FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 9, 2019

MICHAEL DEUSO Complainant v. SHELBURNE LIMESTONE CORP., Respondent	DISCRIMINATION PROCEEDING Docket No. YORK 2019-0015-DM Mine: SLC Swanton Div. Mine ID: 43-00030

ORDER DISMISSING SECTION 105(c) DISCRIMINATION COMPLAINT

Before: Judge McCarthy

This matter is before the undersigned on a Complaint of Discrimination filed pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., as amended ("Mine Act") and 29 C.F.R. 2700.42. Respondent seeks an Order Dismissing the Complaint for untimely filing and lack of jurisdiction. For the reasons set forth below, the undersigned finds that Complainant's untimely filing of his action with the Commission was justifiable because of ignorance, misunderstanding, or mistake, and because of the absence of any material prejudice to Respondent. The undersigned further finds, however, that such action should be dismissed because Complainant's new allegations, which raised arguable protected activity for the first time before the Commission, were not investigated by the Secretary under extant controlling precedent set forth in *Hatfield v. Colquest Energy, Inc.*, 13 FMSHRC 544 (Apr. 1991).

I. STATEMENT OF THE CASE

On April 21, 2017, Complainant was terminated from his position at SLC Swanton ("Mine"). Complainant contacted the Mine Safety and Health Administration ("MSHA") via email on May 22, 2017. In that email, sent at 7:06 a.m., Complainant asserted that he had been terminated because of his age. He further asserted that immediately after he was fired, a physical altercation ensued with Mine owners Dennis and Trampas Demers. As described by Complainant in his email to MSHA:

> I was texted to go to main office in Colchester VT for a meeting which I thought was going to be about plant modifications, but it was about terminating me from [sic] being 57 yrs old.
>
> I sat and listened to them for 5 min. I got up said I heard enough and stormed out of there [sic] office when I reached outside door Dennis Demers grabbed me, as Trampas Demers was shouting at me you did this to yourself & I told you dad he

> is a f**king loser, he is nothing. I went to grab Trampas and Dennis tackled me on to the asphalt where Trampas had his arm on my throat choking me while I was on my back, and Dennis was kneeling his whole body on my chest area between my head holding my head with his hands, I went to take a swipe at Trampas to get him off my throat so could breath [sic], Dennis took my head and picked it up and slammed it on the asphalt 3 times almost knocked me out. After 5 min or so Dennis let me up I grabbed my glasses from the ground Dennis asked for the keys I gave him the plant keys & company truck keys I asked if he would unlock my truck so I could grab some personal things he did. I cleaned it out while Trampas hollered we were going to give you a severance but your to [sic] f**king stupid.

Email from Michael Deuso, Complainant, to the Albany, New York MSHA Field Office (May 22, 2017, 07:06 EDT). Complainant also provided his phone number to the MSHA Field Office.

At 11:01 a.m. on May 22, 2017, an Albany, New York MSHA Field Office supervisor responded to Complainant's email. He stated that the company's main office where the altercation allegedly occurred is "not under MSHA jurisdiction," and that "age discrimination is not a protected act under the Mine Act." MSHA concluded that "there is nothing that MSHA can do to assist in the matter."

After MSHA declined to investigate any further, Complainant filed an unlawful termination claim with the Office of Administrative Hearings at the Vermont Department of Labor. Complainant's claim was active through at least October 30, 2018 in the Vermont state adjudicative system.[1]

On December 12, 2018, Complainant filed a pro se action with the Commission under section 105(c)(3) of the Mine Act. His Commission filing recounts the incident at Respondent's corporate office. It further alleges for the first time that, during the week of April 17, 2017, the Mine owners came to the mine and "made adjustments on the primary and secondary feeders" to run the system at 100% capacity. Complainant states that he "adjusted the feeder knob" to reduce the speed at which the feeders were operating, against the wishes of Respondent. Complainant further asserts that he adjusted the feeder knob because "the belt amps were starting to run past the amp setting that they had the feeders set at so I tweaked the setting on the cone crusher to maintain the belt amperage." With his Commission filing, Complainant submitted a news article recounting a conveyor belt fire at the Mine in 2015.[2] Complainant claims that he reduced the speed of the feeders out of concern for the possibility of another fire on the belts.

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[1] As of this writing, Complainant has a suit against Respondent active in the United States District Court for the District of Vermont. *Deuso v. Shelburne Limestone Corp.*, No. 2:18-CV-131-CR (D. Vt. Aug. 13, 2018).

[2] Elodie Reed, *SWANTON: Stone elevator catches on fire*, ST. ALBANS MESSENGER (Sep. 22, 2015), https://www.samessenger.com/swanton-stone-elevator-catches-on-fire/.

On January 8, 2019, the Respondent filed a Motion to Dismiss ("Motion"). The Motion argues that Complainant's email communication with MSHA on May 22, 2017 constituted a "complaint" within the meaning of section 105(c)(1) of the Mine Act. The Respondent further argues that section 105(c)(3) requires Complainant to file his action with the Commission within 30 days after the Secretary of Labor declines to prosecute his complaint under section 105(c)(2) of the Act. Given that Complainant's filing with the Commission was received on December 17, 2018, approximately 19 months after the Secretary determined that there was nothing that MSHA could do to assist in this matter, the Respondent argues that the action should be dismissed as untimely filed.

On January 31, 2019, the undersigned conducted a conference call with the parties and deferred ruling on Respondent's Motion to Dismiss pending an opportunity for Complainant to show cause why his action should not be dismissed as untimely filed, or dismissed because his allegations were not investigated by the Secretary under Commission precedent set forth in *Hatfield*, 13 FMSHRC at 546. On February 6, 2019, the undersigned issued such Order to Show Cause.

On February 15, 2019, Complainant submitted his Response to the Order to Show Cause, recounting the circumstances surrounding his termination and quoting from Chapter 2 of MSHA's Special Investigations Handbook,[3] which outlines the procedures for investigating discrimination complaints. Complainant avers that MSHA's Albany Field Office Supervisor did not follow MSHA procedures regarding investigation of discrimination complaints, and "if you decide to allow an investigation you will find multiply [sic] violations of the Section 105(c) of the miners act [sic]. I sincerely hope you decide to allow an investigation into this case so future miners will have a safer place to work." Response at 3.

On February 27, 2019, Respondent submitted its Reply to Complainant's Response ("Reply Memorandum"). Respondent argues that Vermont state investigators found insufficient evidence to prove age discrimination and that neither age discrimination nor acts that occur at the Mine's corporate headquarters fall under MSHA jurisdiction. Further, Respondent argues that Complainant was terminated for insubordination after his failure to comply with the operator's directives to refrain from adjusting the dial settings on the belt feeders. Finally, Respondent argues that the Complainant's active engagement in the state law proceedings indicates that he is sophisticated enough to understand his legal rights, and that he should not be excused from filing his section 105(c)(3) action with the Commission approximately 19 months after MSHA informed him that it was declining to take any action on his behalf.

II. LEGAL PRINCIPLES AND ANALYSIS

In cases involving a pro se litigant, the Commission has stated that "motions to dismiss for failure to state a claim should rarely be granted. Instead, a judge should ensure that he informs himself of all the available facts relevant to his decision, including the complainant's version of those facts." *Perry v. Phelps Dodge Morenci, Inc.*, 18 FMSHRC 1918, 1920 (Nov. 1996), citing *Heckler v. Campbell*, 461 U.S. 458, 470-73 (1983) (Brennan, J., concurring). The filings of a pro se litigant are to be construed liberally. *Marin v. Asarco, Inc.*, 13 FMSHRC 1269, 1273 (Aug. 1992), citing *Haines v. Kerner*, 404 U.S. 519, 520 (1972).

[3] U.S. Dep't of Labor, Handbook Number PH05-I-4, Special Investigations Procedures (2005).

Section 105(c)(1) of the Mine Act provides, in pertinent part, that:

> No person shall discharge or in any manner discriminate against . . . or otherwise interfere with the exercise of the statutory rights of any miner . . . in any coal or other mine subject to this Act because such miner . . . has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent . . . of an alleged danger or safety or health violation in a coal or other mine, or because such miner . . . 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 . . . on behalf of himself or others of any statutory right afforded by this Act.

Section 105(c)(2) of the Mine Act provides, in pertinent part, that:

> Any miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. . . .

Section 105(c)(3) of the Mine Act provides, in pertinent part, that:

> Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner . . . of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant 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, charging discrimination or interference in violation of paragraph (1) . . . .

Under section 105(c)(3) of the Mine Act, Complainant had 30 days to file his section 105(c)(3) action with the Commission after receipt of MSHA's May 22, 2107 email communication advising him that there was nothing that MSHA could do on his behalf. As noted, Complainant filed with the Commission almost 19 months later. The Commission has held, however, that a claim may be considered despite untimely filing due to "justifiable circumstances, including ignorance, mistake, inadvertence and excusable neglect." *Perry v. Phelps Dodge Morenci, Inc.*, 18 FMSHRC 1918, 1921-22 (Nov. 1996), citing *Schulte v. Lizza Indus., Inc.*, 6 FMSHRC 8, 12-13 (Jan. 1984); *Farmer v. Island Creek Coal Co.*, 13 FMSHRC 1226, 1230-31 (Aug. 1991).[4] In *Perry*, the Commission noted that "[even if there is an adequate

[4] In *Perry*, complainant Perry filed his discrimination complaint with MSHA pursuant to section 105(c) on September 14, 1995. On November 6, 1995, MSHA notified Perry and Phelps Dodge after investigation that it had concluded that a violation of section 105(c) had not occurred. Perry filed his section 105(c)(3) action with the Commission on November 17, 1996. A Commission Administrative Law Judge issued an Order dated April 26, 1996, dismissing Perry's complaint for failure to state a claim upon which relief may be granted. The Commission

excuse for late filing, a serious delay causing legal prejudice to the respondent may require dismissal." *See Secretary of Labor on behalf of Hale v. 4-A Coal Co.*, 9 FMSHRC 905, 908 (June 1986)." The Commission concluded that "[i]n general, "timeliness questions must be resolved on a case-by-case basis, taking into account the unique circumstances of each situation." *See Hollis v. Consolidation Coal Co.*, 6 FMSHRC 21, 24 (Jan. 1984) aff'd mem., 750 F.2d 1093 (D.C. Cir. 1984).

Although this case arises under section 105(c)(3), the undersigned finds that Commission precedent addressing the Mine Act's legislative history regarding the filing time limit under section 105(c)(2) is instructive here. The Commission has found that the 60-day filing period for discrimination claims is not a jurisdictional bar and that timeliness questions must be examined on a case-by-case basis. *Hollis*, 6 FMSHRC at 24, aff'd mem., 750 F.2d 1093 (D.C. Cir. 1984). The relevant legislative history of the Mine Act supports this case-by-case approach when stating:

> 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.

S.Rep. No. 181, 95th Cong., 1st Sess. 36 (1977), reprinted in Senate Sub-committee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 624 (1978); *see also Herman v. IMCO Services*, 4 FMSHRC 2135, 2138 (Dec. 1982).

Although Complainant's section 105(c)(3) action was filed nearly 19 months after Complainant was notified that MSHA could do nothing on his behalf, the Commission and its judges have waived the untimely filing of a section 105(c) complaint on numerous occasions, even when the delay in filing was extensive, particularly where there is no showing of prejudice

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vacated the judge's Order. Emphasizing the complainant's pro se status, the Commission found that Perry had met his burden of alleging discrimination actionable under Section 105(c), and remanded the case for further evidentiary proceedings and a determination of whether the facts warranted a waiver of the time requirements for filing a complaint.

On remand, a different Commission Administrative Law Judge found that Perry filed his discrimination complaint 223 days after he was discharged and 38 days after the issuance of an arbitration decision upholding his discharge. Considering Perry's pro se status, his hearing testimony, and the absence of any allegation of discrimination throughout the Phelps Dodge appeal process, the judge found that Perry formed the belief that he was discharged for having a lost-time accident and raising a related safety complaint only after he had lost in arbitration. Accordingly, she found that Perry's filing 163 days in excess of the 60–day time limit set forth in section 105(c) was excusable and without prejudice to Phelps Dodge, and concluded that Perry timely filed his complaint within 60 days of exhausting Phelps Dodge's appeal process. *Perry v. Phelps Dodge Morenci, Inc.*, 19 FMSHRC 1664, 1665 n.3 (Oct. 1997) (ALJ).

to respondent. *See , e.g., 4-A Coal Co.,* 9 FMSHRC at 908 (reversing judge's dismissal of section 105(c)(2) complaint filed by the Secretary two years after the incident where the respondent did not demonstrate prejudice due to the delay); c*f.*, *Keim v. Cordero Mining LLC*, 36 FMSHRC 963 (April 2014) (ALJ) (excusing the untimeliness of pro se section complaint filed with MSHA, but dismissing timely filed section 105(c)(3) action for failure to establish any genuine issue of material fact that adverse discipline was motivated, at least in part, by any protected activity, or that respondent harbored any animus toward such activity; *Jack v. Mid-Continent Resources, Inc.*, 6 FMSHRC 1059, 1061 (April 1984) (ALJ) (excusing the untimeliness of pro se complaint filed more than nine months after discharge where complainant misunderstood his rights under the Act and was confused about the proper manner in which to proceed, and respondent did not demonstrate prejudice due to the delay, but dismissing section 105(c)(3) action because discharge was not motivated in any part by protected activity).

In this case, it appears that Complainant misunderstood or was ignorant of the rights he had under the Mine Act to file an action on his own behalf after MSHA declined to further investigate the matter. When the Secretary declines to bring a discrimination case before the Commission, the Secretary typically provides an insufficient evidence letter to the complainant advising of the Secretary's decision and the right to file a discrimination action under section 105(c)(3) with the Commission. *See, e.g.*, *Farmer v. Spartan Mining Co., LLC*, 389 FMSHRC 1301, 1303 (June 2017) (ALJ). In this case, the email sent by MSHA to the Complainant makes no reference to his section 105(c)(3) right to file an action with the Commission. In the undersigned's view, it was reasonable for Complainant to conclude that he had no remedy under the Mine Act based on statements made by MSHA in their initial intake of his Complaint. The Albany MSHA Field Office supervisor informed Complainant that there was nothing that MSHA could do to assist in this matter. Complainant may have mistakenly inferred from this statement that he had no additional rights under the Mine Act. Considering the totality of circumstances, including Complainant's pro se status and the lack of any notification from MSHA about the Complainant's right to pursue an action under section 105(c)(3) with the Commission, the undersigned concludes there were justifiable circumstances that excuse the untimely filing of his section 105(c)(3) action with the Commission.

Additionally, the Respondent failed to demonstrate material prejudice should the undersigned excuse the Complainant's untimeliness. In both its motion to dismiss and its Reply to the Order to Show Cause, Respondent fails to articulate why, much less demonstrate how, its legal interests would be prejudiced by Complainant's delay in filing with the Commission. Although Respondent cites *Perry* to support the proposition that the 19-month delay is too long to qualify as "excusable neglect," Respondent does not address any of the cases or the legislative history cited above, which favor processing a claim despite untimely filing where no prejudice has been shown. Nor does Respondent's Reply Memorandum address the other circumstances outlined in *Perry* that might give rise to a waiver of untimely filing, such as ignorance or mistake. Additionally, as noted, Respondent does not offer any reason why its legal interests would be adversely affected by waiving the untimely filing. Although the pro se Complainant was dilatory in pursuing his legal action under section 105(c)(3), Complainant contested his discharge with the Vermont Department of Labor and the Vermont judicial system shortly after contacting MSHA. As the parties' filings indicate, the Respondent has been on notice of Complainant's claims and has vigorously defended the validity of Complainant's discharge since

Complainant initiated legal actions against Respondent. Furthermore, there has been no showing by Respondent that essential witnesses are no longer available or that essential evidence no longer exists. Therefore, the undersigned concludes that the Respondent has not demonstrated material prejudice caused by waiving the untimely filing of the section 105(c)(3) action that Complainant filed with the Commission.

Nevertheless, the undersigned concludes that Complainant's section 105(c)(3) action should be dismissed under extant Commission precedent set forth in *Hatfield v. Colquest Energy, Inc.*, 13 FMSHRC 544 (Apr. 1991). In *Hatfield*, the complainant sought to amend his complaint under section 105(c)(3) after a Commission judge dismissed his initial complaint for failure to allege any protected activity. The judge denied the respondent's motion to dismiss the amended complaint. The Commission reversed and remanded on interlocutory review, holding that the complainant could not amend his complaint to include allegations that the Secretary had not previously investigated. The Commission reasoned that section 105(c)(2) gave the Secretary the prerogative to investigate violations of section 105(c), not the Commission. The Commission concluded:

> The written discrimination complaint filed by Hatfield with MSHA is general in nature and alleges no specific protected activities. The present record contains no indication that the matters alleged in the amended complaint were part of the case reported to and investigated by MSHA. Nor is there evidence in the record that the Secretary's determination that the Act had not been violated was based on matters contained in the amended complaint. If the Secretary's determination was based upon an investigation that did not include consideration of the matters contained in the amended complaint, the statutory prerequisites for a complaint pursuant to § 105(c)(3) have not been met.

13 FMSHRC at 546.

The Mine Act provides that an aggrieved miner must file a "complaint with the Secretary" to commence the investigatory process under section 105(c)(2). The initial complaint must contain some allegations of protected activity that the Secretary can investigate. If the Complainant does not allege protected activity in its initial communication with MSHA, a complainant cannot subsequently amend his pleading before the Commission to allege new protected activity that was not investigated by MSHA. *Hatfield,* 13 FMSHRC at 545.

Hatfield is controlling here. Complainant's initial complaint filed with MSHA does not appear to allege any protected activity. Complainant's May 22, 2017 email communication with MSHA makes no reference to the alleged belt feeder incident. The closest that Complainant comes to describing the alleged belt feeder incident in his initial communication with MSHA is his general statement that he was called into Respondent's offices to discuss "plant modifications." There is no reference to health or safety concerns. Even given the liberal construction that the Commission accords pro se pleadings, Complainant's email is simply too indefinite to satisfy *Hatfield.*

By comparison, in *DeRossett v. Martin County Coal Corp.*, 15 FMSHRC 883 (May 1993) (ALJ), the judge found that complainant had apparently complied with *Hatfield*, but

dismissed the complaint as untimely filed. *Id.* at 885 and n.2. In *DeRossett,* complainant's initial complaint to MSHA stated:

> 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.

Id. at 884. The judge found that complainant submitted a supplemental statement to MSHA detailing allegations of transfer to the evening shift and efforts to seek reinstatement after layoff. Accordingly, the judge found it apparent that complainant had complied with the administrative prerequisites set forth in *Hatfield. Id.* at 885 n.2. Complainant sought to file an amended complaint with the Commission to include additional violations of section 105(c)(1). Assuming arguendo that DeRossett's complaint to MSHA incorporated the allegations of discrimination contained in the amended complaint filed with the Commission,[5] and even assuming that such allegations were investigated by MSHA, the judge concluded that the complaint was filed untimely and that the untimely filing could not be excused. *Id.* at 885. More specifically, the judge reasonably inferred, under the totality of circumstances, that DeRossett received sufficient information during his period of employment with respondent 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. *Id.* at 887.

By contrast, in this case, Complainant did not provide any additional explanation to MSHA about what "plant modifications" meant in his initial email to MSHA. He simply alleges that Respondent unlawfully discharged him due to his age and thereafter physically assaulted him at company headquarters.[6] Also, there is no evidence in the record that MSHA's

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[5] Specifically, the amended complaint filed with this Commission alleged the following two allegations: 1) complainant made numerous complaints to supervisory personnel about unsafe working conditions, which complaints were a substantial factor in motivating respondent to move complainant to second shift during a reduction in force, despite the retention on the first shift of a position that complainant was qualified and entitled to fill; and 2) complainant sought reinstatement to his former position on numerous occasions following his discharge, but respondent refused to rehire him, despite the recall of less senior individuals following the reduction in force, because of complainant's safety complaints.

[6] While alleged age discrimination and physical assault are serious matters, the Mine Act is not the remedy for every workplace dispute simply because it occurs in or around a mine. *See, e.g., Delisio v. Mathies Coal Co.*, 12 FMSHRC 2535, 2544 (Dec. 1990) ("[T]he Commission does not sit as a super grievance board to judge the industrial merits, fairness, reasonableness, or wisdom of an operator's employment policies except insofar as those policies may conflict with rights granted under section 105(c) of the Mine Act.") (internal citations omitted). Although the Commission has never addressed the issue to the undersigned's knowledge, it is conceivable that under the particular facts and circumstances of a given case, reporting workplace violence or abuse because of protected activity or because it implicates concerns for safe performance of work tasks could rise to the level of protected activity under section 105(c) of the Mine Act. *Cf.*

determination that there was nothing it could do—i.e., there was insufficient evidence that the Act had been violated in customary parlance—was based on matters contained in the new allegations filed under section 105(c)(3).

On the contrary, Complainant's section 105(c)(3) action filed with the Commission on December 13, 2018 sets forth the alleged belt feeder incident for the first time. Under *Hatfield*, the December 13, 2018 filing does not cure the deficiency of the earlier filing because MSHA's insufficient evidence determination was based upon an investigation that did not include consideration of the matters contained in the section 105(c)(3) filing.[7] Under section 105(c)(2), the Secretary is entitled to "cause such investigation to be made as he deems appropriate." Here, the Secretary's designee apparently deemed no investigation appropriate other than an initial reading of Complainant's May 22, 2017 email. Consequently, despite the liberal manner in which the Commission construes pro se complaints, under the Commission's precedent in *Hatfield*, Complainant's December 13, 2018 filing is deficient as a matter of law and must be dismissed.

Harris v. Duane Thomas Marine Contr., LLC, No. 2:13-cv-00076-SPC-DNF (M.D. Fla. Feb. 5, 2013) (the Secretary brought a complaint under section 11(c) of the OSH Act of 1970 alleging that internal complaints to owner and/or external complaints to OSHA concerning workplace violence and verbal abuse constitute protected activity related to the OSH Act). *See Keim v. Cordero Mining LLC*, 36 FMSHRC at 972 n. 5. However, the Secretary's 11(c) theory in *Harris* was never tested by dispositive motion before the case settled in 2014, and there is a clear distinction between reporting workplace violence motivated by alleged protected activity or which implicates concern for the safe performance of work tasks, and engaging in a physical altercation with mine management in reaction to being terminated. In either instance, it is incumbent on the Complainant, pursuant to *Hatfield*, to provide sufficient information to enable MSHA to initiate an investigation into the matter.

[7] As recounted in the statement of facts, Complainant did describe the altercation in his email to MSHA. However, Complainant merely told MSHA that he initially believed the meeting was going to be about "plant modifications," which is not sufficiently descriptive of any protected activity or any nexus between the workplace altercation and protected activity to compel MSHA to investigate. Furthermore, the Supreme Court of Vermont, when hearing Complainant's state law wrongful termination claim, made no reference to a physical fight following Complainant's realization that he was to be terminated. *See Deuso v. Vermont Department of Labor*, No. 2017-425, 2018 WL 2100366 (Vt. May 4, 2018) (unpub. mem.), which states:

> Before the president or vice president had the opportunity to raise their specific concerns, claimant asked if the meeting was about the quarry or about him. When told that the meeting was about him, claimant 'jumped to the conclusion he was being fired and stormed out of the meeting.' He used profanity on the way out of the building.

Id. at *1. Taken together, the undersigned concludes that Complainant's description of the alleged termination to MSHA was insufficient to plead protected activity as articulated in *Hatfield.*

Nevertheless, the undersigned is compelled to comment on the cursory nature of MSHA's investigation of this matter. Complainant contacted the MSHA Albany Field Office supervisor at 7:06 a.m. on May 22, 2017. He informed MSHA that he had been terminated from his position at a mine for allegedly improper reasons and that a physical altercation occurred between Complainant and owners of Respondent immediately after he was fired.[8] He also provided his phone number. One brief follow-up phone conversation between MSHA and Complainant might have uncovered the belt feeder incident, which could have prompted an investigation into whether the Complaint appeared to have merit. Such an investigation would have been timely under the Mine Act and would have preserved Complainant's ability to bring his allegations under section 105(c)(3), if the Secretary determined, after investigation, that he would not prosecute the Complaint on Complainant's behalf.

Furthermore, in subsequent proceedings brought before the Vermont Department of Labor and this Commission, the Respondent acknowledged that Complainant was terminated for refusing to obey an order to keep the belt feeder running at full capacity.

> [Complainant] was specifically instructed not to adjust any of the settings and if any issues arose or if he felt needed [sic] to reset, he was to contact either Dennis Demers or Trampas Demers before making any adjustments. There is no question that he disobeyed and disregarded that direct order. That is the reason he was terminated.

Reply Memorandum at 2. If Complainant reasonably believed that the operator's order was unsafe or hazardous, firing him for refusing to follow that order arguably violates section 105(c) of the Mine Act. *See Secretary of Labor on behalf of Hogan v. Emerald Mines Corp.*, 8 FMSHRC 1066, 1071 (July 1986) ("A miner has the right under section 105(c) of the Mine Act to refuse work, if the miner has a good faith, reasonable belief in a hazardous condition."), citing *Miller v. Federal Mine Safety and Health Review Comm'n*, 687 F.2d 194, 195 (7th Cir. 1982); *Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d. Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981).

In short, a more thorough investigation by MSHA likely would have shed light on the validity of pro se Complainant Deuso's allegations before the Commission. Instead, MSHA summarily dismissed the matter less than four hours after it was initially brought to the Albany Field Office's attention, resulting in dismissal of whatever potential claims to relief Complainant might have had after full investigation by MSHA under extant Commission precedent set forth in *Hatfield.*

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[8] The MSHA Field Office's response to the Complainant's initial filing states, in part, that Respondent's main office does not fall under MSHA jurisdiction. It would appear to be wholly inconsistent with the purposes of section 105(c)(1) if an operator could avoid MSHA jurisdiction simply by bringing miners to the operator's corporate offices before retaliating against them because of the exercise of any alleged protected rights at the mine site.

III. ORDER

For the foregoing reasons, it is **ORDERED** that the section 105(c)(3) Complaint filed on December 13, 2018, be **DISMISSED**.

Thomas P. McCarthy
Administrative Law Judge

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