

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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June 12, 2024

WESLEY MALLERY,	:	DISCRIMINATION PROCEEDING
Complainant,	:	
	:	Docket No. CENT 2024-0106
	:	MSHA Case No. DENV-CD-2023-03
v.	:	
	:	
	:	
EL SEGUNDO COAL COMPANY, LLC,	:	Mine: El Segundo Mine
Respondent	:	Mine ID: 29-02257

**ORDER OF DISMISSAL**

Before:           Judge Bulluck

This case is before me upon a Discrimination Complaint filed by Wesley Mallery, against El Segundo Coal Company (“El Segundo”), pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 (“Mine Act”). 30 U.S.C. § 815(c)(3). El Segundo contends that the case should be dismissed on two bases. For the reasons set forth below, Mallery’s Discrimination Complaint is dismissed.

**I.       Procedural Background**

On May 30, 2023, Wesley Mallery filed his Discrimination Complaint against El Segundo with the Mine Safety and Health Administration (“MSHA”). MSHA investigated Mallery’s allegations and, by letter dated August 3, 2023, notified Mallery of its determination that the evidence was insufficient to establish a violation of section 105(c). MSHA also advised Mallery of his right to file his discrimination case on his own behalf with the Commission, within 30 days of its notice. On January 19, 2024, Mallery filed his Discrimination Complaint with the Commission.

El Segundo filed its Answer to the Complaint on February 5, 2024, asserting that Mallery neither engaged in any protected activity nor suffered any adverse action. El Segundo Ans. at 11. Additionally, in its Answer, El Segundo requested that Mallery’s case be dismissed for his failure to state a claim upon which relief may be granted, and for untimely filing his Discrimination Complaint with MSHA in excess of the 60-day time limit applicable to section 105(c)(2). El Segundo Ans. at 12; *See* 30 U.S.C. § 815(c)(2).

On March 5, 2024, I issued an Order to Show Cause, directing Mallery to show good cause why his Discrimination Complaint should not be dismissed for failure to state a claim upon which relief may be granted, and failure to timely file his Complaint with MSHA and the Commission. That Order explicitly explained to Mallery that his Discrimination Complaint, including all

documents filed with it, is confusing and unclear as to whether he is alleging any cognizable claim for which he may be entitled to relief under section 105(c) of the Mine Act. Additionally, it noted that Mallery remains employed by El Segundo in a paid disability status and, according to El Segundo, he is eligible to return to work if he receives medical clearance from his treating physician. The Show Cause Order directed Mallery to submit a clear and concise statement of the alleged protected activity(ies) giving rise to the adverse action(s), including applicable dates, that may entitle him to relief under the Mine Act, in accordance with Commission Rule 42.

On March 11, 2024, Mallery filed a Response by letter dated March 8. Mallery Resp. I. In his Response, instead of providing a clear and concise statement, Mallery attached two previously filed documents, a Rebuttal to Peterson’s Position Paper and a Statement of Relief, contending that they “clearly show protected activities, [and] the adverse actions suffered as a result.” Mallery also provided explanations for untimely filing his Discrimination Complaint with MSHA and the Commission. Subsequently, on March 13, El Segundo replied, asserting that Mallery failed to provide any new information that would show good cause for his Complaint not being dismissed. El Segundo Reply I.

Recognizing that Mallery failed to provide a clear and concise statement of his cause of action, as directed by the Show Cause Order, and mindful that he is a *pro se* litigant, he was afforded a second opportunity to set forth a clear and concise statement of a cognizable claim. On March 14, 2024, I issued a Second Order to Show Cause, accepting Mallery’s explanations for untimely filing his Discrimination Complaint with MSHA and the Commission and, again, directing him to show good cause why his Discrimination Complaint should not be dismissed for failure to state a claim upon which relief may be granted.

On March 22, 2024, Mallery responded to the second Show Cause Order with nearly identical wording to the narrative provided in his Discrimination Complaint, except that he added indistinct claims of a hostile work environment and assignment to undesirable tasks, and continued to maintain that his placement on short-term disability in February of 2023 constituted an adverse action. Mallery Resp. II. El Segundo filed a Reply on April 2, maintaining that Mallery has not shown any protected activity or adverse action that constitutes a cognizable discrimination claim under the Mine Act, and reiterating that Mallery’s Discrimination Complaint should be dismissed. El Segundo Reply II.

## **II. Legal Standard**

Pursuant to Commission Rule 42, a discrimination complaint “shall include a short and plain statement of the facts, setting forth the alleged discharge, discrimination or interference, and a statement of the relief requested.” 29 C.F.R. § 2700.42.

Where a discrimination complaint fails to state a claim upon which relief may be granted, the Commission looks to dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure. *Ribble v. T&M Dev. Co.*, 22 FMSHRC 593, 594 (May 2000). Under this standard, the complainant must plead sufficient facts that, if accepted as true, allow a reasonable inference to be drawn that the respondent could be found liable for the misconduct alleged. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the complainant cannot prove any set of facts in support of his claim. *Perry v. Phelps Dodge Morenci, Inc.*, 18 FMSHRC 1918, 1920 (Nov. 1996), citing *Conley v. Gibson*, 355 U.S. 41,

45-46 (1957). The Commission has generally viewed motions to dismiss for failure to state a claim with disfavor, and rarely grants such motions. *Ribble*, 22 FMSHRC at 594-95; *Perry*, 18 FMSHRC at 1920. Additionally, the Commission holds the pleadings of *pro se* litigants to less stringent standards. *See Perry*, 18 FMSHRC at 1920, citing *Marin v. Asarco, Inc.*, 14 FMSHRC 1269, 1273 (Aug. 1992). In such *pro se* cases, judges should ensure that they are informed of all the available facts relevant to a decision, including the complainant's version of those facts, before dismissing a case. *Id.*

A cognizable claim of discrimination under section 105(c) requires that the complainant engaged in protected activity, and that he suffered an adverse action that was, at least, partially motivated by the protected activity. *Sec'y of Labor on behalf of Smitherman, v. Warrior Met Coal Mining, LLC*, 45 FMSHRC 446, 451 (June 2023); *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (Apr. 1981). Protected activities under the Mine Act include instances in which a miner "filed or made a complaint . . . notifying the operator or the operator's agent . . . of an alleged danger or safety or health violation in a coal . . . mine." *See* 30 U.S.C. § 815(c)(1). 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." *Pappas v. Calportland Co.*, 40 FMSHRC 664, 678 fn. 5 (May 2018) (emphasis added), citing *Sec'y of Labor on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842, 1847-48 (Aug. 1984). When the alleged discriminatory act is not a self-evident form of adverse action, like discharge or suspension, the surrounding circumstances must be carefully examined to determine the nature of the action. *Sec'y of Labor on behalf of Pendley v. Highland Mining Co.*, 34 FMSHRC 1919, 1930 (Aug. 2012). The Commission applies the test, articulated by the Supreme Court, that a discriminatory adverse action must be "materially adverse to a reasonable employee," in that "the employer's actions must be harmful to the point that they could well dissuade a reasonable worker" from engaging in protected activity. *Pendley*, 34 FMSHRC at 1931, citing *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 57 (2006). An adverse action is not simply any employer action that a miner does not like. *Sec'y of Labor on behalf of Price & Vacha v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1533 (Aug. 1990).

### III. Discussion

The issue before me is whether Mallery has stated a cognizable discrimination claim under the Mine Act, by alleging that his safety complaint(s) resulted in an employer-generated adverse action that was materially detrimental to his employment.

While Mallery has failed to provide a clear and concise statement of his cause of action, I can infer, from a thorough review of his Complaint, that there are, at least, two recent incidents of protected activity that serve as bases for his claim. Mallery alleges that, on January 5, 2023, he raised safety concerns to his supervisors about the failure of blast crews to follow standard operating procedures. Also, on January 12, he addressed the same safety concerns to mine manager, Seth Puls, and human resources representatives, Joanna Sparks and Kisha Jackson. Therefore, without need for further inquiry into the first prong of Mallery's claim, I credit Mallery with sufficiently setting forth facts that constitute the protected activity element of a cognizable discrimination complaint.

Mallery's Complaint fails to state a cognizable claim, however, because it is not based on any employer misconduct. The gravamen of his discrimination claim is that he was placed on short-term disability for his mental health condition. By both parties' accounts, on January 12, 2023, Mallery

met with mine manager Puls and human resources representatives Sparks and Jackson to discuss his concerns about safety and pay issues, during which time the conversation turned to Mallery's family situation and former military status. Mallery Resp. I, Rebut. at 9; El Segundo Reply II at 9. According to El Segundo, based on Mallery's emotionally distraught demeanor, Puls placed him on fully-paid administrative leave, pending a voluntary fit for work evaluation. El Segundo Reply II at 9. Subsequently, on February 3, a board-certified neuropsychologist assessed Mallery as not medically fit to perform his duties, and recommended that he be off work for at least three months in order to obtain treatment. Mallery Resp. I, Rebut. at 9. Mallery then voluntarily applied for short-term disability benefits pursuant to the company's disability plan, and a favorable determination was made by a third-party insurer. Under the short-term disability benefit plan, Mallery continued to receive 100% of his regular pay until April 10, when he had exhausted his leave for the year, after which he began receiving 60% of his regular pay. El Segundo Reply II at 10. Mallery also applied for an extension, and was granted long-term disability. El Segundo Ans. at 11. According to El Segundo, Mallery is eligible to return to work when he receives medical clearance from his treating physician. El Segundo Ans. at 11. While he has not suffered any break in employment, and remains in a pay status to date, Mallery has expressed that he does not desire to return to work. Mallery Resp. I, Stmt. of Relief at 1.

Being placed on short-term disability, where Mallery receives pay and benefits pursuant to the company's plan, does not constitute an employer-generated adverse action. Short-term disability is an income replacement benefit that provides a percentage of pre-disability earnings when employees are unable to work for health-related issues. El Segundo's plan is designed to compensate miners when they are unable to work for health reasons and, therefore, cannot reasonably be construed as detrimental to their terms and conditions of employment. Furthermore, Mallery voluntarily applied for the benefit and acknowledges that he has legitimate medical issues, and the determination was made by third-party medical and insurance providers. Mallery Resp. I, Rebut. at 9; El Segundo Reply II at 10-11. Short-term disability is simply not materially adverse to a reasonable employee who is temporarily unfit for duty, and the record is devoid of any indication that Mallery was coerced into applying for the contractual benefit.

Mallery's Discrimination Complaint also contains a lengthy description of workplace disputes dating back as far as 2019, some of which, in his second Response, he designated as "adverse actions." Mallery Resp. II at 1-2. Among these disputes, ranging from October 2019 to January 2023, are contentions respecting work hours and pay, not being sent to blast school, transfer to a less desirable position, not receiving the employee handbook, and a hostile work environment. These allegations far exceed the time limit applicable to initiating a complaint with MSHA, and are too remote for consideration as bases for his Discrimination Complaint of May 2023. Moreover, without more, some of these allegations appear to be employment disputes that do not fall within the purview of the Mine Act. As the Commission has noted, it is not a "super grievance board to judge . . . an operator's employment policies except insofar as those policies may conflict with rights granted under section 105(c) of the Mine Act." *Delesio v. Mathies Moal Co.*, 12 FMSHRC 2535, 2544 (Dec. 1990).

Mindful that Mallery is *pro se*, he has been afforded two opportunities after filing his Complaint to state a claim upon which relief may be granted, by setting forth a cognizable adverse action and the protected activity that motivated it. Instead, Mallery reiterated the statements that he had previously made in his Discrimination Complaint, which are the very statements that require clarity and, as constituted, do not construct a cognizable claim.

**WHEREFORE**, for failure to state a claim upon which relief may be granted under section 105(c) of the Mine Act, it is **ORDERED** that Wesley Mallery's Discrimination Complaint is, hereby, **DISMISSED, WITH PREJUDICE**.



Jacqueline R. Bulluck  
Administrative Law Judge

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