

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
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February 6, 2019

MICHAEL DEUSO,
Petitioner

v.

SHELBURNE LIMESTONE CORP.,
Respondent

DISCRIMINATION PROCEEDING

Docket No. YORK 2019-0015-DM

Mine: SLC Swanton Div.
Mine ID: 43-00030

ORDER TO COMPLAINANT TO SHOW CAUSE

This case is before me on a pro se Complaint of Discrimination pursuant to Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 (“Mine Act”) filed on December 12, 2018 with the Commission. Respondent filed a Motion to Dismiss on January 8, 2019. The case was assigned to the undersigned on January 24, 2019.

Complainant’s claim of discrimination stems from an incident alleged to have occurred at the Respondent’s main office on April 21, 2017. On May 22, 2017, Complainant e-mailed the Mine Health and Safety Administration’s (MSHA) Albany Field Office supervisor recounting the alleged incident. At that time, Complainant did not raise any issue of protected activity under the Mine Act, but did assert that he was terminated because of his age, and that a physical altercation with Respondent’s representatives occurred after he was terminated by the Respondent. Less than four hours later, MSHA’s supervisor responded to Complainant’s e-mail by asserting that he “was sorry to hear about this very unfortunate incident,” that MSHA lacked jurisdiction over an incident that occurred at Respondent’s main office, and that “there is nothing that MSHA can do to assist in the matter.” The MSHA supervisor’s reply email further stated that Respondent’s “main office would fall under VOSHA [Vermont OSHA] jurisdiction and they should be made aware of the incident,” that age discrimination is a violation of the Age Discrimination in Employment Act (ADEA), and “[i]f you seek legal counsel on this matter, they should be well versed in the laws that have been violated.”

Complainant subsequently sought redress of his alleged improper termination claim with the Office of Administrative Hearings at the Department of Labor for the State of Vermont. Complainant’s claim has been active in the Vermont administrative adjudication system and the state courts¹ through at least October 30, 2018.

¹*Deuso v. Vermont Department of Labor*, No. 2017-425, 2018 WL 2100366 (Vt. May 4, 2018) (unpub. mem.) (reversed and remanded for further proceedings).

On December 12, 2018, almost 19 months after his e-mail conversation with MSHA, the Complainant filed a discrimination claim with the Commission alleging he was discharged for activity protected under the Mine Act. Complainant alleged, in pertinent part, his “belief that for the past couple of years the owners were looking for ways to force me to quit because I was a highly paid employee and by making my job unbearable that they would push me out the door.” Complainant further avers, for the first time, that on the week of April 17, 2017, the owners came to the mine and “made adjustments on the primary and secondary feeders and the system [was] running at 100 percent capacity using the conveyor belt amp meters as guides[.] [I]t had rained and the stone was flowing faster through the feeder pans and the belt amps were starting to run past the amp setting that they had the feeders set at so I tweaked the setting on the stone crusher to maintain the belt amperage.” Complainant further alleges that after the owners came out of a meeting, one of them asked why he had adjusted the feeder knob. Complainant explained, and was told by the owner to “set the dial on 100 percent no matter what happened.” Complainant then turned the dial back to 100 percent and gave the owner a brochure of a belt speed sensor and asked him to install it on the conveyor belt. The owner left with the brochure. Complainant alleges that a couple of days later, he was called down to the main office to be fired for touching the feeder dial.

On January 8, 2019, Respondent filed a Motion to Dismiss arguing that Complainant filed a Section 105(c)(1) complaint with MSHA on May 22, 2017, that MSHA denied the complaint that same day, and that Complainant did not timely file a Section 105(c)(3) complaint within 30 days of MSHA’s denial. In addition, Respondent argues that the acts complained of took place at the Respondent’s main office, which is not under MSHA jurisdiction, and age discrimination is not covered by the Mine Act. Finally, Respondent relies on and attaches Vermont administrative decisions finding that Complainant was terminated for insubordination and failure to obey a direct order.²

Section 105(c)(1) of the Mine Act provides, in pertinent part, that:

No person shall discharge or in any manner discriminate against . . . or otherwise interfere with the exercise of the statutory rights of any miner . . . in any coal or other mine subject to this Act because such miner . . . has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent . . . of an alleged danger or safety or health violation in a coal or other mine, or because such miner . . . instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner . . . on behalf of himself or others of any statutory right afforded by this Act.

Section 105(c)(2) of the Mine Act provides, in pertinent part, that:

Any miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such

² See note 2, *supra*.

discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. . . .

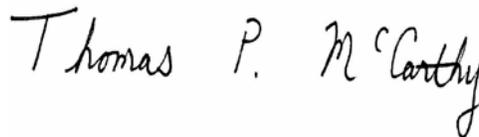
Section 105(c)(3) of the Mine Act provides, in pertinent part, that:

Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner . . . of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph (1)

Under Section 105(c)(3) of the Mine Act, assuming arguendo that MSHA's e-mail communication on May 22, 2017 is considered a determination after investigation that no violation of the Mine Act occurred, Complainant had 30 days to file his 105(c)(3) action with the Commission. As noted, Complainant filed with the Commission almost 19 months later. The Commission has held however, that a claim may be considered despite untimely filing due to "justifiable circumstances, including ignorance, mistake, inadvertence and excusable neglect." *Perry v. Phelps Dodge Morenci, Inc.*, 18 FMSHRC 1918, 1921-22 (Nov. 1996). There is no evidence in the record that the Secretary's May 22, 2017 determination that the Mine Act had not been violated was based upon any investigation of the conveyor belt incident raised for the first time in the Complainant's filing with the Commission. *Cf. Hatfield v. Colquist Energy, Inc.*, 13 FMSHRC 544 (Apr. 1991).

In light of the foregoing, the Complainant is directed to **SHOW CAUSE** why his claim should not be dismissed as untimely filed, or dismissed because the matters contained in his Commission filing were not investigated by the Secretary such that the statutory prerequisites for a complaint pursuant to Section 105(c)(3) have not been satisfied.

Complainant is directed to respond within two weeks of receipt of this order. Respondent will have two weeks from the filing of Complainant's response to submit a reply to Complainant's response.



Thomas P. McCarthy
Acting Chief Administrative Law Judge

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