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GARY THOMPSON V. ISLAND CREEK COAL
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

GARY THOMPSON,

COMPLAINANT

v.

ISLAND CREEK COAL COMPANY,
RESPONDENT

DISCRIMINATION PROCEEDING

Docket No. KENT 88-162-D
MADI CD 88-05

No. 11 Mine

DECISION

Before: Judge Maurer

On February 11, 1988, the Complainant, Gary Thompson, filed a complaint of discrimination under section 105(c) 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 the Island Creek Coal Company. That complaint was denied by MSHA and Mr. Thompson thereafter filed a complaint of discrimination with the Commission on his own behalf under section 105(c)(3) of the Act. Mr. Thompson alleges that he was discriminated against in violation of section 105(c) of the Act because he was discharged on February 8, 1988, by Island Creek Coal Company for failing to report to work on February 3, 1988 and later submitting an admittedly invalid doctor's excuse for his absence. He had been working up until that time under the terms of a Last Chance Agreement because of excessive absenteeism. Mr. Thompson admits that he was actually absent on February 3, 1988 due to a personal bankruptcy proceeding, but asserts that another employee used an invalid doctor's excuse but was not fired.

Island Creek Coal Company, by counsel, has moved to dismiss the subject complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted under section 105(c) of the Act. On August 14, 1989, 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." There has been no response received to date.

For the purposes of ruling on Island Creek Coal Company's motion to dismiss, the well pleaded material allegations of the complaint are taken as admitted. 2A Moore's Federal Practice

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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.

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 F.2d 1211 (3rd Cir. 1981). In this case, Mr. Thompson asserts that he was discharged for using an invalid doctor's excuse to cover up an absence from work while another person was known by management to have done the same thing and was not discharged. 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" but what is in reality, at best, unfairness or inequitable treatment; if that conduct on the part of the operator was not caused in any part by

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an activity protected by the Act. Violating the operator's personnel regulations is not activity protected by the Act. Therefore, 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 this case is therefore dismissed.

Roy J. Maurer
Administrative Law Judge