

CCASE:  
DOUGLAS DEROSSETT V. MARTIN COUNTY COAL  
DDATE:  
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
2 SKYLINE, 10th FLOOR  
5203 LEESBURG PIKE  
FALLS CHURCH, VIRGINIA 22041

DOUGLAS E. DEROSSETT, : DISCRIMINATION PROCEEDING  
Complainant :  
v. : Docket No. KENT 93-203-D  
: MSHA Case No. PIKE-CD-92-14  
MARTIN COUNTY COAL CORPORATION, :  
Respondent : MTR Surface Mine No. 1

DECISION

Appearances: Johann F. Kerlotz, Esq., Piper, Wellman and  
Bowers, Lexington, Kentucky, for Complainant;  
Diana M. Carlton, Esq., Stoll, Keenan and  
Park, Lexington, Kentucky, for Respondent

Before: Judge Melick

This case is before me upon the complaint by Douglas E. DeRossett 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 violations of Section 105(c)(1) of the Act, by Martin County Coal Corporation (Martin County). (Footnote 1)  
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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 miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding 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."

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motion to dismiss Martin County argues (1) that the "amended" complaint filed with this Commission on December 22, 1992, included issues not presented in the original complaint filed by Mr. DeRossett on August 10, 1992, with the Secretary of Labor's Mine Safety and Health Administration (MSHA) and, (2) that the complaint was filed untimely.

The initial complaint filed August 10, 1992, with MSHA states as follows:

I was discharged by Martin County Coal Corp., MTR Surface Mine No. 1, in November 1989, for complaining about safety hazards. I am requesting reinstatement to my original job, receive backpay plus interest, have all benefits reinstated and to have all records pertaining to the discharge removed from my personnel file.

The amended complaint filed with this Commission on December 22, 1992, claims, as additional violations of Section 105(c)(1), the following:

\* \* \*

8. Complainant on numerous occasions made complaints to supervisory personnel about unsafe working conditions, which complaints were a substantial factor in motivating Defendant to move complainant to second shift in April, 1988 during a reduction in force, despite the retention on the first shift of a position for which Complainant was qualified and entitled to fill.

\* \* \*

10. Complainant sought reinstatement to his former position on numerous occasions following his discharge, but Defendant refused to rehire him despite the recall of less senior individuals following the December 4, 1989, reduction in force. Complainant's safety complaints were a substantial factor in Defendant's decision not to rehire him.

\* \* \*

Even assuming, arguendo, however, that DeRossett's complaint to MSHA filed August 10, 1992, did indeed incorporate the allegations of discrimination contained in the amended complaint filed with this Commission on December 22, 1992, and even assuming that such allegations were investigated by MSHA, I nevertheless find that the

complaint was filed untimely and that the untimely filing cannot be excused.(Footnote 2)

In relevant part, Section 105(c)(1) of the Act prohibits discrimination against, or the discharge of, a miner because of his exercise of any statutory right afforded by the Act. n. 1, supra. If a miner believes that he has been discharged in violation of the Act and wishes to invoke his remedies under the Act, he must file his initial discrimination complaint with the Secretary of Labor within 60 days after the alleged violation in accordance with Section 105(c)(2) of the Act.(Footnote 3) The Commission has held that the purpose of the 60-day time limit is to avoid stale claims, but that a miner's late filing may be excused on the basis of "justifiable circumstances." *Hollis v. Consolidation Coal Company*, 6 FMSHRC 21 (1984); *Herman v. IMCO Services*, 4 FMSHRC 2135 (1982). In those decisions the Commission cited the Act's legislative history relevant to the 60-day time limit:

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 60-day 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. (citation omitted).

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2 It appears that Mr. DeRossett did in fact include in a statement on August 14, 1992, detailing his complaint to MSHA, his allegations of being transferred in April 1988 to the evening shift and of several undated efforts subsequent to his December 4, 1989, layoff seeking reinstatement with Martin County. Accordingly, it would appear that he has complied with the administrative prerequisites. See *Hatfield v. Colquest Energy Inc.*, 13 FMSHRC 544 (1991).

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3 After investigation of the miner's complaint, the Secretary is required to file a discrimination complaint with this Commission on the miner's behalf if the Secretary determines that the Act was violated. If the Secretary determines that the Act was not violated, he shall so inform the miner, and the miner then may file his own complaint with the Commission under Section 105(c)(3) of the Act.

The Commission noted accordingly that timeliness questions must be resolved on a case-by-case basis, taking into account the unique circumstances of each situation.

At hearings Mr. DeRossett testified that he was uncertain when he had requested reemployment with Martin County and the only documented effort in that regard appears in a letter dated April 24, 1990, written on Mr. DeRossett's behalf by Attorney Wolodymyr Cybriwsky (Respondent's Motion Exhibit No. 1). The only other date that can be established without substantial speculation was related by Mr. DeRossett to the June 1990 departure of an employee named Stapleton. Thus more than 4 years, more than 2-1/2 years, and more than 2 years elapsed, respectively, from the April 1988 shift transfer, the December 4, 1989 reduction-in-force, and the June 1990 request for reinstatement until the instant complaint was filed with MSHA on August 10, 1992.

In the present case Mr. DeRossett claims ignorance of the filing requirements. He maintains that he was first hired by Martin County in 1978 and that at no time during his 10 years employment with them was he informed of any of his rights under the Act. He maintains that it was not until he discovered a pamphlet in December 1992 entitled "Guide to Miners Rights" in the office of another company did he discover that his purported safety complaints were protected under the Act and that he had a right to file a complaint with MSHA.

Mr. DeRossett also maintains that he always knew that his safety complaints were a causative factor in its discharge but never mentioned that fact to anyone before December 1992. He claims that even when he first contacted the National Labor Relations Board (NLRB) on December 7, 1989, claiming that he was unlawfully discharged because of his participation in a strike (see Respondent's Motion Exhibit No. 2) he believed that he had been discharged because of his safety complaints. He maintains that in spite of this he did not tell the NLRB attorney of this belief nor the attorney who wrote the letter on his behalf in April 1990 (Respondent's Motion Exhibit No. 1) nor the attorney who later represented him in a workman's compensation case against the Respondent.

At the motion hearings former Martin County Director of Training, Troy Chafin, testified on behalf of the Respondent that he had been principal officer in charge of health and safety and had developed and conducted the mandatory and other training programs for Martin County. More particularly, he was in charge of training Martin County employees, including DeRossett, from April 1973 through April 1990. He subsequently worked for the Kentucky Department of Mines and Minerals as Assistant Director of Training and Education and is currently president of his own company.

Chafin testified that he was well acquainted with Mr. DeRossett while he worked for Martin County. At hearing, Chafin identified certificates of training for DeRossett, including those Chafin signed personally certifying that training had been completed for DeRossett on the dates noted (Respondent's Motion Exhibit No. 5). It is clear from the certificates that DeRossett attended at least 13 training sessions while at Martin County at which the subject of "statutory rights of miners" was covered.

Chafin also testified that he personally taught training classes for those sessions for which his signature appears on the certificate but that in all of the training sessions he presented opening comments to the miners, including a review of their rights to make complaints to management and to MSHA free of retaliation. More specifically, he testified that miners' rights under Section 105(c) were discussed at some of the sessions. I find Chafin's testimony credible.

Mr. DeRossett is a high school graduate and, from his appearance and testimony at hearing, it is readily apparent that he is a man of ample intelligence. He has demonstrated the ability to pursue sophisticated complaints regarding his employment with other governmental agencies and has conferred with at least three attorneys regarding employment matters. Under all of the circumstances it may reasonably be inferred that Mr. DeRossett received sufficient information during his period of employment with Martin County from which he knew, or should have known, of his right to file complaints with MSHA under Section 105(c) of the Act for retaliation against him for making safety complaints.

Under the circumstances I conclude that DeRossett knew or certainly should have known of his rights to file a complaint with MSHA under Section 105(c) at the time of his April 1988 shift transfer and also at the time of his December 1989 layoff and his last established request for reinstatement in June 1990, and that therefore his late filed complaint herein cannot be excused for "justifiable circumstances." Accordingly, the complaint herein must be dismissed.

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ORDER

Discrimination proceeding Docket No. KENT 92-203-D is hereby dismissed.

Gary Melick  
Administrative Law Judge  
703-756-6261

Distribution:

Johann F. Kerlotz, Esq., Piper, Wellman and Bowers,  
200 North Upper Street, Lexington, KY 40507 (Certified Mail)

Charles E. Shivel, Jr., Esq., Diana M. Carlton, Esq.,  
Stoll, Keenon and Park, 201 East Main Street, Suite 1000,  
Lexington, KY 40507-1380 (Certified Mail)

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