

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 22, 2015

DANIEL B. LOWE,
Complainant,

v.

VERIS GOLD USA, INC.,
Respondent.

DISCRIMINATION PROCEEDING

Docket No. WEST 2014-614-DM
WE-MD 14-04

Mine: Jerritt Canyon Mill
Mine ID: 26-01621

**AMENDED¹ ORDER ON RESPONDENT’S MOTION TO DISMISS
COMPLAINANT’S FIRST AMENDED COMPLAINT**

Before: Judge Moran

Before the Court is Respondent Veris Gold’s Motion to Dismiss First Amended Complaint. (“Motion”). The Motion contends that the First Amended Complaint “seeks to add a litany of new allegations.” Complainant filed an Answer to the Motion. Complainant’s original discrimination complaint, dated November 22, 2013, names seven (7) individuals,² together with their respective job titles, as responsible for the alleged discriminatory action. A narrative accompanied that complaint. That narrative speaks in broad terms, with Mr. Lowe alleging that he was “continuously discriminated in matters of safety and health as well as in matters of regulatory compliance [and that these] came in the form of constant threats of reprisal by members of senior management and/or corporate officers.” Complaint of Nov. 22, 2013, at 2.

At the outset of this Order it is important to note that even if the Amended Complaint were to be rejected in whole, the original complaint remains intact and unaffected. Put differently, this Order only determines if *additional* claims may be added to the original complaint. For the reasons discussed below, the Court partially grants and partially denies Respondent’s motion.

¹ This amended order is being issued to correct the caption of the original order, which incorrectly listed the Secretary of Labor as the Petitioner in this matter rather than Mr. Lowe as the Complainant.

² The names listed in Mr. Lowe’s discrimination complaint are: Kiedock Kim, Mill Manager; Chris Jones, Assistant Mill Manager; Graham Dickson, Chief Operating Officer; William Hofer, General Manager; Francois Marlan, President/CEO/Director; Barry Goodfield, Director; and Dwayne Ward, Human Resources Manager.

Citing *Hatfield v. Colquest Energy, Inc.*, 13 FMSHRC 544 (Apr. 1991), Respondent contends that Lowe's First Amended Complaint "constitute[s] a theory of the case that MSHA had not previously investigated." Motion at 4. In *Hatfield*, the Commission noted that the complaint filed by the *pro se* miner was

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.*"

Hatfield, 13 FMSHRC at 546 (emphasis added). The Commission went on to state that the "complainant should be afforded an opportunity to demonstrate that the protected activities alleged in the amended complaint were part of the matter that was investigated by the Secretary in connection with [the *pro se* complainant's] initial discrimination complaint to MSHA." *Id.* *Hatfield* remains the operative precedent.

Veris lists five allegations made by Lowe which it contends were not previously investigated by MSHA. These will be discussed in turn.

"A. Allegations that in March 2013, Randy Reichert, a corporate official whose employment was terminated by Veris on May 7, 2013, had a dispute with Lowe arising from another dispute between two industrial hygienists over sampling methods and mercury exposure calculation methods." Motion at 3. These allegations appear in numbered paragraph 8 in Lowe's First Amended Complaint. Lowe asserts that Reichert's behavior in relation to this matter amounted to acts of discrimination related to safety and health.

Lowe asserts that there was no dispute between the hygienists and that it was merely a miscommunication,³ but, more importantly, Lowe asserts that Mr. Randy Reichert wanted him to fire hygienist Garcia because of the miscommunication, but that he refused to fire the hygienist without first conducting a proper investigation into the matter. Answer at 2. Complainant's Answer then goes into matters before a court in British Columbia involving Reichert's termination from Veris Gold. Answer at 2-3.

The fundamental problem with Lowe's Answer is that it does not address the central question for the Court, namely whether the Secretary's determination was based upon an investigation which included consideration of the matter raised in paragraph 8. As Lowe makes no reference to this issue in his Answer, the Court must conclude that Complainant has failed to meet the statutory prerequisite to demonstrate that the protected activities alleged in the amended complaint were part of the matter that was investigated by the Secretary in connection with his

³ Mr. Lowe's Answer is lengthy but not useful to applying the test for evaluating amended complaints, per *Hatfield*.

initial discrimination complaint to MSHA. Therefore the Court sustains Veris' motion regarding this amendment and dismisses item A.

"B. Allegations that Randy Reichert "went on a bizarre tirade" in May 2013 while Lowe was attempting to explain to him the particulars of an MSHA inspection." Motion at 3. These allegations appear in numbered paragraph 9 in the First Amended Complaint. "Lowe believes that Mr. Reichert was terminated by Veris for violent outbursts at trade shows and other 'incidents of inexplicable rage' . . . [and] that the "tirade" by Mr. Reichert amounted to discrimination in relation to safety and health." *Id.* The only connection with the original complaint, is a remark that complainant reported the incident to Bill Hofer, the mine's general manager.

On its face, this allegation was not raised before MSHA in Complainant's November 2013 complaint. Further, Complainant makes no response to Veris' observation that Reichert's name does not appear anywhere in the complaint. Although this is dispositive of item B, for the same reason given for item A, it is also noted that Veris, by Complainant's admission, terminated Reichert's employment shortly thereafter and that no adverse action was experienced by Lowe. In fact, Lowe, who threatened to quit after the Reichert incident was "talked into staying" as a Veris employee. Accordingly, because Lowe failed to meet the *Hatfield* test for item B, it is also dismissed from the First Amended Complaint.

C. This item involves allegations that, in late July, 2013, Veris general manager Joe Driscoll informed Complainant that his job title was going to be changed and that he would no longer be the designated company representative during MSHA inspections. These allegations appear in numbered paragraphs 10-12 in the First Amended Complaint. Complainant believes this was the onset of the decision to abolish the mine's safety department. It includes allegations that there was an arrangement between an MSHA supervisor and Mr. Driscoll that if MSHA would "back off" at the mine, Lowe would be removed from contact with MSHA. Complainant then relates that he was thereafter demoted by Driscoll to the position of "Compliance Coordinator." As Veris capsulizes this contention, "Lowe speculates that this may have borne a relationship to some type of covert arrangement between Driscoll and an MSHA inspector to remove Lowe from his position in order to obtain less stringent treatment by the agency. Lowe asserts that was an act of discrimination." Motion at 3.

The problem with Lowe's Answer for Item C is the same as for Items A and B. That Answer largely repeats the allegations made in the First Amended Complaint but it does not anywhere inform that those allegations were among those presented to MSHA when the original complaint was filed on November 22, 2013, and therefore it fails to satisfy the test in *Hatfield*. Mr. Driscoll's name does not appear among the seven listed individuals in the original complaint filed with MSHA. Nor is this obstacle solved by Complainant's additional remark in his Answer that

in his appeal letter to the Commission one Page #1, Paragraph #2, "For approximately six months leading up to my dismissal Veris Gold USA Inc. senior management interfered with my responsibilities and position as the Mine Safety and Regulatory Compliance Manager in matters of safety, health and regulatory

compliance to include dismantling the Safety Department effectively demoting me and my position.[”] The Complainant believes in fact these actions constitute discrimination under section 105 of the Mining Act.

Answer at 7.

Absent the Complainant producing dated documentation that he made these allegations to MSHA during the course of its investigation and well prior to MSHA’s April 4, 2014, letter to Lowe, declining to file a discrimination complaint on his behalf, this allegation cannot be considered as part of the Complaint. Again, in circumstances where the Secretary’s determination is 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) are not met and such additional claims cannot be heard.

D. Lowe alleges that his termination on November 21, 2013, may have been in relation to “the two safety and health complaints” he made by email to Chief Operating Officer, Graham Dickson on November 19, 2013, and that it was on November 21, 2013, that Dwayne Ward informed the Complainant of his termination. Lowe asserts that no reason was given for the “official termination.” The Complainant believes this was an act of discrimination. This allegation appears in numbered paragraph 14 in the First Amended Complaint. The problem with Veris’ Motion to Dismiss for this item is that it elides the substance of this allegation. In his very broad complaint before MSHA, Lowe did name both Mr. Dickson and Mr. Ward among the persons responsible for the discriminatory action. Therefore, the investigation may be presumed to include all acts associated with that claim. In contrast to Veris’ defense to Items A through C, it makes no claim in its Motion to Dismiss that those individuals were not referenced in the Complaint before MSHA. Accordingly, this part of the First Amended Complaint is allowed. Thus, dismissal is not warranted for this claim. Especially considering the substance of this allegation, Veris can hardly maintain that its inclusion would result in unfair prejudice to it.

E. The last item in Lowe’s First Amended Complaint appears in numbered paragraph 8. There, Lowe seeks “an order assessing a \$20,000.00 civil penalty against the Respondent for the violations of Section 105 (c) of the Act [and] [f]or an order compelling the Secretary of Labor to investigate and to institute either civil or criminal proceedings or both against the Respondent for violations of §108 (b) and §110 of the mining Act of 1977.”

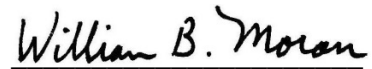
Veris does not address this item and for good reason. Neither of these demands are within the Court’s jurisdiction. If Lowe prevails on his section 105(c)(3) claim, only then will the Secretary be obligated to seek a civil penalty, but this is clearly premature at this point. Further, the Court does not have the authority to direct the Secretary to institute proceedings against the Respondent for violations of §108 (b) and §110 of the mining Act of 1977. Accordingly, this item from the Amended Complaint is dismissed.⁴

⁴ The Court has considered Veris’ claims that the items in the First Amended Complaint are procedurally defective as they are outside of the 60 day time period. Those claims are rejected.

Conclusion

As set forth above, other than Item D, the remaining items, A, B, C, and E, as listed in Complainant's First Amended Complaint, are DISMISSED. The original Complaint, however, stands, with Item D added to the original Complaint.

SO ORDERED.


William B. Moran
William B. Moran
Administrative Law Judge

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