FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 4, 2015

SEAN MILLER, Petitioner, v. SAVAGE SERVICES CORP., Respondent.	DISCRIMINATION PROCEEDING Docket No. WEST 2014-7-DM RM MD 2013-08 Mine: Freeport-McMoRan Morenci Mine Mine ID: 02-00024 A3858

ORDER ON RESPONDENT'S MOTION FOR SUMMARY DECISION

Before: Judge Moran

Before the Court is Respondent Savage Services Corporation's ("Savage") Motion for Summary Decision ("Savage Motion").[1] The Complainant, Sean Miller, is not an attorney and is bringing this action *pro se* pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(3) ("Mine Act"), and 29 C.F.R. § 2700.40(b). For the reasons that follow, the Respondent's Motion is DENIED. The hearing in this matter remains as scheduled, to commence on May 12, 2015, at the Graham County Courthouse, 800 W. Main Street, Safford, Arizona.

Background

On May 14, 2013, Sean Miller made a discrimination complaint with MSHA, which complaint was received on May 17th. Mr. Miller alleged that he was "Harrassed and Retaliated againsts (sic) for putting Commercial Vehicles Out of Service." The Complaint identified Isaiah Krass, assistant operations manager, and Richard Burkie,[2] another Savage supervisor, as the individuals who "harassed and retaliated against[] [him] for putting commercial vehicles out of service." MSHA Discrimination Report May 14, 2013. Thereafter, on August 22, 2013, MSHA advised Miller by letter that

> [b]ased on a review of the information gathered during the investigation, MSHA does not believe that there is sufficient evidence to establish, by a preponderance of the evidence that a violation of Section 105(c) occurred [and] [f]or that reason,

[1] The Order of Assignment lists the Respondent as "Savage Transport," as did a pre-assignment Order directing the Respondent to answer the Complaint. The Respondent is now correctly identified as Savage Services Corporation.

[2] This is a misspelling. The individual is Richard Bjerke.

> the Secretary of Labor will not file a discrimination case with the Federal Mine Safety and Health Review Commission ("Commission") in this matter.

The letter noted that Miller "continue[s] to have the right to file a discrimination case on [his] own behalf with the Commission." Miller did just that, submitting a letter to Carolyn T. James ("Ms. James"), Mine Safety and Health Administration, 1100 Wilson Boulevard, Arlington, Virginia 22209-3939, on September 30, 2013, which letter was then forwarded to the Commission and date stamped as received on October 9, 2013. The letter to Ms. James identified two instances of protected activity: (1) Miller's taking his truck out of service because of inoperable brakes, and (2) his refusal to drive an overweight vehicle and his further refusal to use a replacement truck which had not been cleared for service in place of the overweight vehicle.

At this point, it is necessary to note that Miller subsequently made a second discrimination complaint against Savage, which resulted in the Secretary filing a complaint against Savage, identified as Docket No. WEST 2014-404, and regarding which the Court issued its decision on April 30, 2015, finding that Savage unlawfully discriminated against Sean Miller. The second discrimination complaint was filed on or about October 21, 2013, and was based upon the claim that Miller was unlawfully discharged on or about September 3, 2013. The second complaint references Miller's first complaint, alleging that around May 2, 2013, he was harassed and disciplined for taking vehicles out of service and it identifies May 2, 2013, as one of the incidents of Miller's protected activity. The second complaint then related other alleged instances of protected activity occurring after the matter raised in the first complaint.

Summary Decision

The Commission's procedural rule governing summary decision, 29 C.F.R. § 2700.67, provides in relevant part:

> (b) Grounds. A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows:
>
> (1) That there is no genuine issue as to any material fact; and
>
> (2) That the moving party is entitled to summary decision as a matter of law.
>
> . . . .
>
> (d) Form of opposition. An opposition to a motion for summary decision shall include a memorandum of points and authorities specifying why the moving party is not entitled to summary decision and may be supported by affidavits or other verified documents. The opposition shall also include a separate concise statement of each genuine issue of material fact necessary to be litigated, supported by a reference to any accompanying affidavits or other verified documents. Material facts identified as not in issue by the moving party shall be deemed admitted for purposes of the motion unless controverted by the statement

in opposition. If a party does not respond in opposition, summary decision, *if appropriate*, shall be entered in favor of the moving party.[3]

. . . .

(f) Case not fully adjudicated on motion. If a motion for summary decision is denied in whole or in part, the Judge shall ascertain what material facts are controverted and shall issue an order directing further proceedings as appropriate.

29 C.F.R. § 2700.67 (emphasis added).

Savage's Motion for Summary Decision

On April 3, 2015, Savage filed its motion for summary decision, alleging four bases in support:

> [1] Mr. Miller's complaint was filed with MSHA outside of the 60-day statutory time limit imposed by Section 105(c) of the Mine Act without a justifiable excuse for that delay;
>
> [2] No adverse action actionable under the Mine Act was taken against Mr. Miller as a result of his protected activity;
>
> [3] The complaint now before the Commission alleges conduct that is outside the scope of the complaint Mr. Miller filed with MSHA and to that extent is outside the scope of the agency's investigation and is not properly raised in his Section 105(c)(3) complaint; and
>
> [4] This matter has been superseded by Mr. Miller's termination-related proceeding in No. WEST 2014-404-DM.

Savage Motion at 5.

Because Miller is not an attorney and is acting *pro se*, the Court had a conference call with the parties to discuss Savage's Motion on April 9, 2015. During that call, the Court ruled on two of the bases advanced by Respondent. As to the first basis, that Mr. Miller's complaint was filed with MSHA outside of the 60-day statutory time limit imposed by Section 105(c) of the Mine Act without a justifiable excuse for that delay, the Court rules that Miller's lack of

[3] Following a conference call with the parties regarding Savage's Motion for Summary Decision, the Court emailed Miller, copying Attorney Wolff. As noted below, that email summed up the Court's discussion of the conference call. However, one aspect of the email from the Court misstated the standard for reviewing such motions in the statement that "such a [summary decision] motion asserts that there are no factual issues in dispute *and that the law favors the arguments of the party filing the motion* (Savage, in this case), so the Court may issue its decision without any hearing." In fact, the applicable provision provides: "If a party does not respond in opposition, summary decision, *if appropriate*, shall be entered in favor of the moving party." 29 C.F.R. § 2700.67(d) (emphasis added). Accordingly, it is within the Court's informed discretion to rule in favor of the moving party in such circumstances *or not.* Under the circumstances here, for the reasons expressed in this Order, the Court has determined that, despite the minimal response in opposition from Mr. Miller, it would not be appropriate to enter summary decision in favor of Savage against this *pro se* complainant.

sophistication in legal matters excuses his delay. Beyond that finding, it is noted that Savage's objection relates to Miller's complaint that he was harassed on January 31, 2013, and did not file the complaint with MSHA until some six weeks after the 60 day time limit. However, neither MSHA nor Savage previously raised, or had an issue with, Miller's delayed filing. Savage concedes that the deadline is not jurisdictional. The Court finds that there was delay all around and that Savage should have objected when MSHA first notified Savage that it was investigating Miller's complaint.

The second basis ruled upon by the Court during the call pertains to Savage's objection that the complaint now before the Commission alleges conduct that is outside the scope of the complaint Mr. Miller filed with MSHA, and to that extent is outside the scope of the agency's investigation, and is therefore not properly raised in his section 105(c)(3) complaint. The Court disposed of that objection, but agrees with Savage that Mr. Miller's complaint can't now be expanded from the basis which prompted him to file it, namely the January 31, 2013, events, the harassment associated with those events, and any harm he may have experienced from that harassment.

Although, sequentially, it was the last of the four bases advanced by Savage, the Court turns to Respondent's claim that the matter has been superseded by Mr. Miller's termination-related proceeding in No. WEST 2014-404-DM. The first complaint was not superseded by the second complaint, although *some* factual aspects of the first complaint were addressed during the hearing held in June 2014. MSHA Special Investigator Funkhouser testified that four safety incidents were considered in this first complaint: a brake shoe issue; a brake line leak; a tire issue; and an overweight truck incident. Investigator Funkhouser recommended that MSHA go forward with that first complaint, but MSHA decided against that recommendation and Miller then proceeded on his own in this present section 105(c)(3) action. Funkhouser noted a difference between the first complaint and the second one: the adverse action in the first complaint was harassment, while the second complaint involved Miller's employment termination. Transcript of Hearing at 237-48, *Sec'y of Labor on behalf of Miller v. Savage Services Corp.*, WEST 2014-404-DM (Apr. 30, 2015) (ALJ) [hereinafter *Miller I*].

The last of the bases raised by the Respondent is that the complaint in this matter fails to assert that an "adverse action actionable under the Mine Act was taken against Mr. Miller as a result of his protected activity." More particularly, Savage maintains that "Mr. Miller was not suspended, discharged, disciplined, or even subjected to any undesirable change in his work assignments. . . . Harassment, standing alone, does not constitute an adverse action under the Mine Act." Savage Motion at 11. Savage continues, stating that "[e]ven assuming for the sake of argument that Mr. Krass questioned Mr. Miller about his sexuality, and even assuming further that Mr. [Krass] did so in a harassing manner, that by itself is not 'adverse' activity actionable under the Mine Act." *Id.* at 12.

Savage concludes its argument with the assertion that "because Mr. Miller suffered no adverse action, there is no redressable injury in this case." *Id*. at 13. Rhetorically, it then asks, "What relief could the Commission possibly offer to Mr. Miller when he was not suspended, discharged, disciplined, or subjected to undesirable work assignments? Nothing changed for Mr. Miller." *Id*.

The Court believes that adverse action can be established under allegations such as those contained in Miller's Complaint. The Commission has tacitly recognized harassment as a stand-alone form of adverse action since its 1982 decision in *Moses v. Whitley Development Corp.*, 4 FMSHRC 1475 (Aug. 1982), *aff'd*, 770 F.2d 168 (6th Cir. 1985), in which the Commission considered whether coercive interrogation and harassment may ever constitute a violation of section 105(c)(1). The Commission found that such actions do violate the Mine Act:

> Section 105(c)(1) states that "no person shall discharge or in any manner discriminate against . . . or otherwise interfere with the exercise of the statutory rights of any miner." (Emphasis added.) We have previously noted the high priority Congress placed upon the unencumbered exercise of rights granted miners under the Mine Act. *David Pasula v. Consolidation Coal Company*, 2 FMSHRC 2786, 2790 (October 1980), *rev'd on other grounds sub nom, Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981). As we concluded in Pasula, Congress viewed the free exercise of miners' rights as "essential to the achievement of safe and healthful mines." 2 FMSHRC at 2790. Furthermore, it is clear that section 105(c)(1) was intended to encourage miner participation in enforcement of the Mine Act by protecting them against "not only the common forms of discrimination, such as discharge, suspension, demotion . . . , but also against the more subtle forms of interference, such as promises of benefit or threats of reprisal." S. Rep. 95-191, 95th Cong., 1st Sess. 36 (1977) ["S. Rep."], reprinted in Senate Subcommittee 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) ["Legis. Hist."].
>
> We find that among the "more subtle forms of interference" are coercive interrogation and harassment over the exercise of protected rights. A natural result of such practices may be to instill in the minds of employees fear of reprisal or discrimination. Such actions may not only chill the exercise of protected rights by the directly affected miners, but may also cause other miners, who wish to avoid similar treatment, to refrain from asserting their rights. This result is at odds with the goal of encouraging miner participation in enforcement of the Mine Act. We therefore conclude that coercive interrogation *and harassment over the exercise of protected rights is prohibited by section 105(c)(1) of the Mine Act*.

Moses, 4 FMSHRC at 1478-79 (emphasis added). In that same decision, the Commission stated:

> Under section 103(g)(1) of the Act, Moses had the right to request an inspection and to do so anonymously. The persistence with which the subject of his supposed reporting of the bulldozer accident was raised and the accusatory manner in which it was done could logically result in a fear of reprisal and a reluctance to exercise the right in the future. These conversations thus constituted prohibited interference under section 105(c)(1).

Id. at 1479.

Shortly after *Moses*, the Commission added that, "[i]n general, an adverse action is an act of commission or omission by the operator subjecting the affected miner to discipline or a detriment in his employment relationship." *Sec'y of Labor on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842, 1847-48 (Aug. 1984); *see also id.* at 1848 n.2 ("This case does not require us to develop a more detailed inventory of what is covered by the term adverse action. We recognize that discrimination may manifest itself in subtle or indirect forms of adverse action.").

Quoting *Moses*, the Commission has stated that "[w]hether an operator's question or comments concerning a miner's exercise of a protected right constitute coercive interrogation or harassment proscribed by the Mine Act 'must be determined by what is said and done, and by the circumstances surrounding the words and actions.'" *Sec'y of Labor on behalf of Gray v. N. Star Mining, Inc.*, 27 FMSHRC 1, 8 (Jan. 2005) (quoting *Moses*, 4 FMSHRC at 1479 n.8).

Based on the foregoing, the Court believes that harassment resulting from engaging in protected activity is cognizable under the Mine Act. The essence of the problem regarding Miller's section 105(c)(3) claim is that the protected activity that spawned his first complaint was raised during the hearing on his second complaint but the harassment attendant to that was not. The matters were not consolidated and, as a practical matter they could not be, given that the Secretary opted not to proceed with Miller's first complaint but did take up the second complaint.

Miller's Response to Savage's Motion for Summary Decision

Pursuant to the Court's conference call with the parties discussing Savage's Motion for Summary Decision, the Court directed Mr. Miller to file a response to that motion. The response was minimal, as would be expected from a non-attorney complainant.[4] The Court acknowledges

[4] The full text of Mr. Miller's response provided:

> As I am representing myself and I am not an attorney, consistent with the conference call, the Court does not expect me to supply a memorandum of points and authorities specifying why Savage is not entitled to summary decision. Although after the conference call on Wednesday I realized that I had commented on the wrong timeline of events. Now fully understanding the precise time frame of when the complaint was filed and to the fact of what the delay was.
>
> **Claim #1**
> It took me some time to see and recognize that there was a pattern being established as a result of my frequent Safety complaints. I felt that I was being singled out. On Record as Brian Hancock testified on pg. 354 lines 11- 22, states that I made 75 percent more complaints to the other drivers 25 percent.
>
> **Claim #4**
> I experienced sleeplessness, anxiety, weight gain, while trying to perform job duties. I did not understand, but now I see that there are no new facts to be presented to the court.

that Mr. Miller's response was minimal, but concludes that, in context, summary decision would not be appropriate.[5]

Conclusion

For the foregoing reasons, the Court DENIES Respondent's Motion for Summary Decision. It is not as if Complainant Miller's allegations about harassment have been characterized by Savage as being made out of whole cloth. Savage, while not conceding each aspect of Miller's harassment contention, spoke to his claim at several points in its Motion. As it noted in that submission:

> At a deposition taken in the termination-related case, No. WEST 2014-404-DM, Mr. Miller described "the crux of the discrimination" that took place in January 2013 as follows: "My supervisor – I felt my supervisor personally attacked me, asking – demanding if I was homosexual, if I batted for the other team, and so forth." Exhibit C, at 75:17-22; *see also* Exhibit D (written statement by Mr. Miller dated March 4, 2013, submitted as an internal company complaint to the acting manager of the Morenci operation complaining about Mr. Krass harassing him about his sexuality).

Savage Motion for Summary Decision at 3. Later, it quoted the following from Miller's deposition by Savage about the matter:

> MILLER: I believe discrimination.
> Q: Okay. Who?
> MILLER: Isaiah Krass.
> Q: Okay. When did that discrimination that you've complained about occur?
> MILLER: On the 30th of January.
> Q: Okay. And what was the – the crux of the discrimination, as you perceive it?

E-mail from Sean Miller, Complainant, to Daniel Wolff and Michael Small (Apr. 14, 2015, 11:45 EDT). With reference to Mr. Miller's last remark, that there are no new facts to be presented, this remark is disregarded. During the course of conference calls with the parties for this docket, which were recorded, Mr. Miller misunderstood other aspects of his complaint, but when the Court took the time to explain matters, he would then change his intention about continuing this litigation. In fact Mr. Miller's same email response here contradicts his remark that he has no new facts, as he states experiencing "sleeplessness, anxiety, weight gain, while trying to perform job duties," all of which would constitute *new facts*. This Order attempts to explain the facts about which Mr. Miller will testify in support of his claim of the harassment he experienced in connection with his safety complaint and with the ill-effects, if any, that he subsequently experienced both personally and in connection with interactions with fellow miners.

[5] The issue of a motion for a directed verdict at the conclusion of Mr. Miller's evidence is matter to be resolved at a later time.

> MILLER: My supervisor – I felt my supervisor personally attacked me, asking – demanding if I was homosexual, if I batted for the other team, and so forth. . . . Exhibit C at 75:4-22; 78:4-16[.]

Savage Motion at 9-10.

Indeed, because of a written complaint to management that Mr. Miller submitted on or around March 4, 2013 (Exhibit D), Mr. Krass was issued a counseling statement of his own by the then acting Operations Manager, Richard Bjerke, instructing him not to repeat his behavior and warning him that if he acted in that manner again, it would be grounds for termination. *See* Exhibit I; Savage Motion at 10. Krass was issued a counseling statement on March 5, 2013, in connection with his improper conversations between him (as a supervisor) and an employee (Miller). Ex. C-7 at 3-4, *Miller I*.[6] Savage then concedes, "It is easy enough to understand how questioning a co-worker about his sexuality, regardless of motive, could create an uncomfortable work atmosphere, and for that reason it is easy to see why, from a company's human resources perspective, such conduct should be discouraged, which is exactly why Savage Services issued Mr. Krass a counseling statement." Savage Motion at 12 n.7.

Beyond these remarks, tantamount to admissions, there is also Miller's handwritten statement, dated March 4, 2013, about the incident. Ex. C-9 at 12-13, *Miller I*. The Court, by this Order, makes that admitted exhibit part of this case.

As the Court observed on May 1, 2015, in response to an email from Savage's Counsel:

> [It] would note that when Mr. Miller filed his first discrimination complaint, the special investigator recommended that the case go forward and this came about without Mr. Miller having been demoted or fired or some other thing along those lines. The Commission too, in several cases, has recognized that harassment, by itself, can be the basis for [] discrimination. Apart from the Commission's remarks about this, [the Court] acknowledge[s] that damages, though ascertainable, would be in uncharted waters because decisions so far have involved harassment plus some other action taken against an employee.
>
> <u>The hearing would be for Mr. Miller to have the opportunity to testify in detail about the circumstances surrounding and the nature of the harassment he alleges to have experienced and how that harmed him, financially and/or emotionally, if that is the case, and would also include, if alleged and so testified to under oath by Mr. Miller, any factor of intimidation making him reluctant to assert future safety or health concerns.</u> Savage Services would then have the opportunity to rebut those claims, but bearing in mind that certain statements (effectively admissions) by Savage, could be construed as harassment towards Mr. Miller and, depending on Mr. Miller's testimony, which harassment was linked with his safety complaint(s).

[6] In Savage's Post-Hearing Brief, in connection with Miller's complaint about bad brakes on a truck, it notes that Krass was disciplined for his statements to Miller despite disagreeing with the allegations. Savage Br. 32, *Miller I.*

> That said, as in any case, whether the Secretary is involved or, as in this case, not involved, there is nothing to prevent the parties from discussing between themselves a modest but fair settlement figure pertaining *only* to WEST 2014-7. For emphasis, [the Court] want[s] to remind the parties that any such settlement would be totally separate and apart from the damages associated with WEST 2014-404. The cases are separate and distinct. What happens in one does not impact the other. Note that if the matter does go to hearing and [the Court] find[s] that discrimination occurred, the Secretary would then be obligated to seek a civil penalty for such violation of section 105(c)(3).

Email from the Court to the parties (May 1, 2015, 12:59 EDT) (emphasis added).

Accordingly, at the hearing, Mr. Miller will have the opportunity to testify in detail both as to the nature of his safety complaint and the harassment which he has asserted was leveled at him by Savage's Mr. Krass. Further, Mr. Miller will have a full opportunity to express if that odious alleged harassment, directed at him by Krass, impacted and harmed him. Of course Savage will have the opportunity to establish, if it can, that the harassment had no impact upon Miller and otherwise to defend against the claim, with a goal, one would presume, of diminishing the claim that Miller was harmed by that harassment.

William B. Moran

William B. Moran
Administrative Law Judge

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