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February 16, 2017

VICKIE R. ARLINE, Complainant	DISCRIMINATION PROCEEDING Docket No. SE 2016-0196-DM SE-MD-16-07
v.	
ARCILLA MINING & LAND LLC, Respondent	Mine ID: 09-1077 Sheppard Mine

ORDER OF DISMISSAL

Before: Judge Miller

This case is before me upon a complaint of discrimination under Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(3), filed by Vickie R. Arline against Arcilla Mining and Land, LLC. Arline's complaint concerns an accident involving a truck at the mine in which Arline was injured in June 2014. She alleges that she contacted an attorney regarding her injuries after the accident and was laid off as a result. Arline was offered her job back after several months on light duty, but she refused because of her lingering injuries. Both parties are unrepresented in this case. Because Arline's complaint had a number of substantive and procedural defects, several conference calls were held with the parties and Arline was given the opportunity to supplement her complaint. An Order to Show Cause was issued on January 9, 2017, and while Arline responded to the order, I do not find that the defects have been resolved. As explained below, I find that Arline's complaint fails to state a cause of action, and I therefore dismiss this case.

I. BACKGROUND

On January 5, 2016, complainant Vickie Arline submitted a complaint to the Mine Safety and Health Administration ("MSHA") regarding her discharge from her position with Arcilla Mining and Land, LLC ("Arcilla") in August 2014. MSHA notified Arline on February 26, 2016, that it would not be pursuing her case, noting the 30-day deadline for filing with the Commission. Arline filed a complaint with the Commission on April 19, 2016, but failed to provide proof of service to Respondent. Accordingly, Chief Judge Lesnick sent a letter to Arline on April 21, 2016, notifying her of the proof of service requirement and giving her 30 days to provide such proof. Arline failed to provide proof of service within that time period. The Chief Judge then issued an Order to Show Cause on July 22, 2016, giving Arline 30 more days to provide proof of service.

The case was assigned to this office on November 15, 2016. As of that date, Arline had not yet provided proof of service. This office contacted Arline to explain the proof of service requirement. Arline submitted a second copy of her complaint, but still failed to provide proof of

service. Because the Commission has directed its judges to exercise leniency in handling cases with pro se parties, her case was not dismissed at that point, but instead this office provided Arcilla with a copy of the complaint. A conference call with the parties was held on December 7, 2016. Arcilla admitted that it had received Arline's complaint, and the company was directed to file an answer, which it did shortly after the conference call.

Arline's initial complaint alleges that she was laid off after being injured in an accident with another truck driver on the job. Compl. to MHSA (Jan. 4, 2016); Compl. to Comm'n (Apr. 19, 2016). She believes she was laid off because she contacted an attorney after the accident about her workers' compensation claim, and seeks compensation for her time off work and retraining for another job. Compl. to MSHA; Compl. to Comm'n. In the company's answer, it asserts that it twice offered Arline to return to work, but she refused. Ans. (Dec. 7, 2017). The company also states that Arline received workers' compensation for the time she was off work due to her injury. *Id.*

Arline's complaints failed to address several issues, including her delay in filing with MSHA and what protected activity she alleges. In a December 7, 2016 conference call with the parties, the necessary elements of a discrimination claim were explained to Arline, including what constitutes protected activity. She was granted leave to amend her complaint to explain in writing why she had not timely filed her complaint and provide further information about a protected activity.

Arline filed an amendment on December 9, 2016, but still failed to adequately address the issues of protected activity and delayed filing. An Order to Show Cause was issued on January 9, 2017, explaining these issues and giving her an opportunity to respond. Arline filed a response on January 30, 2017. In her response Arline alleges that the truck driver who hit her was not adequately trained, but she made no complaint about it until she contacted MSHA in January 2016, long after she was terminated. She presented no other allegation of protected activity. A final call was held with the parties on February 6, 2017, to clarify Arline's allegations. Arline again described the truck accident that caused her injuries, emphasizing that she was hit from behind by a new truck driver who had not been adequately trained. Compl. Amdt. (Jan. 30, 2017); Tr. at 4-5. Arline's brother reported the accident to mine management. Tr. at 18. Arline worked the rest of the day after the accident, but began to feel bad when she returned home. Tr. at 5. She went to the emergency room the next day, and was then sent to a workers' compensation doctor, Dr. Smith. Tr. at 6. The doctor informed her that she had a bad case of whiplash and gave her some medication. Tr. at 6. She returned to work the next day doing light duty, which was mostly paperwork. Tr. at 6.

After the accident, Arline spoke with Heath Claxton, a mine manager, and told him that the truck driver who hit her had not been properly trained. Tr. at 18. Claxton agreed and said the accident was not her fault. *Id.* Prior to the accident, Arline had never had any problems at the mine or made any safety complaints. Tr. at 12.

Arline continued to work light duty for the mine in June and July 2014. Tr. at 9. She continued to receive medical treatment from Dr. Smith as well as from an orthopedic doctor, Dr. Richardson. Tr. at 7. Dr. Richardson cleared her to return to full duty on July 24, 2014, and her

medical benefits from workers' compensation ended around that time. Tr. at 7, 14. However, she refused to return to full duty because she was still in pain and felt she had not recovered from her knee injury that was related to the accident, which Dr. Smith but not Dr. Richardson had been treating. Tr. at 9, 14. When her medical benefits were no longer paid, she contacted an attorney for help with her claim. She was laid off shortly thereafter. Tr. at 10.

Arline believes she was laid off because she hired an attorney to assist her when she stopped receiving assistance from workers' compensation for her medical expenses. Tr. at 19. She states that someone at the company told her that they would have been able to help her if she hadn't hired an attorney. Tr. at 9. Arcilla insists that Arline was only laid off because there was no work for her if she could not drive a truck, and that it allowed her to draw unemployment when she left. Tr. at 14. The company reports that it received notice of Arline's injury rating for workers' compensation in November 2014, and that it paid her the required amount for temporary disability, $2,766.00. Tr. at 14. The parties resolved Arline's remaining workers' compensation claims through mediation in July 2016 and as a result Arline received a lump sum settlement from the company. Tr. at 17.

Arline's contact with MSHA began in January 2016, when she first called to report that she had been injured in an accident. Tr. at 11. She states that she is still unable to drive a truck at this time. Tr. at 12. She asks that the company assist her in being retrained for another job and compensate her for the time she has not been working, from August 2014 to the present. Tr. at 21.

II. DISCUSSION

A. Late Filing

Section 105(c)(2) of the Act provides that a miner may make a complaint of discrimination to MSHA "within 60 days after such violation occurs." 30 U.S.C. § 815(c)(2). If MSHA determines that there was no violation, the miner "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." 30 U.S.C. § 815(c)(3).

The Commission has clarified that the Mine Act's 60-day time limit should not be construed strictly in cases where late filing is due to "justifiable circumstances, including ignorance, mistake, inadvertence and excusable neglect." *Perry v. Phelps Dodge Morenci, Inc.*, 18 FMSHRC 1918, 1921-22 (1996). Similarly, the legislative history of the Act states that late filing should be excused "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." S. Rep. No. 95-181, at 36 (1977). Nevertheless, "[e]ven if there is an adequate excuse for late filing, a serious delay causing legal prejudice to the respondent may require dismissal." *Perry,* 18 FMSHRC at 1922. Underlying the 60-day time limit is a concern for the accuracy of the proceedings. In a decision dismissing a discrimination complaint filed three years after the employee's termination, a Commission ALJ observed that "it is highly questionable whether the other employees who might have had some knowledge of the events surrounding the termination would have a present recollection of those

events." *Sinnott v. Jim Walter Res., Inc.*, 16 FMSHRC 2445, 2448 (Dec. 1994) (ALJ); *see also Hacking v. Staker & Parson Cos.*, 38 FMSHRC 851, 857-58 (Apr. 2016) (ALJ) (dismissing discrimination complaint filed two years and nine months after termination).

Arline began working for Arcilla mining in October 2013, after working as a truck driver for other mining companies for approximately fifteen years. Tr. at 2, 15. She was discharged from Arcilla in July or August 2014. Tr. at 10, 15. She filed her complaint with MSHA on January 5, 2016, a year and a half after her discharge. She received her notice of determination from MSHA on February 26, 2016, and filed her complaint with the Commission on April 19, 2016, several weeks after the 30-day deadline. In this court's Order to Show Cause on January 9, 2017, Arline was given the opportunity to explain her delay in filing her initial complaint with MSHA. She stated in her response that she was not aware of her rights under the Mine Act at the time of her discharge. Compl. Amdt. (Jan. 30, 2017). At some undisclosed time, Arline asked her attorney about filing with MSHA, but he was not familiar with MSHA and said it did not apply to her case. *Id.* Arline did not follow up until her complaint in January 2016. In addition, Arline failed to meet the deadline for filing a complaint with the Commission after receiving her denial from MHSA, and failed to provide proof of service to the mine after being given multiple chances. Finally, Arline worked in the mining industry about fifteen years prior to working with Arcilla. Tr. at 15. When she started her employment with Arcilla, she was shown an MSHA video that described her rights under that Act. Tr. at 15. According to Arcilla, her personnel file contains a signed acknowledgement concerning her training and the MSHA video. Tr. at 16.

Arline retained an attorney before she was laid off from the mine, and contends that it was the hiring of the workers' compensation attorney that led the mine to terminate her employment. She worked as a truck driver in the mining industry for many years, and when she began her employment with Arcilla in October 2013, she was again advised of her rights under the Mine Act. She agrees that she had some information about MSHA but did not follow through, nor did her attorney. Instead, Arline chose to pursue other remedies in a workers' compensation proceeding. She reached a settlement of those claims with Arcilla in July 2016. I find that Arline has provided no persuasive reason why her late filings should be excused. Nevertheless, because both parties are pro se, and there are a number of deficiencies in this case, this dismissal is based primarily on the failure to state a claim as outlined below.

B. Sufficiency of the Complaint

Arline's original complaint did not clearly allege any protected activity or adverse motive by the mine. These subjects were raised with Arline in several conference calls and in the January 9, 2017, Order to Show Cause. I accept Arline's allegations as true for the purpose of this order, but find that she has failed to allege any protected activity giving rise to a claim under the Mine Act.

Federal Rule of Civil Procedure 12(b)(6) permits a court to dismiss an action when the complaint fails to state a claim upon which relief can be granted. To survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). A court may order dismissal

sua sponte "when it is patently obvious the plaintiff could not prevail based on the facts alleged in the complaint." *Smith v. Boyd*, 945 F.2d 1041, 1043 (8th Cir. 1991); *see also McKinney v. Okl., Dep't of Human Servs.*, 925 F.2d 363, 365 (10th Cir. 1991); *Baker v. Dir., U.S. Parole Comm'n*, 916 F.2d 725, 726 (D.C. Cir. 1990).

The Mine Act's discrimination provision provides for relief when a miner is discharged or otherwise discriminated against because he has filed or made a complaint under the Mine Act, instituted a proceeding under the Act, or exercised any other statutory right under the Act. 30 U.S.C. § 815(c)(1). In Arline's MSHA Complaint and first Complaint to the Commission, it was unclear what protected activity she was alleging. She was notified of the protected activity requirement in a conference call between the parties and the Judge on December 7, 2016. She was given the opportunity to amend her complaint, which she did on December 9, 2016. In her submission, Arline states that she contacted MSHA to notify them of the tractor trailer accident and that she provided information to an inspector in his investigation of the accident. Compl. Amdt. (Dec. 9, 2016). However, in follow-up calls, it became clear that her only contact with MSHA occurred after she was laid off. A conference call was held on February 6, 2017, to clarify the allegations, and the protected activity requirement was explained to her again. Tr. at 17. While she was given multiple opportunities to name a protected activity, none of the events or activities she described would qualify as a protected activity under the Mine Act.

Arline's December 9, 2016, filing alleges that she contacted MSHA at some point to provide information about the truck accident. Compl. Amdt. However, Arline explained in the February 6, 2017, conference call that she did not contact MSHA until January 2016, well after her termination. Tr. at 11. Arline also indicated that she learned from MSHA that the truck driver who injured her was not properly trained and that the truck had mechanical issues. Compl. Amdt. (Dec. 9, 2016). However, she admits that she did not make any complaints to MSHA or management prior to her termination. Tr. at 12. It is therefore impossible to conclude that communications with MSHA were the cause of her termination.

Arline further alleges that she complained to her employer about her injuries after the accident and refused to operate a truck when asked because she was still injured and unable to operate the truck safely. Compl. Amdt. (Jan. 26, 2017); Tr. at 9, 19. The Commission has recognized that a miner's refusal to work in unsafe conditions is protected activity under the Act. *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (Apr. 1981); *Sec'y of Labor on behalf of Pasula v. Consol. Coal Co.*, 2 FMSHRC 2786 (Oct. 1980). However, the Commission has limited the right to refuse to work to situations in which the miner has a "good faith, reasonable belief in a hazardous condition." *Robinette*, 3 FMSHRC at 813; *see also* S. Rep. No. 95-181, at 35 (1977) (stating that protected activity includes "the refusal to work in conditions which are believed to be unsafe or unhealthful"). The Commission's language requires that the basis for a protected work refusal must be a "condition" in the work environment, and not the miner's own physical impairment. *See Collette v. Boart Longyear Co.*, 17 FMSHRC 1121, 1125-26 (July 1995) (ALJ). As one Commission ALJ has observed,

> [I]t is clear that [Congress's] intent was to protect against "conditions" inherent in the work process and not to provide continuing compensation or disability benefits for individuals who,

> because of certain physical impairments or injuries would find working most jobs in the mining industry impossible. While it is truly unfortunate that persons such as [the complainant] may not, because of such injuries, be able to perform work in the industry[,] it is not the purpose of the Act to remedy such problems. To hold a mine operator responsible under such circumstances would effectively make him a guarantor of compensation. It is clearly not the purpose of the Act, but rather worker's compensation, social security disability and other similar laws to provide loss of income protection under these circumstances.

Id. at 1126; *see also Sheperd v. Black Hills Bentonite,* 25 FMSHRC 129, 133 (Mar. 2003) (ALJ) (finding that miner's refusal to lift heavy bags because it would aggravate a back injury he sustained at work was not protected activity); *Collier v. Great W. Coal, Inc.*, 12 FMSHRC 35 (Jan. 1990) (ALJ) (dismissing case where complainant was discharged for inability to perform his job duties, even though his injuries were due in part to defective equipment at work).

Finally, Arline's allegations that she was laid off for contacting an attorney do not fall within the scope of protected activity. *See* Compl. to MSHA (Jan. 4, 2016). Arline states that she contacted an attorney for assistance in obtaining compensation for her medical expenses in dealing with her injuries after being released to return to work in August, 2015. Tr. at 20. She believes that the call to the attorney resulted in her lay off. However, the Act protects only those miners who make a complaint "under or related to the Act." 30 U.S.C. § 815(c)(1). Arline has not alleged that her contact with the attorney related to any safety issues at the mine or to any right guaranteed under the Act. *Cf. Brannon v. Panther Mining*, LLC, 31 FMSHRC 1533, 1536 (Nov. 2009) (ALJ) (finding that filing a civil lawsuit in state court could constitute protected activity if it furthered rights guaranteed by the Act). In fact, when questioned about her contact with an attorney, Arline repeatedly asserted that she contacted him (later she refers to her attorney as "her") because she needed help collecting medical payments under her worker's compensation claim. She does mention in one pleading asking an attorney about filing a complaint with MSHA but it is unclear when that occurred. Given that it went no farther than questioning her attorney, it cannot be said that the mine knew of the contact or in any way acted upon it.

Both parties in this case were given ample opportunity to present evidence and documents, both in writing and in conferences.[1] On a number of occasions the parties were instructed as to procedure and as to the elements of a discrimination case. Arline was given a number of opportunities to explain what protected activity she alleges in her complaint and why she believes she was unfairly terminated. Each time, her responses related to her injury, to the mine taking care of her as a result of the injury, and to thinking that she would get a more favorable worker's compensation award from them. The mine asserts that Arline was twice offered to return to work as a truck driver and they had no other positions for her to fill. She is eligible for re-hire as a truck driver if she chooses to return to work at any time. Tr. at 22. The mine indicated that they believed that all of the issues related to Arline were workers'

[1] Following the final conference call, Arline faxed medical records to this office, which added nothing to the record, and were returned to her for privacy reasons.

compensation issues, that she never made a complaint during her employment and that she was a good employee and driver. They learned nothing about MSHA until an inspector brought the accident to their attention a year and a half after the accident, long after Arline had been laid off.

Given the evidence in the file presented by both parties, and the fact that both parties have nothing further to present, I find that Arline has failed to state a claim pursuant to Section 105(c) of the Mine Act.

III. ORDER

Based on the above findings and conclusions of law, I find that Complainant has failed to state a claim upon which relief may be granted. Accordingly, the case is hereby **DISMISSED.**

Margaret A. Miller
Administrative Law Judge

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