

Case No. VWZ-0012

August 6, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Motion to Dismiss

Name of Case: Lucy B. Smith

Date of Filing: June 30, 1999

Case Number: VWZ-0012

This determination will consider a Motion to Dismiss filed by Westinghouse Savannah River Company (WSRC) on June 30, 1999. WSRC seeks dismissal of the underlying complaint filed by Lucy B. Smith under the Department of Energy's Contractor Employee Protection Program, 10 C.F.R. Part 708.

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. Subsequently, on January 20, 1997, Ms. Smith received a Reduction in Force notice from WSRC. Ms. Smith then filed a complaint with the United States Equal Opportunity Commission (EEOC) and the State of South Carolina Human Affairs Commission (SCHAC) on February 18, 1997. In these complaints Ms. Smith alleges that she was selected for termination by reason of her age and that her termination would violate the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 et. seq. On March 26, 1997, Ms. Smith filed her Part 708 complaint. Ms. Smith retired from WSRC on April 1, 1997. On April 20, 1997, Ms. Smith again formally complained about her selection for termination to the EEOC and SCHAC. In these complaints, Ms. Smith asserted that she had been subject to age discrimination in her selection for termination.

In its Motion, WSRC asserts that Ms. Smith's Part 708 complaint should be dismissed on two grounds: First, Ms. Smith's Part 708 complaint was filed after the 60 day deadline specified in the provision of 10 C.F.R. Part 708 in effect at the time she filed her complaint, 10 C.F.R. § 708.6(d)(1)/ ; second, Ms. Smith pursued a remedy for her termination under "State or other applicable law"

and thus is barred from pursuing a complaint under Part 708 under 10 C.F.R. § 708.6(a) of the previous version of Part 708 or 10 C.F.R. §§ 708.4(c)(3) and 708.15(a) of the current version of Part 708.

In her response, Ms. Smith asserts that the 60 day deadline was tolled pursuant to section 708.14(b) of the current version of the regulations by her attempts to resolve her whistleblower complaint through an internal company grievance procedure. With respect to WSRC's argument regarding the filing of a complaint with the EEOC and SCHAC, Ms. Smith argues that the complaints filed with those agencies were two separate causes of action. The EEOC and SCHAC complaints were based on a cause of action for age discrimination. The Part 708 complaint is based on a cause of action for reprisals resulting from making protected disclosures. Additionally, Ms. Smith asserts that the bar in section 708.14(b) applies only if the "State or other applicable law" complaint is based upon the same facts. Ms. Smith argues that

the facts in her EEOC and SCHAC complaints are different from those in her Part 708 complaint. Specifically, Ms. Smith points out that the EEOC and SCHAC claims are based upon the fact that she was terminated as a result of her age whereas her Part 708 complaint is based on the fact that she was terminated due to her protected disclosures to WSRC officials.

II. Analysis

A. Timeliness of Ms. Smith's Part 708 Complaint

In its Motion, WSRC asserts that the controlling version of Part 708 with regard to the timeliness of the filing of Ms. Smith's Part 708 complaint is the version of Part 708 in effect at the time of the filing of her complaint. Ms. Smith cites only the current version of Part 708 in her response regarding this issue. I will assume, without deciding, that the previous version of the Part 708 regulations is controlling on this issue. (2)/

Section 708.6(d) of the previous version of Part 708 mandates that a complainant file a Part 708 complaint "within 60 days after the alleged discriminatory act occurred or within 60 days after the complainant knew or reasonably should have known, of the alleged discriminatory act, whichever is later." 10 C.F.R. § 708.6(d). This section also provides that the 60-day period for filing a complaint is tolled where the employee has attempted resolution through internal company grievance procedures. Id.

Ms. Smith's Part 708 complaint was filed 65 days after she received her reduction in force notice. However, the record indicates that Ms. Smith did try to avail herself of WSRC's Employee Concerns program by filing a WSRC "Notice of Employee Concern" form dated January 23, 1997, in which she complains that she had been terminated because of her identification of safety concerns. See "Notice of Employee Concern" (January 23, 1997). While it is not apparent from the record when WSRC responded to this concern, the record contains a February 19, 1997 WSRC memo from Ms. Smith's supervisor to a WSRC official responding to Ms. Smith's January 23 Notice of Employee Concern. I find that Ms. Smith's attempt to resolve her complaint through filing the Notice of Employee Concern would have tolled the 60-day filing period, at a minimum, from January 23 to February 19, 1997, or for a period of 27 days. Consequently, I find that Ms. Smith's complaint was filed in a timely manner.

B. Preclusive effect of Ms. Smith's EEOC and SCHAC Complaints

Both the previous and current versions of Part 708 contain similar prohibitions barring the filing of a Part 708 claim in the event a complainant files a complaint for a remedy under "State or other applicable law" based upon the same facts. Section 708.6(a) (previous version) states "An employee who believes that he or she has been discriminated against . . . and who has not, with respect to the same facts, pursued a remedy available under State or other applicable law, may file a complaint . . ." 10 C.F.R. § 708.6(a) (previous version). See also 10 C.F.R § 708.15(a) (current regulation) ("You may not file a complaint under this part if, with respect to the same facts, you choose to pursue a remedy under State or other applicable law").

I will assume, for purposes of this analysis only, that a complaint under the ADEA may be considered as "other applicable law" under section 708.6(a) (previous version) or 708.15(a). (3)/ Under this assumption, section 708.6(a)(previous version) or 708.15(a) would require dismissal of Ms. Smith's Part 708 complaint if her ADEA complaints were based on the same facts. While both complaints cite Ms. Smith's termination as the adverse action she experienced, the complaints differ significantly as to the cause for the termination. In order to establish a prima facie case for age discrimination under the ADEA, a discharged employee must prove that: (1) he or she is within the protected class; (2) he or she was discharged; (3) he or she was qualified for the employment position; (4) he or she was replaced with someone outside the protected class; or (5) by someone younger; or (6) show otherwise that his or her discharge was because of age. *Elliot v. Group Medical & Surgical Serv.*, 714 F.2d 556, 562 (5th Cir.

1983), reh'g denied, 721 F. 2d. 819 (5th Cir. 1983). The pleading and underlying facts that would support this type of claim are different from those that would underlie a complaint filed under Part 708, the DOE contractor employee whistleblower protection program. For Ms. Smith's Part 708 complaint to prevail, her termination must have been motivated by her disclosures to WSRC officials. See 10 C.F.R. § 708.5 (Part 708 complaint may be filed if individual has been "subject to retaliation for: (a) Disclosing to . . . your employer . . . information that you reasonably and in good faith believe reveals - . . . (3) Fraud, gross mismanagement, gross waste of funds, or abuse of authority"); 10 C.F.R. § 708.5(a) (previous rule). Because the necessary factual prerequisites differ in the Part 708 and ADEA complaints, I find the complaints are not based upon the "same facts" for section 708.6(a) (previous version) or 708.15(a) purposes. See [Carl J. Blier](#), 27 DOE ¶ , Case No. VBZ-0003 (June 21, 1999) (Americans with Disabilities Act and Rehabilitation Act (ADA/RA) complaints do not bar Part 708 complaint since ADA/RA complaints require different factual motivation for employer's adverse personnel action). Consequently, WSRC's Motion to Dismiss should be denied.

It Is Therefore Ordered That:

(1) The Motion to Dismiss filed by Westinghouse Savannah River Corporation on June 30, 1999 is hereby denied.

(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: August 6, 1999

(1) 1/ The DOE revised 10 C.F.R. Part 708 on March 15, 1999. The version of 10 C.F.R. Part 708 in effect prior to the March 15 revision will be referred to as the "previous version" of 10 C.F.R. Part 708.

(2) Ms. Smith's filing of her Part 708 complaint would be timely under the current Part 708 regulations, which gives a party 90 days to file a complaint. See 10 C.F.R. § 708.14.

(3) My belief is that the prohibitions contained in sections 708.6(a) (previous version) and 708.15(a) were meant to bar an individual from filing Part 708 complaints when the individual has already pursued a remedy under State or other applicable whistleblower law in order to prevent him or her from arguing whistleblower claims in multiple forums. The introduction to the current Part 708 regulations indicates that Part 708 was designed specifically "to deal with allegations or retaliation against contractor employees and to provide relief where appropriate." 64 Fed. Reg. 12,862 (March 15, 1999). This purpose would not be furthered by barring Part 708 actions which share similar facts with other non- whistleblower causes of actions. In its Motion, WSRC argues that an individual must make an election of remedies between Part 708 and other causes of action when both causes of action are based on similar facts. In support of its position, WSRC cites the comments to the previous rules: "when redress is available under State or other applicable law, the employee must make an exclusive election of remedies." WSRC Motion to Dismiss at 5 (quoting 57 Fed. Reg. 7,533 at 7,538). However, this quotation is contained in the section of the comments discussing the interaction of the proposed regulations with "'whistleblower' programs implemented pursuant to State or other applicable law." 57 Fed. Reg. at 7,538. The comments to the previous rule, in my opinion, provide additional support for the proposition that Sections 708.6(a) and 708.15(a) were not meant to bar non- whistleblower causes of action.