

CCASE:
ROBIN MULLEN V. JIM RESOURCES
DDATE:
19840906
TTEXT:

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

ROBIN D. MULLEN,	DISCRIMINATION PROCEEDING
COMPLAINANT	
V.	Docket No. SE 82-57-D
JIM WALTER RESOURCES, INC.,	CD 82-30
RESPONDENT	

DECISION

Appearances: Larry Moorer, Esq., Birmingham, Alabama,
 for the Complainant.
 Fournier J. Gale, III, Esq., Birmingham, Alabama,
 for the Respondent.

Before: Judge Fauver

On June 11, 1982, Robin D. Mullen, Complainant, filed a discrimination complaint with the Mine Safety and Health Administration (MSHA), United States Department of Labor, against Jim Walter Resources, Inc., Respondent, under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq. Complainant alleged that she was the subject of certain discriminatory actions on August 15, 1980, February 11, 1982, and April 23, 1982. Complainant alleged that she had been discriminated against "by pay, job placement, I've been harassed by being accused of reporting to my work area in an unfit manner . . . by foremans [sic] coming to my work area with their lights out and sexual harrassed [sic]." MSHA investigated her complaint and found there was no violation of section 105(c) of the Act. Thereafter, Complainant filed the Complaint in this proceeding. After the Complaint was filed, Complainant alleged that another discriminatory act occurred on December 7, 1982.

A hearing on her Complaint was held in Birmingham, Alabama, on November 14 and 15, 1983. Both parties were represented by counsel. Complainant called eight witnesses and introduced six exhibits, all of which were received in evidence. Respondent called three witnesses and introduced eight exhibits, all of which were received in evidence. In addition, at the direction of the Judge, a posthearing expert opinion was obtained from a pathologist, in answer to certain hypothetical questions about Complainant's likely condition as to blood alcohol content on February 11, 1982.

Based on the testimony, the exhibits, and the record as a whole, I find that a preponderance of the reliable, probative, and substantial evidence establishes the following:

FINDINGS OF FACT

1. Complainant, at the time of hearing, November 14-15, 1983, had been employed by Respondent at Number Four Mine for about 4 1/2 years. Number Four Mine, at all times relevant, produced coal for sale or use in or affecting interstate commerce.

2. In late 1981 and early 1982, on at least three occasions, Complainant observed or experienced conditions in the mine which she considered to be unsafe and reported those conditions to her supervisor. In each instance Complainant was relieved from exposure to the condition which she considered unsafe. I do not find discrimination in the way Respondent handled any of these safety complaints.

3. On February 11, 1982, Complainant reported to work at about 3:00 p.m. in a condition indicating by speech, appearance, and mannerisms, that she was under the influence of alcohol or some other drug. Her supervisors advised her, for her own safety and the safety of others, that she did not appear fit for duty and would not be allowed to work that day unless she submitted to an examination at the Brookwood Medical Clinic (a nearby facility where Respondent regularly had medical services performed) and the doctors there found her to be fit for duty. She was also told that if she was found fit for duty she would be paid for her entire shift that day. Complainant refused to go to the Brookwood Clinic for examination, but much later that day went to her private physician for a blood test for alcohol which was conducted about 6:30 to 7:00 p.m. That test showed Complainant's blood alcohol level to be .03 percent. Because of Complainant's apparent unfit condition and her refusal to submit to an examination at Brookwood Clinic, Respondent suspended Complainant for two days without pay.

4. At the direction of the Judge, a pathologist's opinion was obtained after the hearing, with opportunity for both parties to comment on the opinion. The pathologist, Thomas J. Alford, M.D., answered a hypothetical question based on the testimony in this case, finding it probable that Complainant's blood alcohol concentration at 3:00 p.m., on February 11, 1982, was 0.11 (110 mgm. percent) and that she would therefore be legally considered under the influence of alcohol at that time.

~2121

5. Based on all the evidence, including Complainant's testimony and that of her witnesses and witnesses of Respondent, and the pathologist's opinion, I find that on February 11, 1982, about 3:00 p.m., Complainant reported for work while appearing to be, and in fact being, under the influence of alcohol. In her condition, it was reasonable for Respondent to require her to submit to a blood alcohol test at Brookwood Clinic at Respondent's expense and, because of her failure to do so, to suspend her two days for reporting for work in an unfit condition and failing to submit to such a test. By delaying a blood alcohol test until 6:30 or 7:00 p.m., Respondent caused a lower showing of blood alcohol content than would have been shown had she been tested around 3:00 p.m. I find nothing discriminatory in Respondent's treatment of Complainant on February 11, 1982.

6. Complainant filed a grievance under Article XXIII, Section (b)(2) of the National Bituminous Coal Wage Agreement of 1981, concerning Respondent's discipline of her for the February 11, 1982, incident. The grievance went to arbitration. After an arbitration hearing the arbitrator found the facts against Complainant.

7. In April 1982, Complainant bid on a vacancy for a motorman position. The job was awarded under the procedures of the collective bargaining agreement to a miner who was senior to Complainant and who had better experience and qualifications for the motorman job than Complainant. Complainant filed a grievance over this matter, but withdrew her grievance at the third step in the grievance procedure. I find no discriminatory intent or action in Respondent's decision in filling the motorman vacancy.

8. On December 7, 1982, Complainant was disqualified from the position of motorman. I find that she was disqualified from that position because the company in good faith determined that she could not perform all of the required duties of the motorman job, and that this decision by the company was nondiscriminatory and supported by ample facts. Complainant filed a grievance over this disqualification, and the grievance went to arbitration. After an arbitration hearing, the arbitrator found the facts against Complainant.

DISCUSSION WITH FURTHER FINDINGS

Complainant alleges in her Complaint that she was discriminated against on August 16, 1980. However, there was no evidence of this alleged act of discrimination. This charge will be dismissed for lack of proof. Also, this allegation is time-barred by section 105(c)(2) of the Act, which will be discussed later.

~2122

Complainant also alleges that she was discriminated against on February 11, 1982, by being suspended for 2 days. I have found that Respondent acted in good faith and in a nondiscriminatory manner concerning the February 11, 1982, incident.

I also find that Complainant's allegations as to this incident and the August 16, 1980, incident, are barred by the 60-day requirement of section 105(c)(2).

Section 105(c)(2) of the Act states:

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.

In the June 11, 1982 complaint filed with MSHA Complainant alleged that she was discriminated against on August 16, 1980, February 11, 1982 and April 23, 1982.

The claims for alleged acts of discrimination occurring on August 16, 1980, and February 11, 1982, are barred by section 105(c)(2) unless Complainant can show that the filing was delayed under justifiable circumstances. *Joseph W. Herman v. IMCO Services*, 4 FMSHRC 2135 (1982), and *David Hollis v. Consolidation Coal Company*, 6 FMSHRC 21 (1984). Complainant admitted being aware of her MSHA rights in February or March of 1982, but failed to file her complaint for at least three months after having this actual knowledge. I find that Complainant has not shown justifiable circumstances for untimely filing, and on that independent ground her allegations of discrimination on August 16, 1980, and February 11, 1982, should be dismissed.

Thus, I find against Complainant as to the merits and independently under the limitations period as to her allegations of discrimination on August 16, 1980, and February 11, 1982.

As stated in the Findings, I find no showing of discrimination as to Respondent's award of the motorman vacancy on April 23, 1982. I have noted also that Complainant withdrew her grievance at the third step as to this matter.

~2123

Similarly, the disqualification of Complainant for the motorman job on December 7, 1982, has not been shown to be discriminatory. As shown by the thorough arbitration decision in that matter, there was ample evidence for Respondent's decision to disqualify Complainant from the motorman job.

Although the arbitration decisions are not binding in this proceeding, I find that the arbitration decisions denying Complainant's claims as to the February 11, 1982, incident and the December 7, 1982, incident are thorough, well-reasoned, and are entitled to substantial weight in this proceeding.

Complainant has shown no connection between her safety complaints or other protected activity and Respondent's actions on February 11, 1982, April 23, 1982, and December 7, 1982. The evidence overwhelmingly shows that she was disciplined on February 11, 1982, because she violated the collective bargaining agreement by reporting to work in an unfit condition and that the actions by Respondent on April 23, 1982, and December 7, 1982, were taken pursuant to the provisions of the collective bargaining agreement and were in no part motivated by protected activity by Complainant.

CONCLUSIONS OF LAW

1. The Judge has jurisdiction over this proceeding.

2. Complainant has failed to meet her burden of proving a violation of section 105(c) of the Act with respect to any matter raised in her complaint or at the hearing.

3. On an independent ground, Complainant's allegations of discrimination on August 16, 1980, and February 11, 1982, are barred by the 60-day limitation of section 105(c)(2) of the Act.

All proposed findings and conclusions inconsistent with the above are rejected.

ORDER

WHEREFORE IT IS ORDERED that this proceeding is DISMISSED.

William Fauver
Administrative Law Judge