary judgment,

the court having examined the pleadings and papers on file herein, and good cause appearing therefor, it is further

ORDERED ADJUDGED AND DECREED that Defendant's Motion For Summary Judgment be and hereby is GRANTED; and it is further

ORDERED ADJUDGED AND DECREED that a final judgment in favor of Defendant and against Plaintiff be and hereby is GRANTED.

Slip Op. 07-132

HARTFORD FIRE INSURANCE CO., Plaintiff, v. UNITED STATES, Defendant.

Before: Pogue, Judge  
Court No. 07-00101

[Defendant's motion to dismiss for lack of subject matter jurisdiction granted.]

Decided: Aug. 29, 2007

*Barnes, Richardson & Colburn*, (Daniel F. Shapiro, Eric W. Lander, and Sandra L. Friedman) for the plaintiff.

*Peter D. Keisler*, Assistant Attorney General; *David M. Cohen*, Director; *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Michael J. Dierberg*), *Edward Greenwald*, Bureau of Customs and Border Protection, of counsel, for the defendant.

## OPINION

**Pogue, Judge:** Faced with a demand by the United States Bureau of Customs and Border Protection ("Customs") for the payment of antidumping duties pursuant to Plaintiff's bond guaranteeing the payment of such duties, Plaintiff, in this action, asks the court to declare its bond unenforceable. Pursuant to USCIT R. 12(b)(1), Defendant moves to dismiss, claiming a lack of subject matter jurisdiction because of Plaintiff's failure to utilize or exhaust its administrative protest remedies. For the reasons stated herein, the court grants Defendant's motion.

## Background

This action involves three entries of merchandise imported into the United States by Brother Packaging Inc. The merchandise is subject to antidumping duties. Plaintiff, Hartford Fire Insurance Company ("Plaintiff" or "Hartford") guaranteed a basic importation and entry bond for payment of duties, taxes and charges on these entries.

In its three-count complaint, Plaintiff now asks the court to declare its bond unenforceable, claiming that the Continued Dumping and Subsidy Offset Act of 2000, Pub. L. No. 106–387, § 1003, 114 Stat. 1549, 1623 (2000) codified at 19 U.S.C. § 1675c<sup>1</sup> (“CDSOA” or “Byrd Amendment”), has rendered its bond inapplicable and invalid.

The Byrd Amendment altered the government’s use of antidumping and countervailing duties (“ADD” and “CVD” respectively) collected pursuant to ADD and CVD orders on subject merchandise. Customs continues, as it did before the Byrd Amendment, to collect antidumping and countervailing duties, but, pursuant to the Byrd Amendment, rather than depositing those duties into the general treasury of the United States, Customs now deposits all duties collected into “special accounts” established within the U.S. Treasury for each antidumping and countervailing duty order. 19 U.S.C. § 1675c(e); 19 C.F.R. § 159.64.<sup>2,3</sup> In addition, each year, Customs distributes all monies contained in those special accounts, plus interest, on a *pro rata* basis, to “affected domestic producers,” i.e., domestic companies (who continue to produce the subject merchandise under the ADD or CVD order) and worker groups that supported the petition for the antidumping or countervailing duty order. The funds distributed, known as the “continued dumping and subsidy offset,” 19 U.S.C. § 1675c(a), 19 C.F.R. § 159.61(a) (“Byrd Distributions”), are allocated based on “qualifying expenditures,” i.e., certain enumerated business expenses such as manufacturing facilities, equipment, input materials, health benefits for employees, and “[w]orking capital or other funds needed to maintain production,” paid by affected domestic producers. 19 U.S.C. §§ 1675c(b)(4); 1675c(d)(2)–(3); 19 C.F.R. § 159.61(c).<sup>4</sup>

Plaintiff claims that, under contract and surety common law, it is not obligated by the terms of its bond to pay what amounts to a subsidy to the U.S. domestic industry. Rather, Plaintiff claims, the Byrd Amendment constitutes a material alteration of its bond that increased Plaintiff’s risk of loss, which material alteration discharges

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<sup>1</sup>Except where otherwise noted, all references to the United States Code (“U.S.C.”) are to the 2000 edition.

<sup>2</sup>Except where otherwise noted, all references the Code of Federal Regulations (“C.F.R.”) are to the 2007 edition.

<sup>3</sup>Customs deposits monies into special accounts only after the entries of the goods have been liquidated, *i.e.*, final duties have been collected and deposited. Prior to liquidation, Customs deposits all monies collected, *i.e.*, cash deposits, inclearing accounts. *See* 19 C.F.R. § 159.64(a). When goods are liquidated, the money in the clearing accounts is transferred to special accounts. *See* 19 C.F.R. § 159.64(b).

<sup>4</sup>On February 8, 2006, President Bush signed the Deficit Reduction Act of 2005 repealing the Byrd Amendment. *See* Deficit Reduction Act of 2005, Pub. L. No. 109–171, § 7601(b), 120 Stat. 4, 154 (2006). As provided by this repeal: “[a]ll duties on entries of goods made and filed before October 1, 2007, that would, but for [the repeal], be distributed” will continue to be distributed under the Byrd Amendment, 19 U.S.C. § 1675c. *Id.*

Plaintiff from its obligation under the bond. Plaintiff asserts that the court has jurisdiction of what Plaintiff styles a common law dispute pursuant to 28 U.S.C. § 1581(i).<sup>5</sup>

Defendant moves to dismiss because Plaintiff has filed no protest in response to Customs' demand for payment of duties guaranteed by Plaintiff's bond. Defendant notes that Customs' demand that Plaintiff pay antidumping duties and interest is a "charge" within the plain meaning of 19 U.S.C. § 1514(a)<sup>6</sup> and that jurisdiction for a challenge to such a charge must be established pursuant to 28 U.S.C. § 1581(a).<sup>7</sup>

Citing a long line of decisions from the Court of Appeals for the Federal Circuit for the proposition that, when jurisdiction under subsection (a) of § 1581 is or could have been available, jurisdiction pursuant to section 1581(i) may not be invoked unless relief under section 1581(a) would be "manifestly inadequate," *see Am. Signature Inc. v. United States*, 31 CIT \_\_\_, 477 Fed. Supp. 2d 1281, 1287 (2007), Defendant argues that Plaintiff may not, in this matter, invoke jurisdiction under section 1581(i), but must first utilize its protest remedy and obtain jurisdiction pursuant to section 1581(a). Defendant also relies on 28 U.S.C. § 2637(d) which states that "the Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies."<sup>8</sup> Finally, Defendant notes

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<sup>5</sup>In relevant part, 28 U.S.C. § 1581(i) provides:

(i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)–(h) of this section . . . , the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—

- (1) revenue from imports or tonnage;
- (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
- (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or
- (4) administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection and subsections (a)–(h) of this section.

28 U.S.C. § 1581(i).

<sup>6</sup>In relevant part, 19 U.S.C. § 1514(a) provides that "decisions of the Customs Service . . . as to . . . charges or exactions . . . shall be final and conclusive upon all persons . . . unless a protest is filed in accordance with this section. . . ."

<sup>7</sup>In relevant part, 28 U.S.C. § 1581(a) provides that the court "shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part. . . ."

<sup>8</sup>28 U.S.C. § 2637 provides:

- (a) A civil action contesting the denial of a protest under section 515 of the Tariff Act of 1930 may be commenced in the Court of International Trade only if all liquidated duties, charges, or exactions have been paid at the time the action is commenced, except that a surety's obligation to pay such liquidated duties, charges, or exactions is limited to the sum of any bond related to each entry included in the denied protest.
- (b) A civil action contesting the denial of a petition under section 516 of the Tariff Act

that under the rule announced in the court's decision in *American Motorists Ins. Co. v. United States*, 14 CIT 298, 737 F. Supp. 648 (1990), Plaintiff's complaint is untimely because a protest denying liability under an import bond must be filed within the 180-day period of the Customs decision challenged thereby. 19 U.S.C. § 1514(c) (2004). Nor has Plaintiff paid the duties required by 28 U.S.C. § 2637(a) as a condition for assertion of protest jurisdiction.

Plaintiff concedes that Customs' demand for payment under the bond is a charge. Plaintiff argues, however, that it "is not challenging the charge itself." Rather, Plaintiff claims that the issue is whether the surety bond is valid, or whether the bond covers the charge.

Plaintiff argues that its contract and surety claims are not claims identified as protestable pursuant to 19 U.S.C. § 1514(a). Consequently, Plaintiff claims, "[l]ike the plaintiff in *Old Republic*," it had only the options of (1) not paying the duties demanded, and waiting until Customs brought an action against it, at which time it could assert its contract claim, or (2) proceeding with its claim under 1581(i). See, *Old Republic Ins. Co. v. United States*, 10 CIT 589, 599, 645 F. Supp. 943, 952 (1986). It chose "proactively to seek the court's assistance" by invoking 1581(i) jurisdiction.

### Jurisdiction and Standard of Review

A jurisdictional challenge to the court's consideration of Plaintiff's action raises a threshold inquiry. *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 577–78 (1999); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–102 (1998). The court must therefore address Defendant's motion to dismiss for lack of subject matter jurisdiction and make an initial determination that jurisdiction exists before it may reach the merits of Plaintiff's claim.

In deciding a USCIT R. 12 (b)(1) motion that does not challenge the factual basis for the complainant's allegations, the court assumes "all factual allegations [contained in the complaint] to be true and

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of 1930 may be commenced in the Court of International Trade only by a person who has first exhausted the procedures set forth in such section.

(c) A civil action described in section 1581(h) of this title may be commenced in the Court of International Trade prior to the exhaustion of administrative remedies if the person commencing the action makes the demonstration required by such section.

(d) In any civil action not specified in this section, the Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies.

28 U.S.C. § 2637.

It is somewhat unclear why the government is relying on 28 U.S.C. § 2637(d) in support of its USCIT R. 12(b)(1) motion, as section 2637(d) is discretionary, not jurisdictional. See *Carpenter Tech. Corp. v. United States*, 30 CIT \_\_\_\_, 452 F.Supp.2d 1344, 1345, (2006) ("*Carpenter I*") (explaining that the exhaustion requirement is not jurisdictional); see also *Carpenter Tech. Corp. v. United States*, 30 CIT \_\_\_\_, 464 F.Supp.2d 1347 (CIT 2006) ("*Carpenter II*").

[draws] all reasonable inferences in plaintiff's favor." *Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995). Nonetheless, as the Federal Circuit explained in *Norsk Hydro Canada, Inc. v. United States*, the " 'mere recitation of a basis for jurisdiction . . . cannot be controlling[;]' " rather, analysis of jurisdiction requires determination of the " 'true nature of the action. . . . ' " *Norsk Hydro Canada, Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006) (quoting *Williams v. Sec'y of Navy*, 787 F.2d 552, 557 (Fed. Cir. 1986)).

Having determined the true nature of the action, the court then applies the provisions of the various paragraphs of section 1581 to determine the appropriate treatment of a plaintiff's claim. See *Parkdale Intern. Ltd. v. United States*, 31 CIT \_\_\_, 491 F. Supp. 2d 1262 (2007) ("*Parkdale I*"); see also *Parkdale Int'l. Ltd. v. United States*, Slip Op. 07-122, 31 CIT \_\_\_ (Aug. 8, 2007) ("*Parkdale II*"). In *Parkdale I*, the court recently reviewed the meaning of the Federal Circuit's "manifest inadequacy" jurisprudence for articulating the scope of the court's jurisdiction under Section 1581(i). The court noted that in the harbor maintenance tax ("HMT") litigation, the Federal Circuit recognized that a party may assert § 1581(i) jurisdiction even where jurisdiction under § 1581(a) could have been exercised. Cf. *U.S. Shoe Corp. v. United States*, 114 F.3d 1564, 1570 (Fed. Cir. 1997), aff'd, 523 U.S. 360 (1998) with *Swisher Int'l., Inc. v. United States*, 205 F.3d 1358, 1369 (Fed. Cir. 2000). The court concluded that "where the core of a dispute is within § 1581(i), i.e., it relates to a general issue of administration and enforcement policy as to the matters listed in § 1581(i)(1)–(3), § 1581(i) should function according to its terms, unless it is clear that another provision of § 1581 applies." *Parkdale I*, 31 CIT at \_\_\_, 491 F. Supp. 2d at 1268 (emphasis omitted).

The "manifest inadequacy" rubric was also recently discussed in *Abitibi Consol., Inc. v. United States*, 30 CIT \_\_\_, \_\_\_ 437 F. Supp. 2d 1352, 1357 (2006) (noting that Section 702 of the Administrative Procedure Act (which provides that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review", 5 U.S.C. § 704 (2000)) "is mirrored in the court's residual jurisdiction case law, which . . . prescribes that section 1581(i) supplies jurisdiction only if a remedy under another section of 1581 is unavailable or manifestly inadequate.") In *Abitibi*, the court declined to accept jurisdiction over interlocutory agency determinations made in an antidumping proceeding where a remedy under subsection 1581(c) was available, adequate and reviewable.

### Discussion

Plaintiff's complaint in this action seeks to challenge Customs' demand for payment of antidumping duties. At its core, Plaintiff's complaint is a challenge to a Customs' "charge" that is protestable pursu-

ant to section 1581(a). Thus, using the test articulated by the court in *Parkdale I*, section 1581(a) “applies.” Moreover, section 1581(a) was also an available, adequate and reviewable avenue for Plaintiff’s assertion of the court’s jurisdiction over its claim.<sup>9</sup>

Plaintiff’s argument that its claim is a defense to Customs’ charge, rather than a dispute of the charge itself, does not persuade. Customs’ charge required that Plaintiff make payment under its bond; Plaintiff objects, and thus the true nature of its complaint is to avoid making the requested payment.

The court’s decision in *Old Republic*, upon which Plaintiff relies, is consistent with this result. In *Old Republic*, the court permitted a surety’s contract challenge to the collection of duties to proceed under section 1581(i) where the claims could not have been made under section 1581(a) because, despite Plaintiff’s protest and payment of the duties involved, Customs had legitimately extended the time for liquidation of the goods at issue. Consequently, the *Old Republic* court assumed that section 1581(a) jurisdiction was not available. *Old Republic*, 10 CIT at 597, 645 F. Supp. at 951.

Also, unlike the plaintiff in *Old Republic*, Plaintiff here has failed to utilize its administrative protest remedy. See *Woodford v. Ngo*, \_\_\_ U.S. \_\_\_, 126 S. Ct. 2378, 2385 (2006) (citing *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) (“[A]s a general rule [ ] courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.”); see also, *Am. Air Parcel Forwarding Co. v. United States*, 718 F.2d 1546, 1549 (Fed. Cir. 1983) (“[w]here a litigant has access to [the Court of International Trade] under traditional means, such as 28 U.S.C. § 1581(a), it must avail itself of this avenue of approach complying with all the relevant prerequisites thereto. It cannot circumvent the prerequisites of 1581(a) by invoking jurisdiction under 1581(i) . . .” (quoting *Am. Air Parcel Forwarding Co. v. United States*, 5 CIT 8, 10, 150, 557 F. Supp. 605, 607 (1983) with approval)) (citations omitted).

In the case at issue here, Plaintiff’s failure to utilize the administrative protest remedy deprived Customs of the opportunity to conduct a timely consideration of its authority to prescribe the conditions for importation bonds, in the context of its Byrd Amendment functions, and to address Plaintiff’s claim at the administrative level. Importantly, Plaintiff’s failure to invoke section 1581(a) also deprived the court of a clear and timely path for review.

Finally, though not relevant here, to the extent that Plaintiff invokes equitable considerations, arguing that it should be rewarded

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<sup>9</sup> Plaintiff does not contend that it was unaware of the legal basis for its claim or of its protest remedy at the time Customs demanded payment under its bond. Cf. *St. Paul Fire & Marine Ins. v. United States*, 959 F.2d 960, 963–4 (Fed. Cir. 1992).

for “proactively” bringing its action to court, we note that, while the court is not divested of jurisdiction by the liquidation of the entries at issue, *see Shinyei Corp. of America. v. United States*, 355 F.3d 1297, 1310 (Fed. Cir. 2004), the court will not reward a party who sleeps on its rights. *Cf. Mitsubishi Elecs. Am., Inc. v. United States*, 18 CIT 167, 180, 848 F.Supp. 193, 203 (1994) (holding that “failure to seek injunctive relief against liquidation before commencing [an] action . . . precludes [the] Court from exercising jurisdiction under 28 U.S.C. § 1581(i)”), *aff’d* on alternative grounds, 44 F.3d 973, 977 (Fed. Cir. 1994); *see also Mukand Int’l., Ltd. v. United States*, 29 Plaintiff’s complaint is hereby DISMISSED. Judgment will be entered for Defendant. CIT \_\_\_, \_\_\_, 412 F. Supp. 2d 1312, 1318–9 (2005).

### Conclusion

Accordingly, Defendant’s motion will be granted, and Plaintiff’s complaint is hereby DISMISSED. Judgment will be entered for Defendant.

It is so ORDERED.



Slip Op. 07–132

HARTFORD FIRE INSURANCE CO., Plaintiff, v. UNITED STATES, Defendant.

Before: Pogue, Judge  
Court No. 07–00101

### JUDGMENT

This action having been duly submitted for decision, and this court, after due deliberation having rendered a decision herein; now, in conformity with that decision, it is hereby

ORDERED that Plaintiff’s complaint is dismissed.

