

CCASE:  
BOBBY SIZEMORE V. NALIY & HAMILTON  
DDATE:  
19871215  
TTEXT:

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

BOBBY SIZEMORE,  
COMPLAINANT

DISCRIMINATION PROCEEDING

v.

Docket No. KENT 87-196-D  
BARB-CD-87-24

NALLY AND HAMILTON ENTERPRISES,  
INC., RESPONDENT

DECISION

Appearances: Phyllis Robinson Smith, Esq., Hyden, Kentucky,  
for Complainant; Lloyd R. Edens, Esq., Cline &  
Edens, Middlesboro, Kentucky for Respondent.

Before: Judge Melick

This case is before me upon the Complaint of Bobby Sizemore 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 that Nally and Hamilton Enterprises, Inc. (Nally) discharged him on February 13, 1987, in violation of section 105(c)(1) of the Act. In its Answer, Nally maintained that the Complaint was neither timely filed nor stated a claim for which relief could be granted. Following a preliminary hearing on these issues a bench decision was issued. That decision, with only non-substantive modifications, is as follows:

Of course, the threshold issue in this case is whether the original complaint filed with the Federal Mine Safety and Health Review Commission on July 7, 1987, was filed timely under the provisions of Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977.

The statute provides in relevant part that if the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right within 30 days of notice of the Secretary's determination to file an action in his own behalf before the Commission charging discrimination or interference in violation of paragraph 1.

Now the record shows that Mr. Sizemore, the complainant in this case, received the Secretary's notice of his determination that no discrimination occurred, on May 7, 1987. This is evidenced, of course, by the return receipt, which is page 3 of Exhibit RÄ1. The record shows also that his complaint was not filed with the Commission until July 6, 1987. It appears that the Complainant concedes that his complaint was filed untimely, but he is arguing that the delay was excusable because the mine operator was not prejudiced by the delay (and indeed, there seems to be no dispute that there was no prejudice to the operator), because he was confused about the filing time purportedly believing he had 60 days and not 30 days to file, and because he called the Commission by telephone in reference to his complaint, which he maintains should be deemed to be a sufficient filing.

The legislative history of these provisions of the Act indeed lend some support to the contentions raised by the Complainant, and I will quote from that legislative history: "[f]urther, as mentioned above in connection with the time for filing complaints, this 30-day limitation may be waived by the Court in appropriate circumstances for excusable failure to meet the requirement."

Thus, within the framework of the Act, Commission decisions and the legislative history I do have the authority to extend the filing deadline if there is an excusable ground.

However, in this case, first of all, I do not find the excuse to be credible. First, Mr. Sizemore has shown that he can read and understand what he reads. He did this both at his deposition and at the hearing here today. He read from the Secretary's letter; that is, the letter from the Federal Mine Safety and Health Administration, the agent of the Secretary for purposes of these proceedings, and that letter was dated May 6, 1987, in which it is stated that Mr. Sizemore had 30 days to file with the Commission, and indeed, the letter itself provides the address of the Commission. Let me quote from that letter; in part, it says:

If you should disagree with MSHA's determination, you have the right to pursue your action and file a complaint on your own

behalf with the Federal Mine Safety and Health Review Commission at the following address:

Federal Mine Safety and Health Review Commission;  
1730 K Street, N.W.; Washington, D.C. 20006.  
Section 105(c) provides that you have the right  
within 30 days of this notice to file your own  
action with the Commission.

Now Mr. Sizemore admits that he read that letter when he received it, and based on that, I find that he did, indeed, have actual notice of the 30-day filing requirement.

Mr. Sizemore nevertheless claims that he was confused about some 60-day filing requirement, and therefore, thought that in spite of the actual notice he had, that somehow he had actually 60 days in which to file with the Commission. Aside from the fact that I find that he had actual notice of the 30-day requirement and understood it, I reject this excuse of alleged confusion as not having any underlying basis. In particular he has shown no document or source for this alleged confusion. There is no letter; there is no testimony; there is no document setting forth any 60-day requirement that led to his alleged confusion. Of course, there is a 60-day filing requirement in Section 105(c)(2) of the Act but there is no allegation that he at any time had read that statutory language. I therefore reject the contention.

Finally, Mr. Sizemore claims that he called the Commission about the filing requirements and that this should be considered or deemed to be an adequate filing. However, I find this claim to be also deficient because, first of all, he cannot say when he made these telephone calls. Indeed it appears most probable, and it may reasonably be inferred, that he made these telephone calls only in response to Chief Judge Merlin's letter dated July 8, 1987, advising him of the additional procedures that he must follow to perfect his complaint. That letter is a matter of record in the official file and concerns certain follow-up procedures—for example, to notify the mine operator of the filing of the complaint—that Mr. Sizemore was required to follow before the perfection of his actual complaint to the Commission. Thus it appears that the

telephone calls came after the late filing of the complaint.

Under all these circumstances I must find that the original complaint was filed untimely under Section 105(c)(3) of the Act and that there are no grounds for allowing a late filing. I therefore find also that the proffered amendment is also untimely as it could only relate back to the filing of the original complaint. On this basis alone, the complaint and the amended complaint must be dismissed and there is no reason to proceed to the merits of the case.

I should say, however, that even assuming that the complaint had been timely filed, and that the amendment was granted, I do not find that either states a claim for which relief may be granted under the provisions of Section 105(c)(1) of the Act.

The original complaint reads as follows:

On February 13, 1987, at 20 until 4 in the morning we were cleaning up the pit. It got too narrow for both loaders, so I went to the other end to clean up the corner. I loaded the last load, dropped the bucket into the bed of the truck, and got out on the running board to talk to the truckdriver to let my knee loosen up a little bit.

I had been out of the loader about one-and-a-half minutes. Les came by in his truck, pulled up and got up in the loader, and told me he didn't want to see this damn shit no more. "I asked him what he was talking about, and he said, "You out on the running board talking to the truck drivers.'" I told him this was the first time I had been out of the loader since dinnertime at 12:30, and it was 20 until 4, and my knee stiffened up on me. He said, "I've had about all I can take of you. Now get your ass back to work and clean this up." So I went back to work and worked until cleaning time at 4:30. I parked my loader, and he pulled up beside me, and I walked over

to the truck and told him from now on when he wanted something done, he didn't have to cuss at me. He shoved his truck in park and told me he was the boss and would cuss anytime he wanted to. So he got out of his truck and I walked to the other side and told him he might cuss, but he wasn't going to cuss at me. He said he would cuss at me anytime he wanted to, and took his left hand and put on my right shoulder, shoving me and hitting me in the ribs with his right hand. We then proceeded to fight, and I got fired. If found in my favor, I want my job back with full pay and 11 benefits, including medical benefits paid with no reduction in employment time"

Now the proposed amended complaint charges as follows:

Mr. Sizemore testified at his deposition on October 12, 1987, that he had a problem with his knee when he operated equipment for a long time, and that the knee would stiffen up on him.

Mr. Sizemore had been advised that he was not allowed to take breaks from running the equipment, but could occasionally get out and stretch his legs, as long as it did not look like a break.

On the occasion that caused the altercation, this was what he was doing. If Mr. Sizemore had been permitted to take the legally mandated breaks, this incident would not have occurred, and the failure to permit breaks is a violation of the Mine Safety and Health Act.

As stated today at these proceedings, the motion to amend the original complaint has actually been further amended in that it is now not claimed that it was a violation of the Mine Safety and Health Act for the alleged failure of the operator to allow legally mandated work breaks, but it is a violation of a Kentucky wage and hour law that apparently requires an employer to grant ten minute breaks for each four hours of work.

Let me read, first of all, from Section 105(c)(1) of the Act. It provides, in essence, that:

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 because such miner has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent of an alleged danger or safety or health violation in a mine, or because such miner has instituted or caused to be instituted any proceeding under or related to this Act, or because of the exercise of such miner of any statutory right afforded by this Act.

The original complaint asserts only that, in essence, Mr. Sizemore was fired because he was involved in a fight, which was started by an argument over his being "cussed" at by his supervisor. While it certainly may not have been pleasant or nice for his supervisor to "cuss" at him, this certainly has nothing to do with the purposes or the specific statutory protections afforded by Section 105(c)(1).

In the amended complaint, Mr. Sizemore asserts, in essence, that the Respondent violated a Kentucky wage and hour law regarding ten-minute breaks, and that his was the basis for his cussing and fighting, and therefore, somehow the Complainant is thereby protected under the Mine Safety Act.

However, there is no allegation anywhere in the original or amended complaint that Mr. Sizemore had filed or made a complaint under or related to the Act which might be construed as even incorporating a complaint notifying the operator or the operator's agent of an alleged danger or safety or health violation in the mine. Nor certainly was there any allegation that Mr. Sizemore had instituted or caused any proceeding to be instituted under or related to the Act. For that matter, there is no allegation that Mr. Sizemore exercised any statutory right afforded by the Act. Finally, there is no allegation that Mr. Sizemore at any time exercised any refusal to work or work refusal as that is construed within the terms of the Mine Safety Act.

Thus, even assuming that the original complaint was filed timely, and assuming that the motion to amend the complaint was granted, I would nevertheless find that the Complainant would have, in any event, failed to state a claim for which relief may be granted under Section 105(c)(1) of the Act, and the complaints would in any event therefore be dismissed. Under the circumstances, this case is therefore dismissed. There is no reason then to reach the merits of the case, and

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I will prepare a final written decision incorporating this bench decision which will be prepared upon receipt of the transcript in these proceedings, and that will constitute the final disposition of this case.

ORDER

The bench decision rendered in this case is hereby confirmed and this case is dismissed.

Gary Melick  
Administrative Law Judge  
(703) 756-6261