

CCASE:  
MARTHA PERANDO V. METTIKI COAL  
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Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

MARTHA PERANDO,  
COMPLAINANT

DISCRIMINATION PROCEEDING

v.

Docket No. YORK 85-12-D  
MSHA Case No. MORG CD 85-17

METTIKI COAL CORPORATION,  
RESPONDENT

DECISION DENYING MOTION TO DISMISS

Appearances: Martha Perando, Deer Park, Maryland, pro se  
Lisa B. Rovin, Esq., Crowell & Moring,  
Washington, DC on behalf of Respondent.

Before: Judge Melick

This case is before me upon the complaint by Martha Perando under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," alleging discrimination and discharge by the Mettiki Coal Corporation (Mettiki) in violation of section 105(c)(1) of the Act.

More particularly Ms. Perando has cited five alleged acts of discrimination culminating in her discharge on March 27, 1985:

First, I was not advised of my rights as a miner. Second, I was transferred from the mine sight [sic] to the lab at a loss of pay. Underground gross \$520.20. Lab gross \$383.20. The lab was not any better. Third, the form 11001 has not been filed after reporting shortness of breath and heavy preasher [sic] on my chest. Fourth, I was harassed due to filing a compensation claim against Mettiki Coal, letters of reprimand being placed upon me without any notice of not doing the work up to the standards of the company. Fifth, I was terminated on March 27, 1985 while off work under doctor's care.

Mettiki subsequently filed a motion to dismiss the complaint on the grounds that it failed to state a claim for which relief may be granted under section 105(c)(1) of the

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Act.(FOOTNOTE 1) The motion is deemed in part to be a motion for summary decision under Commission Rule 64, 29 C.F.R. 2700.64, and documents submitted in connection with the motion were supplemented at limited hearings under that Rule. At those hearings the Complainant withdrew paragraphs 1 and 3 of her complaint and clarified the remaining paragraphs. To the extent that there is any deviation from her original complaint with respect to paragraphs 2, 4 and 5, I consider the complaint to have been amended by Ms. Perando's testimonial presentation.

In determining whether the complaint in this case "fails to state a claim for which relief may be granted under 105(c)(1)" of the Act, the well pleaded material allegations of the complaint are taken as admitted. Goff v. Youghiogheny & Ohio Coal Company, 7 FMSHRC 1776 (1985); 2A Moores Federal Practice 5712.08. 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.

Ms. Perando alleges in the second paragraph of her complaint that she suffered unlawful discrimination when she suffered a loss of pay after being transferred from underground work to laboratory work. She alleges that she acquired a severe health impairment, industrial bronchitis, as a result of her underground work at Mettiki and was informed by her doctors that she should no longer work in the underground coal mine environment. Ms. Perando maintains that she informed Mettiki officials that she could no longer work underground and thereafter was given a lower rate of pay for work in the laboratory.

I find that these allegations are sufficient under either of two theories of unlawful discrimination under the Act. Her loss of pay following transfer could be viewed as retaliation for "notifying the operator or the operator's agent . . . of an alleged danger . . . or health violation". In addition her allegations could support a claim of discriminatory reduction in pay because of a protected work refusal i.e., the refusal to continue working in the good faith reasonable belief that to continue working would have been hazardous. *Miller v. FMSHRC*, 687 F.2d 194 (7th Cir.1982); *Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (1981). Accordingly I find that Perando's complaint in this regard presents a claim or claims cognizable under the Act.

In reaching this conclusion I have not disregarded Respondent's argument that the right of transfer without a loss of pay under section 105(c)(1) is limited to those cases arising under "a standard published pursuant to section 101" of the Act i.e., limited to cases where the Secretary has promulgated specific standards governing the cited health impairment. However Ms. Perando has not alleged a violation of those specific "right-to-transfer" provisions. Moreover I find nothing in the language of section 105(c)(1) or any Congressional intent that would bar an action based on the allegations herein under the legal theories cited in the preceding paragraph. See *Atkins v. Cyprus Mines Corporation*, 8 FMSHRC \_\_\_\_\_ Docket No. WEST 84-68-AM, February 27, 1986 (Judge Morris).

Ms. Perando also alleges in her complaint that she was harrassed after she filed a workmans compensation claim with the state of Maryland. That claim was filed on December 17, 1984, and alleged that she contracted industrial bronchitis while working underground at Mettiki. Ms. Perando alleges that Mettiki officials knew of this filing and discriminated against her by thereafter requiring her to report her absences on a daily basis one half hour before the beginning of her work shift even though no one was present at that time to receive her calls.

She further alleges that because of her inability to complete these telephone calls in the absence of a responsible company official she was discriminatorily charged with unexcused absences. She seeks to have all such unexcused absences expunged from her personnel records. I find that these allegations are sufficient to set forth a claim of discrimination based on Ms. Perando's purported notification to "the operator or the operator's agent . . . of an alleged danger . . . or health violation". Accordingly these allegations also present a claim cognizable under section 105(c)(1) of the Act.

Finally Ms. Perando alleges in her complaint that she was terminated on March 27, 1985, while off work under a doctor's care. She explained at hearing that what she meant was that she was discharged because she had a serious medical condition caused by Mettiki and that she could not and would not work because of the hazardous health environment presented in the laboratory and in the underground mine. This complaint may also be construed as an alleged work refusal in the face of hazardous conditions. See discussion of paragraph two of the complaint, supra. Accordingly, I find that this allegation also sets forth a claim cognizable under the Act.

Under the circumstances Mettiki's motion to dismiss filed in this case is denied. This matter will accordingly be set for hearing on the merits.

Gary Melick  
Administrative Law Judge

1 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.