

CCASE:
JOHN ED COX V. TENNESSEE CONSOLIDATED
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Federal Mine Safety and Health Review Commission

JOHN ED COX,

COMPLAINANT

v.

TENNESSEE CONSOLIDATED COAL,

RESPONDENT

DISCRIMINATION PROCEEDING

Docket No. SE 85-127-D

MSHA Case No. BARB CD 85-39

DECISION

Appearances: John Ed Cox, Gruetli, Tennessee, pro se;
William I. Althen, Esq., Smith, Heenan &
Althen, Washington, D.C., for Respondent.

Before: Judge Melick

On May 22, 1985, the Complainant, John Ed Cox, 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 Tennessee Consolidated Coal. That complaint was denied by MSHA and Mr. Cox thereafter filed a complaint of discrimination with this Commission on his own behalf under section 105(c)(3) of the Mine Safety Act. Mr. Cox alleges that he suffered discrimination because he was "bumped to the second shift" by a less senior employee.

Tennessee Consolidated Coal in its Answer responded inter alia, that the complaint "fails to state a claim against Respondent upon which relief can be granted". 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 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 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 violation of section 105(c)(1) the Complainant must prove that he exercised a right or activity protected by the Mine Safety Act and that his transfer to the second shift was motivated in any part by the exercise of that protected activity. 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. Cox asserts that he was transferred to the second shift in violation of his seniority rights because of his age. At hearings held on the Respondent's Motion to Dismiss Mr. Cox was given further opportunity to explain the nature of his complaint. He readily acknowledged at those hearings that it had nothing to do with safety but was based solely on his perceived denial of seniority rights. Under the circumstances it is clear that the grounds asserted are not within the ambit of protections afforded by the Mine Safety Act. Accordingly the allegations are not sufficient to create a claim under section 105(c) and this case must be dismissed.

~199

ORDER

Discrimination Proceedings, Docket No. SE 85Ä127ÄD are hereby dismissed.

Gary Melick
Administrative Law Judge