

CCASE:
SOL (JAMES W. MILLER) V. METTIKI COAL
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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

SECRETARY OF LABOR, : TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH : PROCEEDING
ADMINISTRATION (MSHA), :
ON BEHALF OF JAMES W. MILLER, : Docket No. York 93-155-D
Complainant : MSHA Case No. MORG CD 93-06
:
v. : Mettiki Mine
:
METTIKI COAL CORPORATION, :
Respondent :

ORDER DENYING RESPONDENT'S MOTION FOR
CERTIFICATION OF INTERLOCUTORY RULING

This temporary reinstatement proceeding is scheduled for hearing in Morgantown, West Virginia, on November 3 and November 4, 1993. By Order dated October 8, 1993, I denied the respondent's motion to dismiss the Secretary's reinstatement application. In denying the motion, I rejected the respondent's assertion that the subject reinstatement application is defective because it was not filed within the 90 day investigatory period set forth in Section 105(c)(3) of the Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. 815(c)(3). I also was not persuaded that the underlying complaint in this proceeding failed to allege a nexus between the alleged protected activity and the complainant's termination of employment, although I permitted limited discovery through interrogatories.

The respondent has now filed a motion for certification for interlocutory review by the Commission pursuant to Commission Rule 76(a)(1), 29 C.F.R. 2700.76(a)(1). In support of its motion, the respondent contends that the timeliness and legal sufficiency of the Secretary's application involve controlling questions of law and that immediate review of these issues will materially advance the final disposition of this proceeding. I disagree.

Interlocutory review by the Commission is not a matter of right but is committed to the sound discretion of the Commission. 29 C.F.R. 2700.76. To support such a request for review, the respondent must identify dispositive questions of law which are novel or otherwise unresolved. In the instant case it is well settled that the 60 day time period provided in Section 105(c) of the Act for the filing of a complaint with the Secretary and the

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90 day period for the Secretary to complete his investigation of the complaint are not jurisdictional. *Gilbert v. Sandy Fork Mining Co.*, 9 FMSHRC 1327 (August 1987), rev'd on other grounds, 866 F.2d 1433 (D.C. Cir. 1989). Rather, the timeliness of discrimination related complaints must be determined on a case by case basis by examining whether the delay in filing deprives a respondent of a meaningful opportunity to defend. See *Roy Farmer v. Island Creek Coal Company*, 13 FMSHRC 1226, 1231 (August 1991), citing *Donald R. Hale v. 4-A Coal Co.*, 8 FMSHRC 905, 908 (June 1986) (emphasis added).

In this case the respondent seeks dismissal because the Secretary filed the reinstatement application on September 17, 1993, eight days after the expiration of the statutory 90 day investigatory guideline. Surely this eight day delay has not deprived the respondent of its ability to meaningfully defend the application in issue. As the Commission has noted, material legal prejudice means more than the necessity of defending a case that could have been avoided if the filing delay were treated as a jurisdictional defect. 13 FMSHRC at 1231. Consequently, the respondent has failed to demonstrate any unresolved controlling question of law with respect to the jurisdictional filing issue.

Turning to the remaining issue concerning the legal sufficiency of the complaint, the respondent has conceded that the complainant has engaged in protected activity. (Motion to Dismiss, p. 4). The complainant alleges disparate treatment during the course of a reduction in force that resulted in termination. Although the complaint states a cause of action, pursuant to the respondent's request for discovery conveyed during an October 5, 1993, telephone conference, I established a schedule for limited discovery through interrogatories prior to trial. However, my desire to accommodate the respondent's request for discovery is not indicative of any novel or unresolved issues of law concerning the legal sufficiency of the Secretary's application for temporary reinstatement. The interlocutory review process is not the appropriate vehicle for determining the merits of this reinstatement application or whether the underlying complaint has been frivolously brought. These issues must be resolved through the hearing process. Accordingly, I decline to certify the legal adequacy issue to the Commission for interlocutory review.

In view of the above, the respondent's motion for certification of interlocutory review by the Commission IS DENIED. The parties should continue to adhere to the discovery schedule contained in my October 8, 1993, Order.

Jerold Feldman
Administrative Judge

Distribution:

Maureen A. Russo, Esq. U.S. Department of Labor, Office of the Solicitor, 3535 Market Street, Room 14480, Philadelphia, PA 19104 (Certified Mail)

Timothy M. Biddle, Esq., Crowell & Moring, 1001 Pennsylvania Avenue, N.W., Washington, D.C. 20004-2595 (Certified Mail)

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