FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
7 PARKWAY CENTER
875 GREENTREE ROAD, SUITE 290
PITTSBURGH, PA 15220
TELEPHONE: (412) 920-2682
FAX: (412) 928-8689

September 17, 2013

MICHAEL E. TRENT,	:	DISCRIMINATION PROCEEDING
Complainant,	:	
	:	Docket No. SE 2013-213-DM
v.	:	Case No. SE-MD 13-05
	:	
	:	
CEMEX CONSTRUCTION	:	
MATERIALS ATLANTIC, LLC,	:	Mine: Knoxville Cement Plant
Respondent	:	Mine ID: 40-00840

ORDER GRANTING THE RESPONDENT'S MOTION FOR SUMMARY DECISION

Appearances: Michael E. Trent, 2111 Rosewood Road, Knoxville, TN 37924, Complainant

Michelle C. Whitter, Esq., Jackson Kelly PLLC, 1099 18th St., Suite 2150, Denver, CO 80202, for Respondent

K. Brad Oakley, Jackson Kelly, PLLC, 175 E. Main St., Suite 500, P.O. Box 2150, Lexington, KY 40507, for Respondent.

Before: Judge Andrews

This case is before me upon a discrimination complaint filed by Michael E. Trent ("Complainant") pursuant to Section 105(c) of the Federal Mine Safety and Health Act of 1977 (the "Act" or "Mine Act"), 30 U.S.C. § 815(c). Trent is a *pro se* Complainant. Respondent has filed a Motion for Summary Decision. Trent has not filed an opposition, and has not responded to numerous attempts by this court to contact him. For the reasons that follow, the Motion for Summary Decision is Granted.

Procedural Background

Trent filed a discrimination complaint with the Mine Safety and Health Administration (MSHA) on November 30, 2012, after he was terminated on August 28, 2012 from his position in Utility-Production with Respondent. On January 3, 2013, MSHA sent Trent a letter determining that the facts disclosed during the investigation did not constitute a violation of Section 105(c). Trent filed an appeal of MSHA's determination on February 4, 2013, which became the instant action. The case was repeatedly delayed, at Trent's request, in order to provide him time to secure counsel. Trent ceased responding to repeated communications from

this Court, and it is presumed that he did not secure counsel. On July 11, 2013, Respondent filed the instant Motion for Summary Decision. Repeated attempts by this Court to reach Trent by certified mail, e-mail, and phone went unheeded. However, a signature card signed by Trent indicates that he received the communications from this court, including a copy of the Motion and a letter providing an August 1, 2013 deadline to respond in some fashion.

EXHIBITS

Attached to Respondent's Motion for Summary Decision were a number of exhibits, described herein:[1]

Exhibit A is Trent's Discrimination Complaint, November 30, 2012.

Exhibit B is Trent's Discrimination Report attached to the Discrimination Complaint. It includes a handwritten statement of the alleged incident, as well as a 7-page typed statement.

Exhibit C is the January 3, 2013 determination letter from MSHA to Trent.

Exhibit D is the February 4, 2013 appeal by Trent.

Exhibit E is Respondent's First Set of Discovery Requests.

Exhibit F is Trent's response to discovery requests.

ISSUES

At issue is whether Trent has alleged a claim of protected activities under Section 105(c) of the Act.

CONTENTIONS OF THE PARTIES

The Respondent argues that Trent failed to allege a prima facie case of discrimination under the Mine Act because he failed to describe a protected activity. The Complainant alleges that he was terminated for improperly performing a task for which he was not task trained.[2] RX-D. Specifically, Trent alleges that he was fired for violating company policy in regards to the lock out tag out procedures of the FK pump. *Id.* He appears to make an argument of pretext and disparate treatment in alleging that other employees who have similarly violated that policy were not terminated. *Id.*

LAW AND LEGAL AUTHORITY

[1] All exhibits were submitted by Respondent and will be cited as RX- followed by a letter.
[2] The Complainant did not provide any filings in this matter, so his previous discrimination filings will serve as his contentions.

Commission Rule § 2700.67 permits a party to file a Motion for Summary Decision at any time after the commencement of a proceeding, provided that it is not within 25 days before the date chosen for hearing. Such a motion will be granted if there is no genuine issue of material fact and if the moving party is entitled to summary decision as a matter of law. 29 C.F.R. § 2700.67. As the Commission observed in *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, (Jan. 2007), ("*Hanson*") it "has long recognized that [] '[s]ummary decision is an extraordinary procedure,"' and [it] has analogized it to Rule 56 of the Federal Rules of Civil Procedure, under which "the Supreme Court has indicated that summary judgment is authorized only 'upon proper showings of the lack of a genuine, triable issue of material fact."' *Energy West Mining Co.*, 16 FMSHRC 1414, 1419 (July 1994) (quoting *Missouri Gravel Co.*, 3 FMSHRC 2470, 2471 (Nov. 1981); *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)).*Hanson* at *9. Further, the Commission looks "at the record on summary judgment in the light most favorable to … the party opposing the motion," and that "the inferences to be drawn from the underlying facts contained in [the] materials [supporting the motion] must be viewed in the light most favorable to the party opposing the motion." *Poller v. Columbia Broadcasting Sys., Inc*., 368 U.S. 464, 473 (1962); *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). Mindful of the procedural rule and the Commission's words, the Court concludes that there is no genuine issue of material fact and that Highland is entitled to summary decision as a matter of law.

Section 105(c) of the Mine Act protects miners from discharge, discrimination, or other interference of the miner's exercise of a statutory right. Such statutory rights include, but are not limited to, filing or making a complaint relating to the Act, making a complaint of an alleged danger or safety or health violation in a coal or other mine, or institution any proceeding under the Act against an operator. 30 U.S.C. 815(c)(1).

FACTS

The relevant facts of this case are not in dispute. Trent worked as a production worker for Cemex. RX-A. He was terminated on August 28, 2012 for violating the company's Lock-out/Tag-out policy. *Id.* Trent alleges that he was not task trained on the FK pump, but that he did not object, complain, or refuse to do the task. RX-B. D. Another employee who violated the policy, Scott Stratton, was not terminated. RX-B.

ANALYSIS

The Mine Act protects miners and applicants for employment from discrimination motivated by the miner's protected activity. *See Tanglewood Energy, Inc.*, 19 FMSHRC 833 (May 1997). The Commission has held that a complainant in a discrimination proceeding has the burden of establishing a *prima facie* case of discrimination. *Sec. of Labor obo David Pasula v. Consolidation Coal Co*., 2 FMSHRC 2786, 2799-2800 (Oct. 1980). In order to establish such a *prima facie* case, the complainant must present evidence "sufficient to support a conclusion that the individual engaged in protected activity and that the adverse action complained of was motivated in any part by that activity." *Sec. of Labor obo Donald E. Zecco v. Consolidation Coal Co*., 21 FMSHRC 985, 989, (Sept. 1999). Though the *prima facie* case requirement is minimal, the complainant must present some facts upon which the trier of fact can find retaliation. The Commission has stated:

> To make out a prima facie case of discrimination, the complainant need only "present[] *evidence sufficient to support a conclusion* that the individual engaged in protected activity and that the adverse action complained of was motivated in any part by that activity." *See Driessen*, 20 FMSHRC at 328 (emphasis added). This burden of proof is lower than the ultimate burden of persuasion, which the complainant must sustain as to the overall question of whether section 105(c)(1) has been violated. *See EEOC v. Avery Dennison Corp.*, 104 F.3d 858, 861 (6th Cir. 1997) (holding that "[t]here must be a lower burden of proof to sustain a prima facie case than to win a judgment on the ultimate issue of discrimination"); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981) (holding that "the burden imposed on a plaintiff at the prima facie stage is not onerous")**;** *McGuinness v. Lincoln Hall*, 263 F.3d 49, 53 (2d Cir. 2001) (stating that the burden of establishing a prima facie case of discrimination is "minimal") (*citing St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 (1993); *Young v. Warner-Jenkinson Co., Inc.*, 152 F.3d 1018, 1022 (8th Cir. 1998) ("'The prima facie burden is not so onerous as, nor should it be conflated with, the ultimate issue' of discriminatory action.").[6] To establish a prima facie case, it is sufficient that the alleged discriminatee present evidence from which the trier of fact could infer retaliation. *See Young*, 152 F.3d at 1022 (concluding that plaintiff "produced evidence sufficient to raise an inference of discrimination"); *see also Long v. Eastfield College*, 88 F.3d 300, 304-05 n.4 (5th Cir. 1996) (stating that at prima facie stage, plaintiff need not prove that protected activity was sole factor motivating employer's challenged decision; "[t]he ultimate determination … is whether the conduct protected … was a 'but for' cause of the adverse employment decision").

Jayson Turner v. National Cement Co. of California, 33 FMSHRC 1059, 1065 (May 2011). In the instant case, Trent has failed to meet even that minimal burden.

The Mine Act seeks to protect miners to refuse work that he believes would expose him to an identifiable danger. *Mountain Top Trucking Co., Inc.*, 1997 WL 34994, *23 (ALJ) (Jan. 1997). In the instant case, Trent could have refused to perform the task that he was not trained to perform, or he could have complained. Had he engaged in either of these choices, his actions would be protected. However, Trent performed the task, and when he did so in violation of a company policy he was terminated. "Any claim of protected activity that is not grounded on an alleged violation of a health or safety standard or which does not result from some hazardous condition or practice existing in the mine environment for which the operator is responsible falls without the penumbra of the statute. *Sec. of Labor obo Danny H. Bryant v. Clinchfield Coal Co*., 4 FMSHRC 1379, 1421 (July 1982)(ALJ). According to the undisputed facts, there was no protected activity.

Trent appears to argue that other miners who similarly violated the policy were not terminated. Had Trent engaged in protected activity, this fact could be evidence of disparate treatment or pretext. However, in the instant case, it does not violate Section 105(c) of the Act.

Because Trent has not alleged a protected activity, he has not met his burden of presenting a prima facie case of discrimination. Wherefore, the Respondent's Motion for Summary Decision is **GRANTED**.

ORDER

It is **ORDERED** that the Respondent's Motion for Summary Decision is **GRANTED**.

/s/ Kenneth R. Andrews
Kenneth R. Andrews
Administrative Law Judge

Distribution:

Michael E. Trent, 2111 Rosewood Road, Knoxville, TN 37924, Complainant

Michelle C. Whitter, Esq., Jackson Kelly PLLC, 1099 18th St., Suite 2150, Denver, CO 80202, for Respondent

K. Brad Oakley, Jackson Kelly, PLLC, 175 E. Main St., Suite 500, P.O. Box 2150, Lexington, KY 40507, for Respondent.

/mzm