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

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF DANIEL G. JENKINS, AND, THOMAS S. PERRY,	COMPLAINT OF DISCRIMINATION
COMPLAINANTS	DOCKET NO. WEST 80-463-DM
v.	MD 80-87
	MD 80-88
KAISER CEMENT CORPORATION, RESPONDENT	MINE: Kaiser Cement

DECISION

APPEARANCES:
Phyllis K. Caldwell, Esq., Office of the Solicitor
United States Department of Labor, 1585 Federal Building
1961 Stout Street, Denver, Colorado 80294,
For the Complainants

Roger Zeltmann, Director Labor Relations, Kaiser Building
300 Lakeside Drive, Oakland, California 94612,
For the Respondent

Before: Judge Virgil E. Vail

STATEMENT OF THE CASE

The Secretary of Labor (hereinafter the Secretary) brought this action on behalf of Daniel G. Jenkins and Thomas S. Perry alleging that Jenkins and Perry were unlawfully discharged. Respondent contends that Jenkins and Perry were discharged for insubordination.

Pursuant to notice, a hearing was held on June 3, 1981, in Helena, Montana. During the initial proceedings the complainant Thomas S. Perry and respondent entered into a settlement agreement which was presented to the undersigned and approved. This settlement agreement was subsequently reduced to writing and approved in a partial settlement order dated September 18, 1981.

At the hearing, Daniel G. Jenkins testified on his own behalf. Carl Lane and Wes Banta, both employees of the respondent testified on respondent's behalf. The respondent also offered the testimony of Thomas D. Short and Bill LaVelle.

Post-hearing and reply briefs were filed by both parties.

STIPULATIONS

At the hearing the parties offered the following stipulations:

1. The Federal Mine Safety and Health Review Commission has jurisdiction in this proceeding.

2. Kaiser Cement is a surface metal, non-metal mine.

3. Kaiser Cement has not previously had a discriminatory discharge case before the Commission.

4. Kaiser Cement produces 350 to 400 thousand tons of cement annually and employed 95 people, including 71 hourly employees.

ISSUES

1. Is the complaint of Daniel G. Jenkins barred by the time restrictions, as contained in 105(c) of the Federal Mine Safety and Health Act of 1977 (hereinafter the Act)?

2. Was Daniel G. Jenkins unlawfully discharged in violation of 105(c) of the Act, now codified at 30 U.S.C. 815(c)(1)?

FINDINGS OF FACT

Based on the testimony and evidence presented at the hearing, I make the following findings of fact:

1. Daniel G. Jenkins was employed by the respondent from 1963 until the time of his discharge on February 14, 1980. (Tr. 28). At the time of his discharge, Jenkins was employed as a heavy equipment operator.

2. On February 14, 1980, Carl Lane, the quarry superintendent, told Jenkins that he was to load holes with explosives (Tr. 113).

3. Jenkins refused to load the holes, relying on a union safety agreement, allegedly entered into at a union meeting in August 1979 (Tr. 33 and 113). Jenkins introduced at the hearing a copy of notes he had taken at the meeting (P's Exhibit 2). (FOOTNOTE 1)

4. After Jenkins refusal, he and Lane went to Wes Banta's office, the industrial relations superintendent, to discuss Jenkins refusal to load the holes.

5. The following people were present at the meeting: Jenkins, Perry, Banta, Lane and the union president, Bryon Johnson (Tr. 30).

6. At the meeting, Jenkins reiterated his position that he was not required to load explosives, based on a Step III grievance meeting. However, Banta could find no reference to such an agreement in his notes, nor did complainant offer any testimony other than his own to support his position (Tr. 136).

7. Banta told Jenkins he would have to produce evidence of the agreement and suggested that he go ahead and load the holes and then file a grievance with the union.

8. Jenkins still refused to load the holes and asked Banta how long a suspension he would receive for his refusal. Banta told him that his actions were more serious than a suspension and he would probably be discharged. At that time, Jenkins told Banta he was going to MSHA because of safety reasons. (Tr. 137) Banta requested Jenkins tell him what he thought was unsafe about the loading, but Jenkins did not offer a reply (Tr. 137).

9. Jenkins did not express any fear to either Lane or Banta (Tr. 48 and 138). The only reference to safety was made when Jenkins said he was going to MSHA (Tr. 138).

10. Jenkins was discharged on the ground of insubordination.

DISCUSSION

The complaint of discrimination on behalf of Jenkins was filed by the Secretary on September 8, 1980 alleging that the act of discrimination occurred on or about February 15, 1980. Respondent contended that the Commission therefore did not have jurisdiction because the complaint was not filed within 90 days, as required by the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq., Sept. 1, 1977 (hereinafter referred to as the Act).

The relevant part of the Act provides as follows:

> 105(c)(2) Any miner or applicant for employment 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. 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. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary,

> shall order the immediate reinstatement of the miner pending final order on the complaint . . .
>
> (3) Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner, applicant for employment, or representative of miners of his determination whether a violation has occurred.

At the hearing, the undersigned ruled that the Commission had jurisdiction. It has been held that filing deadlines are jurisdictional in nature and failure to comply with the filing requirements should not result in dismissal of discrimination proceedings. Secretary of Labor, on behalf of Gary M. Bennett v. Kaiser Aluminum and Chemical Corporation 2 MSHA 1424 (1981), Christian v. South Hopkins Coal Co., 1 FMSHRC 126 (1979) and U.S. CODE CONG. & AD. NEWS at 3436. Therefore, I held that the delay in filing the complaint in this matter did not deprive the Commission of jurisdiction.

Turning to the merits of this case the statutory provision, Section 105(c)(1) of the Act, now codified at 30 U.S.C. 815(c)(1), provides as follows:

> 105(c)(1) 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, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment 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 the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has 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, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

The Commission has ruled that to establish a prima facie case for a violation of 105(c)(1) of the Act a complainant must show by a preponderance of the evidence that (1) he engaged in a protected activity and

(2) that the adverse action was motivated in any part by the protected activity. The employer may affirmatively defend, however, by proving by a preponderance of all the evidence that, although part of his motive was unlawful, (1) he was also motivated by the miner's unprotected activities, and (2) that he would have taken adverse action against the miner in any event for the unprotected activities alone, David Pasula v. Consolidation Coal Company 2 FMSHRC 2786 (1980). Rev'd on other grounds, No. 80-2600 (3d Cir. October 30, 1981).

The first question to be addressed is whether complainant, Jenkins, was engaged in a protected activity. There is no doubt that many mining activities are inherently dangerous. This is particularly true in a situation such as the one presented here, where employees are handling explosives. However, the fact that there is a danger presented by the job assignment does not automatically bring it within the bounds of "protected activity."

There was conflicting testimony presented as to whether Jenkins had ever voiced his concern over the safety hazards presented by loading explosives. Jenkins had been given on the job training on how to load holes. In fact Jenkins, through his own testimony, stated that he had assisted the powderman and done actual loading of explosives a total of 156 hours through June 23, 1979 (Tr. 52-53). He further testified that he had loaded shot 9 times when he had been the "head man" (Tr. 53). Jenkins also testified that his refusal to do the work on February 14, 1980, was based on the alleged union agreement (Tr. 46). The agreement was never proven and the fact that Jenkins thought that there was an agreement that heavy equipment operators did not have to load holes does not bring him within the sphere of protected activity, as defined in the Act.

Jenkins testified that because the respondent had made changes in the type of explosives used, he was concerned over his own safety and the safety of other employees. The evidence proves, however, that Jenkins did have experience with the new types of explosives and just one month prior to his discharge had worked with the new style of boosters and primadets (Tr. 32 and 122). The respondent's on the job training program had received MSHA approval (Tr. 126). Jenkins had received the required amount of training and had in fact complained to Lane that he was doing too much of the loading and that the job should be equalized between himself and Thomas S. Perry, the other heavy equipment operator.

It was proven that Jenkins had never been in charge of loading since the change in products had been made. In January of 1980 he had assisted the powderman, which meant helping to haul the powder and explosives out and tying knots. Being in charge meant that he would supervise the loading and follow the "shot plan' prepared by Lane (Tr. 132). Lane testified that after 3 or 4 shots someone is qualified to load (Tr. 128). Jenkins never asked for assistance or expressed any fear of doing the work.

I cannot conclude that Jenkins refusal to do the assigned task was protected activity. The preponderance of the evidence shows that Jenkins refusal to load explosives was based on an agreement he actually thought was in existence that would have excluded anyone within his job classification from doing such work. The existence of such an agreement was never substantiated. The complainant did produce his notes he alleged were taken at the August 1979 meeting. However, no notes were found in the official records of respondent of such an agreement and testimony by respondent's witnesses denied knowledge of such an agreement. Jenkins did not express any fear regarding his refusal to work with explosives to Lane or Banta on the day involved herein (Tr. 48 and 94). It was after Jenkins refused to comply with the instruction of Lane and Banta to load explosives, that Banta said, "as far as I am concerned you are through" (Tr. 95). It was following this statement by Banta that Jenkins indicated he would contact MSHA. The uncontroverted chain of events shows that the reason for the discharge of Jenkins was his continued refusal to work after respondent had looked for the alleged agreement that heavy equipment operators were exempt from such work. I find, in view of Jenkins past experience in handling explosives, that this was unreasonable and not protected activity. If the discharge had been based upon Jenkins threat to contact MSHA, I would find that to be protected activity. However, as stated above, the complainant was on his way out the door after being told he was through when he voiced this remark.

After the hearing, respondent submitted a copy of the arbitration decision concerning Jenkins discharge. The Secretary moved to strike the decision from respondent's brief. The Secretary's motion is hereby GRANTED and the undersigned states that he has not read nor is his decision in anyway influenced by the arbitrator's findings or conclusions.

CONCLUSIONS OF LAW

1. Complainant's action is not barred by the time limitations in the Act.

2. Respondent did not violate 105(c) when it discharged complainant for insubordination.

ORDER

It is ORDERED that the complaint of Daniel G. Jenkins be and is hereby DISMISSED.

Virgil E. Vail
Administrative Law Judge

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~FOOTNOTE_ONE

1 Jenkins notes state as follows: Heavy Equipment loading holes. Cannom will tell Carl from safety factor nobody will load holes but the powder man unless he is sick or on vacation.