

CCASE:

F. KAESTNER, v. COLORADO WESTMORELAND

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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

FRANKLIN D. KAESTNER,
COMPLAINANT

v.

COLORADO WESTMORELAND INC.,
RESPONDENT

COMPLAINT OF DISCHARGE,
DISCRIMINATION OR INTERFERENCE

DOCKET NO. WEST 81-24-D

MSHA CASE NO. DENV CD 80-28

MINE: Orchard Valley

DECISION

Appearances:

Franklin D. Kaestner
P.O. Box 805
Paonia, Colorado 81428, Pro Se

Rosemary M. Collyer Esq.
Sherman & Howard
2900 First of Denver Plaza
633 Seventeenth Street
Denver, Colorado 80202,
For the Respondent

Before: Judge Jon D. Boltz

STATEMENT OF THE CASE

On October 20, 1980, the complainant, pro se, filed a complaint of discrimination against the respondent based on section 105(c) of the Federal Mine Safety and Health Act of 1977 [hereinafter "the Act"]. The complainant alleged that his employment with the respondent was terminated on July 1, 1980, since he had developed bronchitis and lung problems after working in respondent's underground coal mine. Complainant alleged that he "talked to the management at the mine about a less dusty job," but was told that management could not "create a job for me away from the dust." Complainant alleges that when he was hired by respondent and given a complete physical examination he was "given a clean bill of health," but that he [later] received a letter from the Department of Health, Education and Welfare stating that "traces" of pneumoconiosis were found in his lungs. Complainant also alleges that the respondent had other jobs he could perform on the outside of the mine or in the shops.

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Respondent denies that it in any way discharged, discriminated or interfered with the rights of the complainant and alleges that complainant was terminated because he refused to work underground and that there was no position available that would have removed complainant totally from underground work.

At the completion of complainant's case, respondent moved to dismiss the complaint on the basis that complainant had not shown that he had engaged in any protected activities whatsoever, "much less adverse actions taken as a result of that protective activity." Ruling on the motion was reserved until respondent's evidence was presented.

ISSUE

Whether or not complainant's complaint of discrimination should be dismissed for failure of the complainant to establish a prima facie case. More specifically, the question is whether or not the complainant presented evidence which standing alone and un rebutted shows that he is entitled to relief.

FINDINGS OF FACT

Based on evidence introduced during complainant's case, I make the following findings of fact:

1. The complainant was hired by respondent to work at its underground coal mine as a general mine worker, commencing April 10, 1978.
2. Complainant resigned his employment with the respondent July 20, 1979, and was rehired August 20, 1979, with subsequent duties as a section mechanic.
3. Commencing approximately October 1979, complainant began to have severe coughing attacks underground and had difficulty breathing. Complainant attributed the health problems to a lung irritation due to dust.
4. A doctor consulted by the complainant recommended that complainant seek a less dusty job because his current job would create lung problems in the future.
5. On June 27, 1980, and just prior to going underground to work his shift, complainant told his supervisor that he did not believe he could take the dust any longer.
6. On July 1, 1980, the complainant was asked by the respondent to resign because respondent could not create a less dusty job for him. When complainant refused to resign, he was terminated.
7. Approximately a week or ten days after complainant was terminated, respondent attempted to obtain employment for the complainant with another mining company, but complainant would not take the employment because he "thought if one coal mine was

going to kill me in ten years, ... another one will too."

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8. Complainant had been notified in a letter from the Department of Health, Education and Welfare dated February 9, 1979, that his chest x-ray showed some evidence of pneumociosis, although breathing tests were normal. This letter was not given by complainant to respondent until July 30, 1980, approximately 30 days after complainant's employment had been terminated.

DISCUSSION

The activity which is protected is set forth in Section 105(c)(1) of the Act. It reads in part as follows:

No person shall discharge ... any miner ... because such miner ... has filed or made a complaint under ... this Act, including ... notifying the operator ... of an alleged danger or safety or health violation ..., or because such miner ... is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner ... has ... caused to be instituted ... any proceeding under ... this Act ... or because of the exercise by such miner ... of any statutory right afforded by this Act.

In order for the complainant to establish a prima facie case showing a violation of section 105(c)(1), it is necessary for him to introduce evidence that (1) he engaged in a protected activity, and (2) that his termination was motivated in any part by the protected activity. Secretary of Labor on behalf of David Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980).

The complainant testified that he thought the Act was violated because of his termination "and I wasn't even given the opportunity to continue working underground. It wasn't safety violations. I thought my working rights were violated by terminating me because of the health conditions, and without even being allowed to continue working underground if I had wanted to."

The complainant introduced no evidence of making any complaint to the respondent in regard to an alleged danger or safety or health violation. Indeed, there was no evidence of any safety or health violation in the mine. There was no evidence that the complainant was entitled to any option of transferring from his position to another position in any area of the mine pursuant to applicable provisions of the Act.

During the course of his employment, the complainant had worked a total of approximately two years and one month underground. Complainant believed that dust encountered in the mine contributed to his bronchitis and caused coughing spells. Under these circumstances he wanted a less dusty job and informed his supervisor that he did not think he could take it (working underground) any longer. The respondent terminated the complainant because respondent had no other less dusty jobs in

the mine and, in any event, complainant was not entitled to the option of transferring pursuant to any rights accrued under the Act.

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Complainant has, thus, failed to show that he engaged in any protected activity and has therefore failed to establish one of the essential ingredients of the prima facie case.

ORDER

Respondent's motion, heretofore reserved, is granted and the complaint is dismissed.

Jon D. Boltz
Administrative Law Judge