

CCASE:

J.C. GROSS V. LEECO INC.

DDATE:

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TTEXT:

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

JOHN C. GROSS,  
COMPLAINANT

DISCRIMINATION PROCEEDING

Docket No. KENT 83-283-D

v.

BARB CD 83-30

LEECO, INC.,  
RESPONDENT

DECISION AND ORDER OF DISMISSAL

Appearances: John Lang, Esq., Bruce, Clarke and Lang, London,  
Kentucky, for the Respondent.  
John C. Gross, Yeaddiss, Kentucky, pro se,  
Complainant.

Before: Judge Lasher

This proceeding, which was initiated by the filing with the Federal Mine Safety and Health Review Commission of a complaint of discrimination by John C. Gross on September 23, 1984, arises under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1976 & Supp. V 1981), hereinafter "the Act."

By letter dated August 24, 1983, the Complainant had been notified that his complaint of discrimination, filed July 25, 1983, with the Mine Safety and Health Administration (MSHA) had been investigated and the determination made that a violation of section 105(c) had not occurred. Under the Act, a complaining miner has an independent right to bring a complaint before this Commission and this proceeding is based on that right.

On October 26, 1983, the Respondent filed a Motion to Dismiss on the grounds that the Complaint was not timely filed, i.e., not filed within the 60 day statutory time limit. Subsequently Respondent sought dismissal for the further reason that the Complaint fails to state a claim under the Act. A preliminary hearing to determine the two issues raised by the motion to dismiss was held on the record in Manchester, Kentucky on November 29, 1984, at which Respondent was represented by counsel and Complainant appeared pro se.

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The Complainant, a 29 year old truck driver with a tenth grade education, had been employed by Respondent for approximately 6 months when he was discharged on September 20, 1982, after the truck he was driving struck a "belt structure." (Tr. 4, 5.) There is no indication on the record that he previously had filed safety complaints with any governmental agency or made safety complaints to his employer. After his discharge he filed no complaints, grievances or actions other than that involved in this proceeding. Complainant is not a union member--Leeco's employees are unrepresented. However, Complainant lives in a community of 200 to 300 people and most of the working men living there are miners (Tr. 41, 42). Two of his brothers, Denton and Sylvan, were at the time of his discharge, coal miners for Blue Diamond Coal Company and are union members (Tr. 23, 43, 44). Sylvan lives near the Complainant. At the preliminary hearing Complainant, who was accompanied by brother Denton, was asked what he told his brother Sylvan about his discharge, leading to the following dialogue:

THE COURT: Did you talk to him about being discharged?

THE WITNESS: Well, I told him I got fired.

THE COURT: Did you tell him why?

THE WITNESS: Yeah.

THE COURT: What did you tell him?

THE WITNESS: Well, I told him just how everything happened, you know; the brakes went out on the truck, the fuel stuck, and hit the beltline and got out to check the truck, and they fired me.

(Tr. 44.)

The termination slip which was handed to Complainant by his foreman, Kenneth Haskins, on September 20, 1982, charged as follows:

Name, John Gross; Company, Leeco; Date of Termination, 9/20/82; Department or Mine, 31; Reason for Termination, abuse equipment, run truck into the tunnel belt.

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The discrimination complaint (Court Exh. 2) filed by Complainant with MSHA on July 21, 1983, in pertinent part indicated that:

Complainant was notified after the brakes went out on Mack truck he was driving that he was fired for abuse of equipment. (The truck ran into the belt line.)

Note: The complainant was not aware of the 60 day time limit on filing a discrimination complaint.

It should be initially noted that Respondent has neither alleged or established any specific prejudice it suffered as a result of the filing delay.(Footnote.1)

With respect to any justification for the filing delay, Complainant gave the following explanations:

THE COURT: All right, Mr. Gross, why did you not file a Complaint before July 21, 1983, when you were discharged on September 20, 1982?

THE WITNESS: Well, I didn't know there was a time limit on it. And it kept bothering me, you know, to think that I had been done that way, just fired.

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THE COURT: You said you didn't know there was a time limit?

THE WITNESS: Yes.

THE COURT: Okay.

THE WITNESS: And I kept talking to people, you know. And I didn't know where to go, you know, to file a Complaint.

\* \* \* \* \*

THE COURT: Okay, you were saying that you kept talking to people, or something to that effect. Continue where you were; could you do that?

THE WITNESS: Then I found out where to go to, to file this Complaint. And so I went ahead and filed it.

THE COURT: Okay; is there any other reason why there was a delay in your filing?

THE WITNESS: No.

(Tr. 11, 12.)

THE COURT: Okay. I'm not trying to put words in your mouth. You say yes, if you did.

Okay. You said specifically, as to who that you talked to after you were discharged, that you talked to Steve Lewis, Ronald Baker, and your family; right?

THE WITNESS: Yes.

THE COURT: Now when you say family, is that--what? Who does that include?

THE WITNESS: Wife.

THE COURT: Anybody else? Father, brother, anybody like that?

THE WITNESS: Well, I talked to Mom and Dad, you know, about it. They didn't know nothing about it, either.

THE COURT: Okay. And did you talk to your brother, who's here today with you in the courtroom, about it?

THE WITNESS: No.

THE COURT: You didn't talk to him. What does he do for a living?

THE WITNESS: He's a underground miner.

\* \* \* \* \*

THE COURT: And where does he work?

THE WITNESS: Blue Diamond.

THE COURT: And was he working there in 1982 and 1983?

THE WITNESS: Yes.

\* \* \* \* \*

THE COURT: Okay. Was your father a miner?

THE WITNESS: No.

THE COURT: Is your brother in a union?

THE WITNESS: Yes.

THE COURT: What union does he belong to?

THE WITNESS: Southern Labor.

THE COURT: What?

THE WITNESS: Southern Labor.

(Tr. 23, 24.)

As to his efforts in attempting to learn of his rights, he testified as follows:

BY MR. LANG:

Q. Mr. Gross, if I understand your testimony, you were discharged from Leeco on or about September 20th, 1982; is that correct?

A. Yes.

Q. And you recall you--the Judge showed you a copy of the Complaint which you filed in connection with that discharge; is that correct?

A. Yes.

Q. You just testified that you had an occasion to file a Discrimination Complaint with the Federal Mine Safety and Health, with MSHA, on or about July 21st, 1983; is that correct?

A. Yes.

Q. And that would be a period of, if my mathematics is correct, 302 days after you were discharged. Now Mr. Gross, you've just testified pursuant to questions from the Judge, that you were not aware of the 60-day filing requirement; is that correct?

A. Yes.

Q. Do you want to tell this Court why it took you 302 days to file the Complaint?

A. Well, I didn't know. And I kept talking to people. I didn't know where to file the Complaint at, didn't know how to go about it, didn't have no money, laid off.

Q. Did you have an occasion to call an attorney, to ask an attorney what the filing requirements would be?

A. Didn't have no phone.

Q. Did you have a quarter to go to a pay phone and call an attorney?

A. Well, the closest pay phone is Hyden, and that's 26 miles.

Q. So you did not have an occasion at any point in time for the 302 days, to call an attorney, to ask him what the filing requirements would be; is that correct? And that in the 302 days, you did not have occasion to get to a telephone to call an attorney?

A. Well, our attorneys in Leslie County, if you go in and talk to them, you pay them 10 or 12 dollars. I took a couple of letters in after I filed this case, and they charged me \$10 to read the letter and tell me what it was about.

Q. Mr. Gross, if I understand your testimony, then, you made no effort to contact counsel in this 302-day period to attempt to ascertain what, if any, filing requirements there would be; is that correct?

A. Yes, I talked to different people about it.

Q. No, I asked counsel; whether or not you spoke to any attorney during this time period.

A. No, I didn't speak to an attorney.

Q. Okay; so my question then, Mr. Gross, is during the 302-day period that elapsed from the time you were discharged and the time you filed your Complaint, you did not make any effort to contact an attorney, to ascertain what, if any, filing requirements there would be in connection with a Discrimination Complaint; is that correct?

A. No, I didn't contact an attorney.

Q. Okay. You testified that you spoke with some people to try to find out what, if any, requirements there was; what people are you referring to?

A. Friends.

Q. What are their names?

A. Well, Steve Lewis was one of them.

Q. Where does he live?

A. He lives on Big Fork.

Q. Big Fork? Is he any relation to you?

A. First cousin.

Q. What does Mr. Lewis do for a living?

A. He's a miner.

Q. What, if anything, did Mr. Lewis tell you?

A. Well he didn't know very much about it, he just--

Q. When did you contact Mr. Lewis in connection with this matter?

A. I don't remember what the date was.

Q. Well, do you recall whether or not it was immediately after you were discharged, or could



it have been two months after you were discharged, or a year after you were discharged? Do you have any recollection of approximately the time frame in which you had this conversation?

A. It might have been anywhere from two to three months.

Q. Who else, if anybody, did you speak to in connection with this matter?

A. Well, I talked to different people about it. Not nobody, you know, particular.

Q. I understand you spoke with different people. What I'm trying to find out is, who those people are. Their names, where do they live, what do they do for a living.

A. Well, I talked to Ronald Baker; he was the one that told me--

Q. Excuse me. Who?

A. Ronald Baker.

Q. Ronald Baker. Where does he live?

A. He lives on Baker Fork.

Q. Do you know what Mr. Baker does for a living?

A. He's a underground miner.

Q. What, if anything, did Mr. Baker tell you?

A. He told me to go to MSHA and file, at Hyden.

Q. Do you recall when that conversation took place?

A. It was a few days before I filed the case.

Q. That was the first time you spoke with Mr. Baker; is that correct?

A. ABout the discrimination, yes.

Q. Who else, if anybody, did you speak with in connection with this matter?

A. Well, I talked to my family about about it, you know.

Q. Your immediate family?

A. Yes.

Q. Are you married?

A. Yes.

Q. You spoke with your wife?

A. We talked about it, you know, on how I'd been fired, you know, without a reason. I had a good work record. Drove a truck for six years. Never had no complaints, you know, about my work, driving.

Q. But you didn't speak to your wife or your family concerning what your rights would be, is that correct, insofar as filing an administrative complaint?

A. Well, we'd heard that, but we wasn't even sure that, you know, there was such a thing.

Q. You wouldn't expect our wife or family to know something like that, would you?

A. Yes.

(Tr. 13-17.)

The complaint was filed with MSHA on July 21, 1983, (Tr. 43), an interval of 10 months from his discharge and, consequently an 8 month filing delay. There being no question but that it was not timely filed with the Secretary within the 60-day period prescribed in section 105(c)(2) of the Act, the question comes down to the existence of any justification for the delay. The Commission has held that the purpose of the 60-day time limit is to avoid stale claims but that a miner's late filing may be excused on the basis of "justifiable circumstances," *Joseph W. Herman v. IMCO Services*, 4 FMSHRC 2135 (December 1982). The Mine Act's legislative history relevant to the 60-day time limit states:

While this time-limit is necessary to avoid stale claims being brought, it should not be construed strictly where the filing of a

complaint is delayed under justifiable circumstances. Circumstances which could warrant the extension of the time-limit would include a case where the miner within the 60-day period brings the complaint to the attention of another agency or to his employer, or the miner fails to meet the time limit because he is misled as to or misunderstands his rights under the Act. S.Rep. No. 181, 95th Cong., 1st Sess. 36 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 624 (1978) (Emphasis added.). Timeliness questions must be resolved on a case-by-case basis, taking into account the unique circumstances of each situation. (Emphasis added)

Here, the filing delay is prolonged. Scrutiny of the entire record reveals that the essence of Complainant's excuse for the delayed filing is that he was unaware of his rights. However, Complainant has not asserted or established any specific justification for his ignorance or tardiness, only general allegations that he "didn't know where to file the Complaint, didn't know how to go about it, didn't have no money, (and was) laid off."

This is not a case (1) where the Complainant was misled as to his rights under the Act or the filing period, or (2) where he misunderstood such. He brought no other claims or complaints before other agencies, state or federal, which might have lulled him into a false sense of security, nor did he express any complaint or disagreement concerning abstract rights granted under the Act to his employer either at the time of his discharge or thereafter. He said he talked over his discharge with his wife and parents, but from all indications they obviously were not capable of advising him in a meaningful way. Inexplicably, he failed to discuss the matter with his brother, Denton, a miner and union member, who was working at a mine at the time of Complainant's discharge. There is no indication that he sought advice from any government agency, attorney, legal aid society or other informed person or agency wherein there would be any realistic chance to determine his rights or remedies within a reasonable period after his discharge. Nor did he indicate that he asked any friend or family member (FOOTNOTE.2) to seek advice or find out for him.

It was only until a few days before filing the MSHA complaint that he apparently came upon another miner who told him of the right to file a complaint under the Act.

Is a miner who believes he has been discriminated against entitled to remain in long-term ignorance of his rights and remedies because of inaction, lack of initiative, or reasonable good-faith effort? I conclude that in the situation such as that involved here, where a miner's filing delay is not occasioned by a specific justification such as--or similar to--those enumerated in the Act's legislative history, and is explained primarily by lack of knowledge of the rights provided for in the Act, there exists an obligation to make meaningful and good faith efforts to ascertain such rights. Such efforts should be of a nature to create a realistic opportunity for finding out one's rights, should commence within a reasonable time after the employer's alleged discriminatory action, and be continuing until the miner is informed one way or the other.

The 60-day statutory limitation is not a particularly long filing period in view of the lack of sophistication of the average Complainant and the complexity of some of the legal bases for bringing a discrimination action. On the other hand, the placement of limitations on the time-periods during which a plaintiff may institute legal proceedings is primarily designed to assure fairness to the opposing party by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them. Here, the filing delay of 8 months is a lengthy one, no specific or clear justification therefor was shown, and there was no reasonable or meaningful effort on Complainant's part to ascertain his rights, or otherwise obtain assistance. Such mandates the conclusion that Complainant's delay in filing his complaint was not justified (Footnote.3) and that the complaint was not timely filed.(Footnote.4)

