

CCASE:  
WILLIAM J. BUDA v. DECONDOR COAL CO.  
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Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

WILLIAM J. BUDA,  
COMPLAINANT

DISCRIMINATION PROCEEDING

Docket No: WEVA 85-147-D

v.

MORG CD 85-11

DECONDOR COAL COMPANY,  
RESPONDENT

DECISION

Before: Judge Maurer

On February 11, 1985, the Complainant, William J. Buda, 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., (hereinafter referred to as the "Act"), with the Secretary of Labor, Mine Safety and Health Administration (MSHA) against DeCondor Coal Company, Inc. That complaint was denied by MSHA and Mr. Buda thereafter filed a complaint of discrimination with the Commission on his own behalf under section 105(c)(3) of the Act. Mr. Buda alleges that he was discriminated against in violation of section 105(c) of the Act because he was laid off on October 2, 1984 by DeCondor Coal Company and has not been called back to work although two men with less seniority have been recalled. He goes on to state that he has more experience and more seniority than these two men and therefor should have been called back to work before them.

The undersigned administrative law judge's review of the initial pleadings in this case raised the legal issue of whether the Complaint states a claim for which relief can be granted under section 105(c)(1) of the Act. On May 28, 1985, an ORDER TO SHOW CAUSE was issued by the undersigned wherein the Complainant was ordered to show cause within fifteen (15) days as to why this proceeding should not be dismissed for "failure to state a claim for which relief can be granted under section 105(c)(1) of the Act." The only response received to date was a May 31, 1985 telephone call from the Complainant essentially reiterating his original complaint.

The issuance of the aforementioned ORDER TO SHOW CAUSE was akin to the administrative law judge raising, sua sponte, 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 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 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 of 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 must prove that he engaged in an activity protected by that section and that his discharge was motivated in any part by that protected activity. 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, 633 F2d. 1211 (3rd Cir., 1981). In this case, Mr. Buda asserts that he was not recalled to work in accordance with his seniority with the company. More particularly, two men with less

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seniority than he, have already been recalled whereas he is still laid off. Even assuming that this allegation is true, it is clearly not sufficient to create a claim under section 105(c)(1) of the Act. That section does not provide a remedy for what the Complainant perceives to be "discrimination" if that conduct on the part of the Company was not caused in any part by an activity protected by the Act. Accordingly I find that the Complaint herein fails to state a claim for which relief can be granted under section 105(c)(1) of the Act, and the case is therefore dismissed.

Roy J. Maurer  
Administrative Law Judge