

CCASE:
JAMES H. TUCKER, V. SOUTHERN OHIO COAL
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19850123
TTEXT:

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

JAMES H. TUCKER,
COMPLAINANT
v.
SOUTHERN OHIO COAL COMPANY,
RESPONDENT

DISCRIMINATION PROCEEDING
Docket No. WEVA 85-47-D
MSHA Case No. MORG CD 85-3
Martinka Mine

DECISION

Before: Judge Melick

On October 12, 1984, the Complainant, James Tucker, filed a complaint of discrimination under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et. seq., "the Mine Safety Act," with the Secretary of Labor, Mine Safety and Health Administration (MSHA) against the Southern Ohio Coal Company. That complaint was denied by MSHA and Mr. Tucker thereafter filed a complaint of discrimination with this Commission on his own behalf under section 105(c)(3) of the Mine Safety Act. Mr. Tucker, alleges that he was denied employment in violation of section 105(c) of the Mine Safety Act because of "my color and my age." More specifically he alleges as follows:

"They turned me down, saying I had a diseased disc. I got a second opinion of the Lumbar spine, the area of the spine that they xrayed (sic) me for at the Herron Clinic. The findings, on the second opinion, show that there is nothing wrong with my back.

I think that is has to do with my color and my age, color more so than age. There is no more than 14 or 15 Blacks working there."

The Southern Ohio Coal Company thereafter responded, inter alia, that the "complaint fails to state a claim upon which relief can be granted inasmuch as [Complainant] has failed to allege therein any facts, conditions or events giving rise to such alleged discrimination which are within the scope of section 105(c) . . ." That response may be taken as a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. For the purposes of such a motion, the well pleaded material allegations of the complaint are taken as admitted. 2A Moore's Federal Practice, 12.08. A complaint should not be dismissed

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for insufficiency unless it appears to a certainty that the complainant is entitled to no relief under any state of facts which could be proved in support of a claim. Pleadings are, moreover, to be liberally construed and mere vagueness or lack of detail is not grounds for a motion to dismiss. *Id.*

Section 105(c)(1) of the Mine Safety Act provides 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, 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 representative of miners or applicant for employment has instituted or caused to be instituted any proceedings 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 or miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

In order to establish a prima facie violation of section 105(c)(1) the Complainant, as an applicant for employment must prove that he exercised a right protected by the Mine Safety Act and that the refusal to hire him was motivated in any part by the exercise of that protected right. See Secretary ex. rel. David Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980), rev'd on other grounds, sub nom, Consolidation Coal Company v. Secretary, 663 F.2d 1211 (3rd Cir., 1981). In this case Mr. Tucker asserts that he was not hired solely because of his age and/or race. Even assuming, arguendo, that the allegations were true however, the grounds asserted are clearly not within the ambit of

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protections afforded by the Mine Safety Act. Accordingly the allegations are not sufficient to create a claim under section 105(c).

While the Mine Safety Act does not provide redress for employment discrimination based on age or race, there are of course other Federal and state laws dealing with such discrimination. It is noted in this regard that the Complainant herein has apparently filed a complaint of age and racial discrimination with the West Virginia Human Rights Commission. The complaint herein must however be denied and the case dismissed.

Gary Melick
Assistant Chief Administrative Law Judge