

# Case No. VWZ-0020

February 3, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Motion to Dismiss

Name of Case: Lucy B. Smith

Date of Filing: October 14, 1999

Case Number: VWZ-0020

This determination will consider a Motion to Dismiss filed by Westinghouse Savannah River Company (WSRC) on October 14, 1999. WSRC seeks dismissal of three allegations of retaliation by reason of failure to rehire submitted by Lucy B. Smith under the Department of Energy's Contractor Employee Protection Program, 10 C.F.R. Part 708. In a submission dated December 6, 1999, WSRC further requests dismissal of a discovery request made by Ms. Smith regarding hiring by subcontractors of WSRC.

## I. Background

Ms. Smith's Part 708 complaint arises from her employment as a chemist with WSRC at DOE's Savannah River Site. Ms. Smith alleges that she made three protected disclosures involving health and safety concerns to WSRC officials during the last half of 1996. On January 20, 1997, Ms. Smith received a Reduction in Force notice from WSRC. Ms. Smith subsequently elected to retire from WSRC on April 1, 1997. In her complaint, Ms. Smith alleged that she was selected for termination because of her disclosures.

Pursuant to a Motion for Discovery, I permitted Ms. Smith to engage in discovery pertaining to potential WSRC retaliation by virtue of its failure to rehire Ms. Smith for various job openings. See [Lucy B. Smith](#), 27 DOE ¶ 87,521 (1999). As part of this decision, I ordered that after discovery, Ms. Smith must submit to me and WSRC any specific formal allegation of WSRC retaliation by failure to rehire which she sought to have considered at the hearing in this matter. In a letter dated September 1, 1999, Ms. Smith seeks to amend her Part 708 complaint by alleging that WSRC retaliated against her by failing to hire her for two chemist positions filled in August and October of 1998 and one filled on March 23, 1999. Regarding these hirings, Ms. Smith asserts that she was "subject" to preferential hiring eligibility under Section 3161 of the Defense Authorization Act, 42 U.S.C. § 7274 (h), (j).

In its Motion, WSRC argues that any allegations regarding a failure to rehire should not be considered at the hearing. Specifically, WSRC argues that Section 3161 of the Defense Authorization Act confers no private cause of action to Ms. Smith for failure to be rehired by WSRC. Specifically, WSRC points out that Section 3161 requires that the Secretary of Energy prepare a "workforce restructuring plan" for each defense nuclear facility. Further, Section 3161 uses only permissive language ("to the extent practicable") in its directive to give rehiring preference to terminated employees at such facilities. WSRC cites *Pawlick v. O'Leary*, No. 1:95-3300-6 (D.S.C. Sept. 23, 1997), *aff'd*, *Pawlick v. O'Leary*, No. 97-2459 (4th Cir. June 26, 1988) (per curiam) (*Pawlick*), for the proposition that Section 3161 does not confer a private right of action upon an individual. WSRC also argues that neither the provisions of the DOE-WSRC contract nor the two forms entitled "Statement of Interest in Maintaining Section 3161 Employment Eligibility"

(described below) that Ms. Smith signed contain language which would mandate her rehiring by WSRC. Consequently, WSRC maintains that her failure to be rehired for any of the three positions described by Ms. Smith can not be considered retaliatory. Because WSRC believes that failure to rehire can not be a retaliation, WSRC requests that Ms. Smith's discovery request regarding hiring by WSRC subcontractors at the DOE Savannah River facilities be dismissed.

WSRC also argues that, as a practical matter, it did not retaliate against Ms. Smith because during the time the three chemists were hired, her name was not active in WSRC's Preferential Hiring Database. This database contains information on previously terminated employees who wish to be considered for future job positions. WSRC states that on January 20, 1997, Ms. Smith completed a form entitled "Statement of Interest in Maintaining Section 3161 Employment Eligibility" ("Statement of Interest" form). This form enables an individual to be placed on the Preferential Hiring Database for the Savannah River Site. The form also states that an individual must complete a new "Statement of Interest" form prior to one year from the date the individual signs the form. Because Ms. Smith had not submitted another "Statement of Interest" form within the one year period, Ms. Smith's name was moved from the active list to inactive status on March 17, 1998. WSRC asserts that Ms. Smith did not submit another "Statement of Interest" form until March 29, 1999. Thus, from March 17, 1998 to March 29, 1999, Ms. Smith's name was not active in the database, and consequently, she would not have been considered for any available position, including the three chemist positions at issue here, during that period.

In response, Ms. Smith argues that she is not asserting any rights under Section 3161. Instead, she states that her claim with regard to the allegations concerning her failure to be rehired is based upon 10 C.F.R. Part 708. Specifically, she asserts that the definition of "retaliation" in 10 C.F.R. § 708.2 refers to "an action . . . taken by a contractor against an employee with respect to employment . . . as a result of the employee's disclosure of information." Thus, Ms. Smith argues that this definition would encompass a failure to be rehired when the employee had a preference in rehiring.

## **II. Analysis**

### **A. Allegations Concerning Failure to Rehire**

WSRC asks that I dismiss Ms. Smith's request to amend her complaint regarding the allegation of failure to rehire her for one of the three chemist positions identified in her September 1 letter.

As an initial matter, I find that Section 3161 of the Defense Authorization Act, 42 U.S.C. § 7274 (h), (j), does not create for Ms. Smith any entitlement to one of the three chemist positions at issue here. I find the Court's reasoning in Pawlick persuasive. Section 3161 requires the Secretary of Energy to prepare a plan for the restructuring of Department of Energy nuclear weapons facilities which includes a provision that "[E]mployees whose employment . . . is terminated shall, to the extent practicable, receive preference in any hiring of the Department of Energy." 42 U.S.C. §7274(h). The Pawlick court held that there is no mention of a private cause of action in the statute nor legislative history to support the creation of such a cause of action. Pawlick, slip op. at 3. Further, the court held that the use of discretionary language ("shall, to the extent possible") in the section was inconsistent with a finding that the statute confers a right that can be enforced through private litigation. Consequently, the Court concluded that Congress did not intend to confer a privately enforceable federal right to sue pursuant to Section 3161. *Id.* Additionally, neither of the two "Statement of Interest" forms signed by Ms. Smith or the DOE-WSRC contract provisions submitted by WSRC include language that would mandate rehiring of Ms. Smith. However, even if Ms. Smith does not have an enforceable right under Section 3161, the DOE-WSRC contract or the "Statement of Interest" forms, I also find that if, as a result of a protected disclosure, she was denied reemployment, such action could be retaliation cognizable under Part 708.

Section 708.2 defines retaliation as "an action . . . taken by a contractor against an employee with respect to employment (e.g. discharge, demotion, or other negative action with respect to the employee's

compensation, terms, conditions or privileges of employment) as a result of the employee's disclosure of information, participation in proceedings, or refusal to participate in activities described in § 708.5 of this subpart." 10 C.F.R. § 708.2. In the present case, I believe that Ms. Smith's eligibility for preference in hiring is a privilege of her former employment at WSRC. While Section 3161 does not in itself require that previously terminated employees be automatically rehired, the fact remains that WSRC established a database so that it could consider former employees for possible rehiring. Given these facts, I find that inclusion in the WSRC database and subsequent consideration for rehiring is a privilege of Ms. Smith's former employment at WSRC. Thus, if WSRC failed to rehire her as a result of her protected disclosures such action could be considered retaliation under Part 708.

In its Motion, WSRC has presented substantial evidence indicating that it would have not considered her for the three positions at issue notwithstanding her alleged disclosures because of her failure to complete another "Statement of Interest" form within the one year period specified on the form. Because of her failure to complete another "Statement of Interest" form, it appears that Ms. Smith's name was not active in the Preferential Hiring Database during the period when the three chemist positions were filled. The language in the "Statement of Interest" form Ms. Smith signed clearly states that a new form must be completed within one year of the date an individual completes the last form. Specifically, the form states "I also understand that to retain preference in hiring status, I am required to complete a new form prior to one (1) year from the date of my signature below." See Exhibit A to October 14, 1999 WSRC Motion to Dismiss. In response, Ms. Smith asserts that following the WSRC lay off, she had contacted a Ms. Carol McClure of the WSRC personnel department who informed her that all retired people would be removed from the database. Sometime after that conversation, Ms. Smith asserts that she tried to telephone a Mr. Lamar Cherry in the WSRC personnel department but that he did not return her telephone call. Several months later, Ms. Smith states she received a form letter asking whether she would want to be considered for rehire, to which she responded in the affirmative.

OHA has held that Motions to Dismiss should only be granted where there is 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, e.g., [Lockheed Martin Energy Systems, Inc.](#), 27 DOE ¶ 87,510 (1999). Given Ms. Smith's assertions in her response, which for the purposes of this motion I will assume are true, I will not dismiss Ms. Smith's allegations of retaliation since it is conceivable that WSRC could have given Ms. Smith incorrect information about the "Statement of Interest" form in retaliation for her alleged disclosures. Additional material presented at the hearing might substantiate this allegation.

## **B. Discovery**

WSRC also requests that I dismiss Ms. Smith's September 1, 1999 discovery request. In this request Ms. Smith asks for: a list of chemists, engineers, project managers and risk management personnel (both safety and human health) who were hired by Bechtel, Babcock and Wilcox, BNFL and other subcontractors at the Savannah River site. This request asks for material which is not relevant to the current proceeding. The current proceeding has at issue allegations that WSRC retaliated against Ms. Smith for alleged protected disclosures. From the record before me, it appears that Ms. Smith was not an employee of any contractor or subcontractor other than WSRC when she made her disclosures or was terminated from employment. Thus, I do not see how the information sought in this discovery request would shed any light on allegations that WSRC retaliated against Ms. Smith. WSRC need not respond to Ms. Smith's September 1, 1999 discovery request.

In sum, I will grant WSRC's Motion in part. I will not dismiss Ms. Smith's allegations as to her failure to be rehired described in her September 1, 1999 letter. However, I will deny Ms. Smith's request for discovery contained in the September 1 letter.

It Is Therefore Ordered That:

(1) The Motion to Dismiss filed by Westinghouse Savannah River Corporation on October 14, 1999, Case

No. VWZ-0020, is hereby granted in part as described in the foregoing decision.

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

Richard A. Cronin, Jr.

Hearing Officer

Office of Hearings and Appeals

Date: February 3, 2000