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UNITED MINE V. CONSOLIDATION COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

UNITED MINE WORKERS OF AMERICA, ON BEHALF OF GARY L. SHREVE, COMPLAINANT	Complaint of Discharge, Discrimination, or Interference
v.	Docket No. WEVA 81-378-D
CONSOLIDATION COAL COMPANY, RESPONDENT	McElroy Mine

DECISION

Appearances: Mary Lu Jordan, Esq., Washington, D.C., for Complainant;
Daniel L. Fassio, Esq., Pittsburgh, Pennsylvania,
for Respondent.

Before: Judge Melick

This case is before me upon the complaint of the United Mine Workers of America (Union) on behalf of Gary L. Shreve under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," alleging that the Consolidation Coal Company (Consolidation) discriminated against and interfered with Mr. Shreve in violation of section 105(c)(1) of the Act. (FOOTNOTE 1) Seven specific protected activities and eight acts of discrimination and interference ranging in time from December 7, 1979, to March 7, 1981, are alleged. Complainant seeks costs, expenses (including attorney's fees) and a general order requiring Consolidation to cease and desist from purportedly threatening to transfer or discharge employees who report unsafe or unhealthy conditions and who refuse to perform work in unsafe or unhealthy conditions.

Consolidation argued in dismissal motions that the complaint should have been dismissed as to those alleged discriminatory acts that did not occur within 60 days before the Union complaint was filed with the Secretary, citing sections 105(c)(2) and 105(c)(3) of the Act as authority. (FOOTNOTE 2) It is undisputed that the Union complaint in this case was initially filed with the Secretary on November 21, 1980, and that the Union was subsequently notified of the Secretary's determination that no violation of section 105(c) had occurred. Six acts of discrimination and interference were cited in that complaint only two of which were alleged to have occurred within 60 days before that complaint was filed with the Secretary, i.e., the acts alleged to have occurred on November 10 and 12, 1980. The remaining acts were alleged to have occurred on December 7, 1979, February 23, 1980, March 4, 1980, and "sometime in 1980."

While the Union had initially claimed that the four earlier discriminatory acts should each have been considered on its own merits as an independent complaint under section 105(c)(3) of the Act, it has apparently withdrawn from that position. As clarified in its posthearing brief, the Union position now is that evidence of the earlier acts should be considered only as evidence of a pattern of conduct leading up to the alleged discriminatory acts on November 10 and 12, 1980. To the extent that evidence of prior acts of discrimination could be used to demonstrate that the conduct of the individual allegedly acting in a discriminatory manner on November 10 and 12, 1980, was in conformity with those previous acts as a habit or practice, I found such evidence to be relevant and admissible at hearing. Commission Rule 60(a), 29 C.F.R. 2700.60(a). See also, Rule 406, Federal Rules of Evidence. I see no reason to reconsider that ruling at this time. In light of the position of the Union in its brief, the question of whether those earlier acts could also support independent actions before the Commission under section 105 of the Act is no longer before me.

Consolidation further argued in its motion for partial dismissal that the complaint herein should have been dismissed as to the discriminatory acts alleged to have occurred subsequent to the filing of its complaint with the Secretary. For the reasons that follow, I conclude that I cannot consider the merits of those alleged acts either as independent complaints under section 105 of the Act or as relevant evidence in support of the alleged incidents on November 10 and 12, 1980, which preceded those alleged acts. Under section 105(c)(3), the right of a miner or representative of miners to file an action before the Commission on his own behalf arises only after the Secretary determines that no violation of section 105(c) has occurred. See footnote 2, supra. I am bound to give operative effect to the plain meaning of that statutory requirement. United States v. Menasche, 348 U.S. 528, 99 L.Ed 615, 75 S. Ct. 513 (1955). Accordingly, I do not have authority to consider in this proceeding as a substantive matter any discriminatory acts alleged to have occurred subsequent to the filing of the complaint with the Secretary and which therefore had not been considered by the Secretary. Respondent's motion for partial dismissal is therefore granted with respect to the discriminatory acts alleged to have occurred on February 17, 1981, and March 7, 1981.

Consolidation further argued that any evidence relating to those alleged acts of discrimination on February 17, 1981, and March 7, 1981, was inadmissible for any purpose in this proceeding. While arguably such evidence of subsequent conduct might be admissible to show the habit or routine practice of an individual thereby being relevant to proving that the conduct of that individual on the particular occasion at issue was in conformity with that habit or routine practice, Commission Rule 60(a), supra; Rule 406, Federal Rules of Evidence; the proffered evidence in this case is clearly so collateral to the principal issues that I find it to be irrelevant. Since the alleged violators of Mr. Shreve's rights on February 17 and March 7, 1981, were persons not even alleged to have been involved in any of the preceding discriminatory acts, their behavior on these occasions could hardly be considered evidence of habits or routine practices of any of the other individuals cited for the previous discriminatory acts. (FOOTNOTE 3) The proffered evidence is not therefore admissible. Commission Rule 60(a), supra.

I also observe that the Union failed to inform Consolidation of these alleged subsequent discriminatory acts until the day of hearing. This constituted a violation of the prehearing order issued by the undersigned on June 24, 1981. In order to refute these new allegations of discrimination, it appears that Respondent would have been required to call the five witnesses alleged to have participated in, or been present during, the alleged acts. Four of those witnesses were located too far from the hearing site to appear on the scheduled

day of hearing. In addition, at least one of the witnesses was committed to testify on the following day as an essential witness in an out-of-state trial. Thus, on the one hand, it would have been unfairly prejudicial to the Respondent to have allowed the proferred evidence without providing it an opportunity to rebut that evidence and, on the other hand, it would have caused undue delay and expense to have continued the hearing for an additional 2 days to provide Respondent an opportunity to call the essential witnesses on its behalf. Moreover, even the Complainant conceded that it did not wish to have the proceedings continued. Under the circumstances, even assuming, arguendo, that the proffered evidence was relevant, it was an appropriate sanction for noncompliance with the prehearing order to have excluded that evidence. Evidence regarding alleged discriminatory acts on February 17, 1981, and March 7, 1981, is therefore given no consideration in this case.

Summary of the Evidence

The Principal Complaints - November 10 and 12, 1980: These complaints center on two conversations, one on November 10, 1980, between union safety committeeman Richard Lipinski and Gary Shreve's foreman, Albert Aloia, and the other on November 12, 1980, between Gary Shreve and Albert Aloia. At the time of the conversations, Albert Aloia, a recent mine engineering graduate, had been working at the McElroy Mine for only 2 years and had been a section foreman for less than a year. According to Aloia, on Friday, November 7, a company official informed him that an alleged "hotline" safety complaint had been made to the Federal Mine Safety and Health Administration (MSHA) regarding the scoop car under Aloia's control. He was informed that the complaint concerned unsecured lids for the scoop car batteries. Aloia was "disgusted" about the complaint because he thought he had already corrected the problem. It appeared that in spite of his corrective actions and without reporting any problem to him someone on the safety committee had reported the complaint to MSHA. He suspected that his scoop car operator, Gary Shreve, had initiated the complaint. It had been Shreve's past practice to bypass him in complaining of equipment defects.

On the following Monday (November 10), Aloia had occasion to talk with Union Safety Committeeman Lipinski. Aloia confided in Lipinski because he felt they "understood each other" and had a "fairly good relationship." Aloia's testimony about the conversation is as follows:

> Q. [Attorney for Consolidation] And did you ask him what was wrong with the method that you had remedied [sic]?
>
> A. [Aloia] In a general sense I did. I stated that I didn't think there would be anything wrong with it.
>
> Q. What did he say?
>
> A. He didn't say much during the whole conversation.

Q. Did he say that it was okay, as far as he was concerned?

A. I don't think he stated that?

Q. He didn't state that?

A. No.

Q. Do you recall him stating anything about the method about which the lids had been secured?

A. I do not recollect him stating anything.

Q. Did you discuss Mr. Gary Shreve at all during this time when you were inspecting the lids on the scoop car?

A. Yes.

Q. And how did his name come up in the conversation?

A. It is what we were talking about before, he was the operator and if there was a problem I felt he should have came and tell me about [sic]. And that's basically what I was telling Lipinski.

JUDGE MELICK: What was the full conversation that occurred regarding Mr. Shreve, on this day with Mr. Lipinski?

THE WITNESS: I told Lipinski that if there was a problem here that the problem should come to me first. It seemed like lately all the problems that were going on the safety committee were going around me and I'd be getting it second hand, and that didn't seem right. That wasn't the way it was supposed to work.

JUDGE MELICK: What did that have to do with Mr. Shreve?

THE WITNESS: In what sense?

JUDGE MELICK. Well, the question I asked, the information I want is the full extent of the conversation between you and Lipinski concerning Mr. Shreve.

THE WITNESS: I also said in that conversation that it seemed like we've had a numerous number of problems with that scoop and maybe Gary couldn't handle the job because of all the problems.

JUDGE MELICK: Did you suggest anything else?

THE WITNESS: No, sir.

JUDGE MELICK: Did you suggest that perhaps he would be better at another job.

THE WITNESS: No, sir.

JUDGE MELICK: Is that the extent of your conversation concerning Mr. Shreve?

THE WITNESS: Yes, sir.

JUDGE MELICK: All right.

Q. (By Mr. Fassio) Did you tell Mr. Lipinski that you were going to have Gary Shreve taken off the scoop car?

A. No, sir.

Q. Did you tell Rick Lipinski that there was always something wrong with the scoop car?

A. I told Mr. Lipinski that there was a numerous amount of problems with the scoop car.

Q. Did you tell him that it was always one thing after another and it always needs fixing?

A. No, I don't believe, I said that. I said that there was a numerous amount of problems.

Q. Did you state to him you can see why other foremen do not want to work with Gary Shreve?

A. No, I don't think I said that.

JUDGE MELICK: You could have said it?

THE WITNESS: No, I did not say that.

JUDGE MELICK: Did you say anything that might be interpreted as coming out that way?

THE WITNESS: I said that I thought that maybe Gary could not handle the job.

(Tr. 306-309).

Union safety committeeman Richard Lipinski also testified concerning that conversation. The relevant testimony appears as follows:

> * * * I could tell he was kind of-- he was kind of upset and he was kind of disgusted. He says, I'm going to have Gary Shreve taken off the scoop car, you know, he says, he keeps on-- everytime he runs it, there's something wrong with the scoop car. And he said, I'm just tired of it, and he said I've tried to work with Gary on getting things fixed on the scoop car, but it's always one thing after another and, you know, like it seems like all the time there's something that needs fixing on the scoop. And that he could see why none of the other foremen really liked working with Gary.
>
> I told Albert, I says, you know, you're really upset. The way I'm saying it now, I'm saying, you know, just in my own tone voice [sic], but you know, he was very upset and I told him there's no sense getting this upset Albert, you know.
>
> And he says, no, he says, the hotline was called on my scoop and I'm really pissed off about it. He said, that when Gary runs the scoop car, you know, there's always something that comes up, but with someone else on the scoop car when Gary's off or on vacation and they don't seem to have any problems.
>
> And I says, you know, that really doesn't really, you know, sound like him. And he said, well, come on up and I'll show you what, you know, what it is all about. I went on up and he showed me where they had welded some additional supports on, to hold the lids on better. I told Albert then, I said, that to me this isn't an upsetting manner-- matter, that, you know, what they done was a perfectly, you know, correct thing to do to support the lids on better and I can't see you being so upset over this.
>
> And that was-- right then, we kind of ended the conversation * * * .

(Tr. 188-189).

Lipinski reported the conversation he had with Aloia to Gary Shreve on Wednesday, November 12, 1980. Shreve's testimony in this regard is as follows:

> Q. [Counsel for Union] And can you tell us what Mr. Lipinski said?
>
> A. [Gary Shreve] Yes, he said that Albert had stated to him that he was going to remove me from my job. He'd had enough and it was-- there was some foul words said, and then

> he said that he was just tired of it. He'd had enough. I was coming off the scoop.
>
> Q. Did he explain any further, as to why Mr. Aloia had made this statement at this time?
>
> A. Yes, he said that-- he told me that I had called the hotline on his, his scoop car-- his scoop car.

(Tr. 30).

After Lipinski told Shreve about the conversation he had with Aloia, Shreve confronted Aloia. Shreve's testimony concerning that conversation is as follows:

> Q. * * * I asked was the statement that was alleged to have been made by Mr. Aloiai [sic] made directly to you?
>
> A. [Shreve] Later that day, yes.
>
> Q. Later what day?
>
> A. The --
>
> Q. The 12th of November?
>
> A. Yes, 12th of November.
>
> Q. And what did Mr. Aloiai [sic] say to you?
>
> A. He said that he blew it.
>
> Q. He blew it?
>
> A. Yeah, he lost it. It was a -- he admitted to everything Ricky said.
>
> * * * * * * *
>
> Q. All right, at that point what happened?
>
> A. I told him that I was going to file a safety grievance.
>
> Q. You didn't say, what is going on, you said I'm going to file a safety grievance?
>
> A. He knowed what was going on.
>
> Q. How did he know what was going on? I thought you had said you had been in Mr. Donley's office, Mr. Donley

said to go downstairs and go inside and talk to your section foreman?

A. Because I had talked to John-- I had approached John Tothe and John Tothe wanted to meet with me and Albert, and that would have been with no one else there, basically, and that would have been if we would have went in the office, I would have asked for a committeeman and I wouldn't have cared, just so I had somebody to hear the conversation. Now, that's my opinion that he sent "Preacher" away.

Q. All right, what I'm really interested in, Mr. Shreve, what was said between you and Mr. Aloia?

A. That I was going to file a safety grievance.

Q. Over?

A. The way he had been treating me and harassing me. I considered it harassment and discrimination.

Q. Did Albert ask you what sort of harassing treatment you had been subjected to by him?

A. Yes.

Q. What did you say?

A. And I didn't quote the dates or anything, I quoted [sic] over in tailgate. I quoted [sic] up at the end of the section.

Q. You gave him a litany of everything that happened over the years.

A. Yes.

Q. Did you mention the statement by Richard Lipinski?

A. Yes.

Q. And what did Albert say?

A. Albert said, yes he made it. He was just mad because he--

Q. What was the statement that was made by Lipinski quote it exactly, tell me what Albert admitted to, that you recall?

A. I don't follow you, could you repeat the question?

Q. Yes, my question really is, you said that Albert admitted making the statement, I want to know what statement that Albert admitted to making?

A. Albert said that he thought that I'd called the hotline. He-- his scoop, his scoop was turned into the hotline and that-- his exact words were that pissed me off. That's what he said to me.

Q. Albert admitted to you that he thought that you had made the hotline call?

A. Yes.

Q. And that he was upset over it?

A. Yes.

Q. Did he admit that he had threatened to fire you or take you off the scoop car?

A. Yes.

Q. What did he say?

A. He said that he had made the statement, yes, I told Rick that I was going to take you off the scoop car.

Q. Okay, he admitted that, is that your testimony?

A. Yes.

Q. Did he say why he had made that statement allegedly to Mr. Lipinski?

A. I don't-- did he say-- repeat the question.

Q. That question is if Mr. Aloia admitted, as you say that he did, that he'd threatened to take you off the scoop car, did he tell you why or did Mr. Lipinski tell you why Mr. Aloia supposedly made that statement?

A. The first time I heard it was from Rick Lipinski. The second time was in D section with Albert Aloia.

Q. And what was the reason given?

A. Because he was turned into the hotline. His scoop was turned into the hotline.

(Tr. 91 and 100-103).

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The same conversation was described by Aloia in the following testimony:

Q. You did talk with Mr. Shreve?

A. Yes.

Q. Did he approach you or did you approach him?

A. He approached John Paul Tothe and said that he needed to talk to us.

Q. That he needed to talk to you and Mr. Tothe?

A. Yes, sir.

Q. Did he say why he needed to talk to you and Mr. Tothe?

A. I don't believe he did, because I really didn't talk to him. He talked to John and John just informed him [sic] that we needed to go over and talk to Mr. Shreve about something.

Q. Okay--

A. And I was supposed to meet John there at twelve o'clock that day or something like that and John filled me in then.

Q. Okay, did you eventually have your discussion with Mr. Shreve and Mr. Tothe?

A. We got there around twelve, and somehow he said he didn't want to talk to John, but John said you had better go over there and talk to him.

Q. John said to you you had better go over there and talk to Gary Shreve?

A. Yes.

Q. Okay, did you go over and talk to him?

A. Yes, I did.

Q. What was the conversation about?

A. We talked about, what Lipinski and I talked about, and we went over some things about how safety problems with the scoop, why they were not reporting and stuff like that, how they got around me, and how they went to the committee

before they came to us, we talked about some other things that had happened on the scoop, with the pitch point signs [sic] and things like that, and I think he said something about I threatened his job, and I stated that I did not threaten his job.

Q. Mr. Shreve asked you whether or not you threatened his job?

A. Yes, he did.

Q. And what did you tell Mr. Shreve?

A. I told him that I did not threaten his job.

Q. Did he ask you whether or not you had threatened to take him off the job of scoop car operator?

A. Yes, I believe that's how it was worded.

Q. Excuse me?

A. I believe that's how it was worded.

Q. What was your response?

A. I said I did not threaten to take him off the job.

Q. Did you ever intend at any time to threaten or take Gary Shreve off the job of scoop car operator?

A. No, I didn't.

Q. Do you feel that anything that you said to Mr. Shreve concerning his work as a scoop car operator, was in any way threatening or intimidating?

A. No, I didn't, I tried to relate to him that when he had safety problems to come to me first, instead of --

Q. Why was that?

A. Because I felt that we had a relationship that we could have solved problems, we didn't have to go outside our group of people.

Q. When you say your group of people, you mean the people that work at the section?

A. Yeah, the twenty-one people that we have.

> Q. But you didn't in any way tell Mr. Shreve not to go outside the group of people?
>
> A. No, I didn't, something was stated about, if he was to file a grievance, and I told him that was his right.
>
> Q. So you didn't say you shouldn't file a grievance over this?
>
> A. No, I didn't.

(Tr. 310-313).

Evaluation of the Evidence

In order to prevail in this case, the Complainant must first establish by a preponderance of the evidence that (1) Gary Shreve engaged in a protected activity, (2) that adverse action was taken against him, and (3) that the adverse action was motivated in any part by the protected activity. Secretary of Labor ex rel. David Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980); rev'd on other grounds, No. 80-2600 (3d Cir. October 30, 1981), Robinnette v. United Castle Coal Co., 3 FMSHRC 803 (1981), and Chacon v. Phelps Dodge Corporation, 3 FMSHRC ÄÄÄ, November 13, 1981. The reporting of an alleged danger or safety violation to the representative of miners is a protected activity under section 105(c)(1) of the Act. Footnote1, supra. The miner is protected from retaliation even if he did not actually report a safety violation or hazard to the representative of miners if the adverse action against him was the result of a belief that he had made such a report. Elias Moses v. Whitely Development Corporation, 3 FMSHRC 746 (1981), petition for review granted, May 1981. Even assuming, however, that Shreve had engaged in such a protected activity, I do not find in this case sufficient evidence of resulting discriminatory action or interference to support a violation of section 105(c)(1).

November 10, 1980, Conversation: The complaint alleges that Shreve was unlawfully threatened in a conversation between Aloia and Lipinski on this date. According to Aloia, he told Lipinski in the subject conversation only that "it seemed like we've had a numerous number of problems with that scoop and maybe Gary [Shreve] couldn't handle the job because of all the problems." According to Lipinski, Aloia said:

> I'm going to have Gary Shreve taken off the scoop car * * * everytime he runs it, there's something wrong with the scoop car. * * * I've tried to work with Gary on getting things fixed on the scoop car, but it's always one thing after another and * * * it seems like all the time there's something that needs fixed [sic] on the scoop.

While Aloia's version of his own statement is too imprecise, ambiguous and conditional to constitute any impermissible threat, I do not find his version to be entirely credible. Because of

Lipinski's position of neutrality and

disinterest on the other hand, I find him to be a more reliable witness. It is apparent from Lipinski's version of the conversation that Aloia indeed wanted to have Shreve transferred from the scoop car. According to Lipinski, Aloia was "really upset" and "kind of disgusted" at the time of this conversation because the MSHA hotline had been called on the scoop. Aloia himself admitted that he was indeed "disgusted" to learn that the "hotline" had been called on the scoop because the battery lids on the scoop had already been repaired. While he knew that Shreve had not made the actual "hotline" call, he suspected that Shreve had originated the complaint to the union representative who made that call. Accordingly, I am compelled to find that Aloia's statement to Lipinski was motivated at least in part by his belief that Shreve had originated that safety complaint.

An essential question still remains, however, as to whether that statement of intent to have Shreve transferred even though motivated by a protected activity, resulted in any unlawful interference or discrimination against Shreve if it was expressed only in confidence to a third party with no intent that it be communicated to Shreve. Indeed on the facts of this case, I find that Aloia did not intend to have any part of the conversation disclosed to Shreve. In explaining this confidentiality and his reason for confiding in Lipinski, Aloia testified "[y]ou got to understand that [Lipinski] and I had a fairly good relationship, I felt, we understood each other." Since any reference to the possibility of Shreve being transferred was thus made to Lipinski in confidence with no intent or expectation that Lipinski would violate that confidence, I cannot conclude that any such statement constituted an improper threat to Shreve. The facts are not unlike those in NLRB v. McCann Steel Company, Inc., 448 F.2d 277 (6th Cir. 1971). In that case, an apparent threat made in a private conversation between management personnel not intended to be overheard by any employees was held not to constitute an improper threat to the employees under the National Labor Relations Act. Here, the private conversation between Aloia and Lipinski was not only not intended to be revealed to Shreve, it was deemed by Aloia to be confidential.

It is arguable that Aloia should nevertheless be responsible for threats made out of the presence of Shreve when the third party in whose presence the threats were made violates such a confidence. However, because of the inherent unreliability of such hearsay, Shreve would not be justified in relying on such evidence alone to establish an unlawful threat. Otherwise, an operator could be penalized under the Act for the rankest of irresponsible and false rumors. (FOOTNOTE 4) Before any person under similar circumstances could be permitted to rely upon that type of information, it would be reasonable to expect that it be confirmed, preferably by confronting the source. As

discussed, infra, Shreve did in fact subsequently confront that source, i.e., Aloia, who thereupon apparently confirmed that the earlier conversation between he and Lipinski did in fact take place but indicated that what had been said had since been countermanded and retracted. See discussion of November 12 conversation, infra. Any threat that had been made was accordingly then neutralized. See N.L.R.B. v. Staub Cleaners, Inc., 418 F.3d 1086 (2d Cir. 1969), for application of the "neutralization theory" under the National Labor Relations Act. Under the circumstances, I do not find find that either version of the conversation between Aloia and Lipinski on November 10, 1980, would have resulted in any unlawful discrimination or interference.

November 12, 1980, Conversation: It is undisputed that on November 12, 1980, there was a direct conversation between Shreve and Aloia in which Shreve confronted Aloia with the hearsay reports from Lipinski. Even if Shreve's version of this confrontation is accepted as the more credible, it is clear that Aloia did not then threaten to remove Shreve from the scoop car. The most that can be gleaned from Shreve's version of this conversation is that Aloia admitted that in his previous conversation with Lipinski 2 days before, he had indeed threatened to remove Shreve but that he now recognized that such a threat was improper and retracted it. Indeed, by admitting to Shreve that he "blew it," Aloia was clearly expressing that recognition. Thus, when Shreve first confronted Aloia with the hearsay allegations of threats reported to him by Lipinski, the "threats" were neutralized. Staub Cleaners, supra. In other words, as a result of the confrontation on November 12, 1980, Shreve could not have been truly threatened. While he then learned that the previous hearsay rumor about a possible recommended job transfer was in fact accurate, he also learned at the same time that the earlier contemplated action had already been countermanded and was retracted. Under the circumstances, I find that Complainant has failed to meet its burden of proving any unlawful discrimination or interference. (FOOTNOTE 5) The complaint is accordingly dismissed.

Gary Melick
Administrative Law Judge

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~FOOTNOTE_ONE

1 Section 105(c)(1) of the Act provides in part as follows:

"No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, [or] representative of miners * * * in any coal * * * mine subject to this Act because such miner, [or] representative of miners * * * has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of miners at the coal * * * mine * * * or because of the exercise by such miner, [or] representative of

miners * * * on behalf of himself or others of any statutory right afforded by this Act."

~FOOTNOTE_TWO
2 Section 105(c)(2) provides in part as follows:

"Any miner * * * or representative of miners 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 discrimination."

Section 105(c)(3) provides in part that:

"Within 30 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner * * * or representative of miners 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)."

~FOOTNOTE_THREE
3 While the evidence could have arguably supported a contention that the alleged discriminatory acts of Consolidation personnel other than Aloia showed a conspiracy or pattern of discrimination by the company, the Complainant failed to proffer evidence to demonstrate that these acts were other than the isolated independent acts of the named individuals.

~FOOTNOTE_FOUR
4 This is not to say that where the comments of management personnel are introduced as evidence of motive for a subsequent discriminatory action, such a limitation would apply. In this case, as in McCann Steel, supra, it is the statement itself which is alleged to constitute improper or illegal conduct.

~FOOTNOTE_FIVE
5 Since the prior alleged acts of discrimination against Shreve were admitted only as evidence to support the alleged unlawful nature of the acts of November 10 and 12, which I have found not to be in violation of the Act, a detailed analysis of these incidents is unnecessary. The overall credibility of the complaint herein may also be considered in light of Shreve's allegations that although he had been threatened with discharge or transfer on as many as eight different occasions between December 7, 1979, and March 7, 1981, no such action has ever been taken. Moreover, the Complainant has conceded that the alleged acts of discrimination or interference were each so inconsequential as not to have warranted any remedial action under the Act.