In the Matter of:

**LARRY D. SMYTH,** **ARB CASE NO. 99-043**

**COMPLAINANT,** **ALJ CASE NO. 98-ERA-23**

**v.** **DATE: June 29, 2001**

**JOHNSON CONTROLS WORLD, INC.,**

**RESPONDENT.**

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

**Appearances**:
*For the Complainant:*
Larry D. Smyth, *Pro se, Santa Fe, New Mexico*

*For the Respondent:*
S. Barry Paisner, Esq., *Hinkle, Cox, Eaton, Coffield & Hensley, L.L.P., Santa Fe, New Mexico*

## FINAL DECISION AND ORDER

This is the second of two discrimination complaints filed by Complainant Larry D. Smyth under the Energy Reorganization Act, as amended, 42 U.S.C. §5851 (1996). Both complaints are connected with his employment by Respondent Johnson Controls at the Los Alamos National Laboratories (LANL).

The instant complaint is the outgrowth of efforts to settle the first complaint, which Smyth had filed against LANL's operator, the University of California, when he was laid-off in 1997.[1/] During the settlement proceedings in that earlier complaint, Johnson Controls (which evidently was not a party to the first proceeding) provided a letter to Smyth offering to rehire him when work became available at LANL, but restricting the departments into which he could be rehired. Both Smyth and the ALJ in the first proceeding objected to the restrictive letter, which promptly was rescinded by Johnson Controls and replaced eight days later by another letter which placed no restrictions on Smyth's eligibility for rehire. Although Smyth accepted this second letter, he filed an ERA

[1/] *See Smyth v. Regents of the Univ. of California, LANL*, ALJ No. 98-ERA-3, [ALJ] Recommended Dec. and Ord. Approving Settlement (Jan. 22, 1998); *Smyth v. Regents of the Univ. of California, LANL*, ARB No. 98-068, Final Ord. Approving Settlement and Dismissing Complaint (Mar. 13, 1998).

complaint with the Labor Department alleging that Johnson Controls' first letter constituted an unlawful act of discrimination.

A threshold question in this case is whether Johnson Controls' first letter constituted an "adverse action" under the ERA. In a Recommended Decision and Order (RD&O), a Labor Department Administrative Law Judge concluded that it was, found in favor of Smyth and awarded damages. *Smyth v. Johnson Controls World, Inc.*, ALJ No. 1998-ERA-23 (Feb. 5, 1999). Johnson Controls appealed to this Board.

Contrary to the ALJ, we conclude that because Johnson Controls' first letter was promptly and effectively rescinded and had no demonstrable adverse effect on Smyth, no adverse action occurred. We therefore dismiss the complaint.

## BACKGROUND

Smyth worked as a pipefitter for Johnson Controls, one of the subcontractors at Los Alamos National Laboratory. He was laid off in April 1997 when he refused to accept what he regarded as an illegitimate transfer.[2/] Smyth immediately found other work for better pay which lasted until July 9, 1998. Smyth was not available for work until July 23, 1998, when he received a call from the union hall; he was rehired by Johnson Controls on August 3, 1998, as a journeyman pipefitter in the construction department.

There is no dispute that Smyth engaged in a number of protected activities both before and after his layoff. *See* RD&O at 19. One of those activities was the July 1997 filing of the first whistleblower complaint against the University of California. As part of the settlement negotiations of that complaint, Smyth was offered a letter from Johnson Controls (dated December 8, 1997) which stated:

> Johnson Controls . . . agrees that when we place a call for Pipefitters you will be given the same opportunity for employment as any other Pipefitter with your skills. When you are hired, it will be under the same conditions as those of any other Pipefitter who resigned from Johnson Controls . . . at the same time.
>
> *It is mutually understood by both parties that you will be assigned to either the central maintenance or utilities departments.*

ALJ Exhibit 15 (emphasis added).

---

[2/] Smyth filed this complaint against Johnson Controls on December 22, 1997. At trial, the ALJ accepted evidence concerning the circumstances leading up to Smyth's termination in April 1997 on the possibility that there might be a continuing violation. However, the ALJ ultimately rejected a continuing violation theory and held that the only issue to be decided was whether the letter of December 8, 1997, violated the ERA, implicitly holding that Smyth's claims of other discriminatory acts were untimely. RD&O at 15-16. We concur with the ALJ's conclusion that this case does not involve a continuing violation.

According to Smyth, the central maintenance and utilities departments at LANL hire new workers infrequently. The ALJ advised the parties that the restrictive rehire letter was inconsistent with the agreed-upon settlement, and directed the attorneys to go back to their clients to obtain a correct letter. RD&O at 4. Evidently at the University's request, Johnson Controls then withdrew the December 8 letter and provided a substitute on December 16 which stated:

> Johnson Controls . . . agrees that when we place a call for Pipefitters you will be given the same opportunity for employment as any other Pipefitter with your skills. If you are hired, it will be under the same conditions as those of any other Pipefitter who resigned from Johnson Controls . . .
>
> *It is mutually understood by both parties that you will be assigned in accordance with the Pipefitters Collective Bargaining Unit* [sic].

ALJ Exhibit 14 (emphasis added).

Smyth viewed the restrictive December 8 letter as a new act of discrimination in retaliation for his protected activities. Although he consummated the settlement of his first discrimination complaint (against the University), he also proceeded to file the instant complaint against Johnson Controls on December 22, 1997.[3/]

**The ALJ's recommended decision –** The ALJ issued an extensive recommended decision in February 1999. After addressing a number of preliminary matters (RD&O at 14-18), the ALJ turned to the merits of the case, including Johnson Controls' central argument that the December 8 letter was not an adverse action. RD&O at 19-24. The ALJ noted that the ARB has held that the ERA protects employees against a broad range of discriminatory adverse actions, including non-monetary losses, citing *Van der Meer v. Western Kentucky Univ.*, ARB No. 97-078, ALJ No. 95-ERA-38 (ARB Apr. 20, 1998). Even though Smyth did not suffer any financial harm as the result of the December 8 letter, the ALJ concluded that the letter was an adverse action because:

> it significantly restricted the departments within which [Smyth] could possibly be re-hired and impeded his ability to fairly compete for any position for which he was qualified. The fact that no position became available or that [Smyth] was not available to fill that position because of his employment [elsewhere] is a fortuity that affects only the potential damages for which [Johnson Controls] might be held liable.

RD&O at 20. The ALJ also heavily discounted the significance of Johnson Controls' prompt recission of the letter:

---

[3/] Smyth also found the December 16 letter objectionable, but testified that it was not part of his complaint. RD&O at 5.

> Similarly, the fact that the letter was changed eight days after its issuance is more properly considered in assessing the damages to which Complainant might be entitled. It does not alter the fact that the action itself was adverse.

*Id.* The ALJ went on to find that Respondent violated the ERA by issuing the December 8 letter, RD&O at 21-23, and recommended an award to Smyth of $10,000 in compensatory damages for emotional distress, $700 in attorney's fees, and $1,647.54 in costs and expenses. Johnson Controls appealed.

## JURISDICTION AND SCOPE OF REVIEW

We have jurisdiction over this appeal under the employee protection provision of the Energy Reorganization Act, 42 U.S.C. §5851, and its implementing regulations. 29 C.F.R. §24.8(a) (2000).

Neither §5851 of the ERA nor the implementing regulations specify our standard of review. Accordingly, our review of the ALJ's recommended decision is *de novo.* 5 U.S.C. §557(b) (1996); *Overall v. Tennessee Valley Authority,* ARB Nos. 98-111/128, ALJ No. 1997-ERA-53 (ARB Apr. 30, 2001).

## DISCUSSION

The ERA protects an employee who engages in whistleblowing activities from retaliatory "unfavorable personnel action[s]" affecting the employee's "compensation, terms, conditions, or privileges of employment." 42 U.S.C. §5851(a), (b)(3)(C). Although actions short of ultimate employment decisions" (*e.g.,* hiring, firing or demotion) are actionable under such anti-discrimination laws, the complained-of action must rise to some threshold level of substantiality in order to be cognizable. In *Griffith v. Wackenhut Corp.*, ARB No. 98-067, ALJ No. 1997-ERA-52 (ARB Feb. 29, 2000), an ERA case involving a reprimand and 3-day suspension that were rescinded promptly and voluntarily by the employer (with full restoration of lost wages), this Board considered the nature and quantum of injury needed to qualify as actionable under the ERA:

> We conclude that Griffith failed to establish that the disciplinary action Wackenhut took against her affected her compensation, terms, conditions or privileges of employment. The suspension without pay and reprimand caused Griffith three days of anxiety about her employment status but resulted in no financial harm or negative effect on her employment or earning capacity because of the alacrity and thoroughness of Wackenhut's self-corrections. [Griffith's] negative state of mind was too temporary to render the suspension "adverse."
>
> * * *
>
> "While adverse employment actions extend beyond readily quantifiable losses, not everything that makes an employee unhappy is actionable adverse action." *Smart v. Ball State Univ.*, 89 F.3d 437,

> 441 (7th Cir. 1996). *See e.g., Ribando v. United Airlines, Inc.,* 200 F.3d 507 (7th Cir. 1999) (employee's unhappiness over a letter of concern in her personnel file was not actionable because it was not "materially" adverse); *Taylor v. FDIC*, 132 F.3d 753, 764 (D.C. Cir. 1997) (repeated failure to designate complainants as "acting" managers during their supervisor's absences deemed "too minor" to be adverse); *Smart v. Ball State, supra* (humiliation over negative performance evaluation during training did not make the evaluation adverse); *Harlston v. McDonnell Douglas Corp.,* 37 F.3d 379 (8th Cir. 1994) (job transfer that resulted in fewer secretarial duties and more stress not adverse because the changes were not materially significant disadvantages); *Passer v. American Chemical Society,* 935 F.2d 322 (D.C. Cir. 1991) (last minute cancellation of a "rare and prestigious" seminar in complainant's honor would be adverse **if** the complainant could prove the cancellation would make it more difficult for him to find future employment).
>
> In our view, these decisions make the unexceptionable point that personnel actions that cause the employee only temporary unhappiness do not have an adverse effect on the employee's "compensation, terms, conditions or privileges of employment." ("Temporary" is an important concept here; we do not suggest that the psychological effect of a personnel action on the targeted employee could never establish the adverseness of the personnel action.)

*Id.*, slip op. at 10-11 (emphasis in original).[4/]

It is against this backdrop that the ALJ's reliance on our decision in *Van der Meer*, *supra*, is misplaced. While it is true that the ERA "protects employees against a broad range of discriminatory adverse actions" – including non-financial losses – the situation in *Van der Meer* clearly is distinguishable from this case. Van der Meer was a tenured professor who was placed on

---

[4/] *See also Mack v. Strauss,* 134 F.Supp.2d 103, 113 (D.D.C. 2001) (under Section 501 of the Rehabilitation Act of 1973, "there can be no claim in this case that the negative performance evaluation constituted an adverse action given the undisputed evidence that the evaluation was rescinded and changed to a 'fully effective' performance rating"); *Blalock v. Dale County Bd. of Educ.*, 84 F.Supp.2d 1291, 1310 (M.D. Ala. 1999) (under Title VII, Title IX of the Education Amendments of 1972, and 42 U.S.C. §1983) (involuntary transfer of teacher rescinded one week later not an adverse action; "threshold level of substantiality" not met); *Butler v. Isleta Indep. Sch. Dist.*, 161 F.3d 263, 268 (5th Cir. 1998) (Title VII) (no violation when a teacher initially was transferred involuntarily to teach at a different grade level but transfer was rescinded when another teacher offered to trade, observing that "even if an employment action was contemplated, or even favored, by the school district, none occurred"); *Coney v. Dep't of Human Resources of State of Georgia*, 787 F.Supp. 1434, 1442 (M.D. Ga. 1992) (Title VII) ("A written reprimand, which was later rescinded, merely warned plaintiff that his failure to carry out his assigned duties would not be tolerated in the future. The court finds that a nonthreatening written reprimand, which is later removed from an employee's personnel file, is not an adverse employment action").

involuntary administrative leave by the university during a feud between warring factions of the physics department faculty. Although he suffered no loss of pay, van der Meer publicly was removed and escorted from his classroom by security guards acting at the direction of senior university administrators, barred from the campus, accused in writing of making "threatening remarks," and required to seek psychiatric treatment. On appeal to this Board, we rejected firmly the University's claim that no actionable injury had occurred because van der Meer continued to receive his salary throughout the period he was suspended:

> We . . . concur with the ALJ that van der Meer was subject to an adverse action by the University. The Respondent contends that no adverse action was taken against van der Meer, because he was paid his full salary during the forced leave of absence. We reject this contention. The ERA protects employees against a broad range of discriminatory adverse actions, including non-monetary losses. *Boytin* [*v. Pennsylvania Power and Light Co.*, Case No. 94-ERA-32, Sec. Dec. and Order of Remand, Oct. 20, 1995)], slip op. at 11-13 (worsened working conditions can be construed as adverse action even without salary loss); *Artrip v. Ebasco Services, Inc.*, Case No. 89-ERA-23, Sec. Dec. and Order of Remand, May 21, 1995, slip op. at 6-7 (adverse action need not be monetary loss). Although van der Meer was paid throughout the involuntary leave of absence, his removal from the campus and the consequent publicity negatively impinged upon his professional and personal reputation. For example, the University's action against van der Meer was not accompanied by any timely official explanation, and therefore gave rise to unsubstantiated speculation regarding the cause for van der Meer's removal. One of van der Meer's students, who was present at the time when the campus police delivered Haynes' letter, testified that the speculation among the students regarding the probable reasons for van der Meer's removal ranged from drug smuggling to sexual molestation.
>
> * * *
>
> There is no question that public embarrassment and damage to van der Meer's professional reputation were a direct consequence of WKU's hasty actions. Denying an academician the opportunity to teach and conduct research is a significant and compensable adverse action. The Board finds that the fact that van der Meer was placed on paid leave, rather than unpaid leave, to be no barrier to a finding of adverse action.

Slip op. at 4-5.

Here, the restriction the December 8 letter placed on Smyth's potential rehire by Johnson Controls had no affect whatsoever on his employment status, inasmuch as Smyth already was

employed elsewhere at a higher salary and not seeking immediate reemployment with Johnson Controls. Moreover, the offending December 8 letter was removed a week later on December 16. Thus the first letter did not prevent Smyth from obtaining a job with Johnson Controls because he was not available for rehire at that time, and it did not affect his recall rights under the collective bargaining agreement. Nor was the reemployment restriction somehow announced to the public or to the journeyman pipefitter community; in contrast to *Van der Meer*, therefore, Johnson Controls' December 8 letter did have any demonstrable affect on Smyth's reputation. As in *Griffith*, we have here a case in which Smyth suffered, at most, temporary unhappiness that did not have an adverse affect on his "compensation, terms, conditions, or privileges of employment."

In sum, we find under the facts of this case that the December 8 letter did not constitute an adverse action under the ERA, and that Smyth therefore has not proven his complaint of discrimination. The complaint therefore is **DISMISSED**.

**SO ORDERED.**

**PAUL GREENBERG**
Chair

**CYNTHIA L. ATTWOOD**
Member

**RICHARD A. BEVERLY**
Alternate Member