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LEONARDO R. LAMAS V. DUVAL CORP
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

LEONARDO R. LAMAS, COMPLAINANT	DISCRIMINATION PROCEEDING
	Docket No. WEST 86-99-DM
v.	MD 85-45
DUVAL CORPORATION, RESPONDENT	Duval Mine

DECISION

Appearances: Leonardo R. Lamas, Tucson, Arizona, pro se;
G. Starr Rounds, Esq., Evans, Kitchell & Jenckes, Phoenix, Arizona, for Respondent.

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 Leonardo R. Lamas (herein "the Complainant") on March 24, 1986, arises under Section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., (1982) (herein "the Act").

By letter dated February 28, 1986, the Complainant had been notified that his complaint before the Labor Department's Mine Safety and Health Administration (MSHA), which was filed on an indeterminate date in October, 1985 had been investigated and the determination made that a violation of Section 105(c) of the Act had not occurred. Under the Act, a complaining miner has an independent right to bring a second complaint before this Commission and this proceeding is based on that right.

On August 11, 1986, the Respondent filed a motion for summary judgment alleging inter alia that the complaint was not timely filed since it was filed more than 60 days-approximately 2 years-after the last alleged discriminatory action of Respondent, i.e., the termination of Complainant's employment on August 21, 1983.

A preliminary hearing to determine the issues raised by the motion to dismiss was held on the record in Tucson, Arizona, on

November 19, 1986, at which Complainant (FOOTNOTE 1) and Harlen Klemetson, a former official of Respondent, testified.

The record herein reflects that on August 21, 1981, Complainant was placed on a disability leave status by Respondent because he was unable to perform his duties and his doctors would not release him for work. Two years later, on August 21, 1983, Complainant was terminated pursuant to Article IV, Section 3(2) of the pertinent collective bargaining agreement. Complainant's complaint with MSHA was filed sometime in October, 1985 (Ex. CÄ1; T. 17). Thereafter, by letter dated February 28, 1986, Complainant was advised by a Labor Department official that on the basis of MSHA's review "MSHA has determined that the facts disclosed during the investigation do not constitute a violation of Section 105(c)."

After Complainant's termination, Respondent heard nothing further regarding such termination until sometime in about mid-October, 1985 when it was informed by MSHA that Complainant had filed a complainant alleging discrimination (T. 17Ä20; Ex. RÄ1).

In early 1986, Respondent sold its Arizona operations. As a result, it retained only three of its employees who have been assisting in the transition but whose relationship with Duval will soon end (T. 24Ä26). All of the potential witnesses either expressly named by Lamas in his Complaint or necessarily involved in events described by or affecting Lamas are no longer employed by Duval. Aside from outside doctors to whom Lamas was referred, these potential witnesses include a number of his foremen, safety supervisors, individuals involved in decisions regarding massive layoffs, recalls, and the handling and distribution of benefits, the directors of personnel and labor relations, their assistants and others (T. 25Ä29; Ex. CÔ1).

Section 105(c) of the Act, 30 U.S.C. 815(c)(2), states, in pertinent part:

> "Any miner %y(3)27 who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination." (Emphasis added).

The MSHA complaint having been filed in October 1985, there is no question but that it was filed with the Secretary more than 2 years beyond the 60Äday period prescribed in section 105(c) of the Act.

The Commission has held that while the purpose of the 60Äday time limit is to avoid stale claims, a miner's late filing may be ecused 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 60Äday 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 60Äday 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 therefore must be resolved on a case-by-case basis, taking into account the unique circumstances of each situation.

After considering the testimony, exhibits, and arguments submitted by the parties, it is concluded that the Respondent's position in seeking dismissal is meritorious.

Complainant's attempted justification for the delay is in the form of a barren assertion that he was engaged in a Workmen's Compensation matter and that "the lawyers and the people" from MSHA, and MSHA Inspector Pascoe, had advised him "to wait and see the results" (T. 17). In light of his entire testimony and Respondent's rebuttal evidence, I find Complainant's assertions incredible, vague, and not probative. Thus, Complainant Lamas admits that prior to his termination in August 1983, he had several conversations with MSHA representatives in its Tucson office (T. 18). Further, he concedes that he knew he had 60 or 65 days within which to file a complaint regarding his termination and that this time began to run as of August 21, 1983, the date of his termination and the date Complainant put on the face of the complaint as Respondent's last act of discrimination (See Complainant's deposition, Ex. RÄ1, at pp. 9Ô10, 68Ô69; Attachment No. 1 to RÄ1; T. 18Ô19, 36Ô39).

Although it would appear that a complainant should first be required to establish a recognizable and believable justification for a filing delay beyond the 60Äday period before any burden

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devolves on a mine operator to show prejudice therefrom, the record nonetheless lends support to Respondent's claim that because of the delay it would be prejudiced in its attempt to defend itself from the allegations made by Complainant. In its brief it alleges: "Duval is barely in existence and soon will not exist. It retains only three employees (Ex. CÄ1; T. 24, 26). All of the alleged participants in the events cited by Lamas are no longer employed by Duval. Those responsible for the decisions about which he complains and who know the reasons for such decisions, e.g., the investigation of the accident in 1979 or 1980, the transfer request, the payments granted in December, 1981 and March 1982, do not work for Duval; they, and others who could testify about Duval's practices, are no longer its employees (Ex. CÄ1; T. 24Ô28). Moreover, the events to which Lamas refers occurred as early as 1979Ä1980; they are from about four to seven years old (Ex. RÄ1). Obviously, memories dim with the passage of years and it is Lamas' inexcusable neglect or failure to act that has caused this situation to exist."

The 60Äday 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. Where, as here, the filing delay is prolonged, (FOOTNOTE 2) it seems a fair proposition to require (1) a clear justifiable explanation therefor, which (2) is supported in the record by substantial and reliable evidence.

The considerable length of the time lapse here as well as the bald, inherently dubious, unreliable basis asserted for the delay mandate the conclusion that such delay in filing the complaint was not justified.

ORDER

Respondent's motion to dismiss is granted and this proceeding is dismissed.

Michael A. Lasher, Jr.
Administrative Law Judge

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~FOOTNOTE_ONE

1 Complainant noted at the commencement of the hearing that there was no interpreter present. It appeared, however, that he understood English, understood the questions asked him by readily

answering them, was perfectly able to ask questions himself, and that he had a keen grasp of the hearing situation and of the subleties and complexities of the matters involved in the hearing.

~FOOTNOTE_TWO
2 This is not the situation sometimes seen where the complaint was filed a few days, or even a month, late.