

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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July 1, 2016

BRIAN JACKSON,
Complainant,

v.

ALAN RITCHEY MATERIALS CO., LC,
Respondent.

DISCRIMINATION PROCEEDING

Docket No. CENT 2016-0178-DM
SC-MD-16-02

Mine: Pope's Point
Mine ID: 34-01930

ORDER ON MOTION

Before the Court in this Section 105(c)(3) discrimination action is Respondent Alan Ritchey Materials Co., LC's ("Alan Ritchey") Motion to Strike Complainant's First Amended Complaint. For the reasons which follow, because the Court finds that the First Amended Complaint is superfluous, the Motion is **GRANTED**. However, the Complainant's original complaint before the Mine Safety and Health Administration ("MSHA") remains intact and this proceeding, along with the Court's observations and comments about the nature and limits of Mine Act discrimination proceedings, as set forth below, moves forward towards its October 12, 2016, hearing date.

Complainant Brian Jackson filed a discrimination complaint with MSHA on November 24, 2015. According to his handwritten complaint, Jackson stated, in essence, that on November 17, 2015 he showed up for work and was then advised that he would be assigned to work on a boat that evening. Concerned about the assignment, Jackson then went to the plant manager's office "to explain [that he did] not feel safe on the river at night time due to [the] sinking [of] a boat on July 28, 2015." Jackson was on that boat. He was told that, despite his concerns, he had to perform the work on the dredge. Jackson then expressed the same issue to his supervisor, Daniel Baker, and advised Baker that he would return to work the next day. When Jackson arrived at work the following day, he was informed that he no longer had a job with Alan Ritchey. Jackson's complaint stated that he believed his discharge was "due to [his] feeling unsafe and discrimination against [him] being a registered Choctaw Nation Tribal Member." MSHA's discrimination report acknowledges that "Mr. Jackson [asserts that he] was terminated after he told his supervisor that it was unsafe to work in a small boat on the river in the dark to repair a cable near the dredge (sic) [i.e. "dredge"]. Mr. Jackson refused to do this particular job

again because two weeks prior the boat he was in sank (sic) to where (sic) the fire department had to be called in to rescue him.”¹

Thereafter, on January 5, 2016, MSHA sent a letter to Jackson advising that, pursuant to its investigation, it did not believe there was sufficient information to establish by a preponderance of the evidence that a violation of Section 105(c) occurred.

Complainant Jackson filed an appeal of MSHA’s determination on January 21, 2016. Critically, he did state “I request an appeal of MSHA’s determination dated January 5, 2016.” That statement constitutes a sufficient basis to preserve the Complainant’s appeal under Section 105(c)(3). On February 1, 2016, Ronald R. Huff, Esq. advised, by letter to the Federal Mine Safety and Health Review Commission (“Commission”) that he was representing the complainant. On May 19, 2016, the case was assigned to this Court.

Subsequently, Attorney Huff filed, on June 10, 2016, Complainant’s “First Amended Complaint.” That Amended Complaint alleges the grounds for Jackson’s safety concerns involving working on a boat, asserts that he refused to work under such unsafe conditions, and that he was then discharged from his employment with the Respondent. First Amended Complaint, ¶ 5-11. However, the Amended Complaint then adds that “[d]uring the course of his employment, Complainant, a member of the Choctaw Nation, was subjected to discrimination, harassment, and derogatory comments from supervisors and fellow employees based on his ethnicity.”² *Id.* at ¶ 12. It continues, stating that “Complainant was also subjected to sexual harassment by his supervisor, Daniel Baker, who threw feminine hygiene products at him and telling him, ‘this is for your bleeding p***y.’” *Id.* at ¶ 13. The Amended Complaint then returns to Jackson’s original discrimination complaint, filed with MSHA, noting that it “alleg[ed] he was discharged because he refused to work under unsafe conditions.” *Id.* at ¶ 14. Further, the Amended Complaint notes that Jackson alleges he “was discharged in violation of Section 105(c) of the [Mine Act] . . . for refusing to work under unsafe or unhealthy conditions.” *Id.* at ¶ 18.

¹ This recounting should not be viewed as findings of fact. Rather, it is a recounting of the Complainant’s version of the events which led to his discharge from Respondent’s employment and MSHA’s remark in that report about the allegations.

² Jackson’s appeal of the MSHA determination made the same claims, stating:

During the course of my employment, I, a member of the Choctaw Nation, was subjected to discrimination, harassment, and derogatory comments from supervisors and fellow employees based on my ethnicity. These include being called a ‘f**king Injun’ and ‘damn Indian.’ I was also told to ‘get [my] brown a** over here.’ I was also subjected to sexual harassment by my supervisor, Daniel Baker, who threw feminine hygiene products at me and telling me ‘this is for your bleeding p***y.’ This was witnessed by Joshua Hall. I seek reinstatement to my position as Ground Hand and lost earnings.

On June 15, 2016 Respondent filed its Motion to Strike Complainant's First Amended Complaint ("Respondent's Motion").³ Respondent asserts that there were procedural flaws in Complainant's Amended Complaint and that "Complainant [] substantially changed the allegations and the claims for relief" in that filing from his original complaint. Respondent's Motion, at 3.

Discussion

Both sides displayed some misunderstanding about discrimination claims under the Mine Act. Therefore, the basic elements for such claims are briefly reviewed. A complainant alleging discrimination under the Mine Act establishes a prima facie case of prohibited discrimination by presenting evidence sufficient to support a conclusion that the individual engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *See Turner v. Nat'l Cement Co. of California*, 33 FMSHRC 1059, 1064-67 (May 2011); *Sec'y o/b/o Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds* 663 F.2d 1211 (3d Cir. 1981); *Sec'y o/b/o Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. *See Robinette*, 3 FMSHRC at 818 n.20. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *See id.* at 817-18; *Pasula*, 2 FMSHRC at 2799-800; *see also E. Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642-43 (4th Cir. 1987) (applying *Pasula-Robinette test*).

Of particular importance to this case, the Court calls attention to the fact that protected activity does not encompass all types of discrimination. Protected activity includes filing or making complaints under or related to the Act or exercising any other statutory right afforded by the Act. 30 U.S.C. § 815(c)(2). The Act states that protected activity includes when a 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." 30 U.S.C. § 105(c)(1).

"Under the Act, protected activity includes filing or making a complaint of an alleged danger, or safety or health violation, instituting any proceeding under the Act, testifying in any such proceeding, or exercising any statutory right afforded by the Act." *Sec'y. o/b/o Piper v. Ken American Res.*, 35 FMSHRC 1680, 1680 n.1 (June 2013) (ALJ Andrews) (citing *Pasula*, 2 FMSHRC at 2799).

³ Also considered by the Court were Complainant's Motion for Leave to file its First Amended Complaint, its response to Respondent's Motion to Strike its amended complaint, and Respondent's Reply to Complainant's Response to Respondent's Plea to the Jurisdiction and Motion to Dismiss.

“The purpose of the protection is to encourage miners ‘to play an active part in the enforcement of the [Mine Act]’ recognizing that, ‘if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation.’” *Sec’y. o/b/o Rodriguez v. C.R. Meyer & Sons*, 35 FMSHRC 981, 982 (Apr. 2013) (ALJ Steele) (quoting S. Rep. No. 181, 95th Cong., 1st Sess. 35 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 623 (1978)).

“[W]hile the Act does not expressly state that miners have the right to refuse work under conditions involving health or safety dangers, ‘the Commission and the courts have recognized the right to refuse to work in the face of such perceived danger.’” *Lujan v. Signal Peak Energy*, 37 FMSHRC 1362, 1364 (June 2015) (ALJ Barbour) (quoting *Dykhoff v U.S. Borax, Inc.*, 22 FMSHRC 1194, 1198 (Oct. 2000)).

Accordingly, Mine Act discrimination claims may not entertain other types of discrimination, such as those based on sex, religion, age, or national origin. There is a further important limitation where a Section 105(c)(3) claim is involved; it is confined to the grounds of cognizable claims which were raised before MSHA and its investigation of such claims. Thus, the complaint, and MSHA’s investigation of the allegations in it, establishes the extent of the court’s jurisdiction. *Hatfield v. Colquest Energy*, 13 FMSHRC 544 (April 1991)⁴; *Pontiki Coal Co.*, 19 FMSHRC 1009, 1017 (June 1997).

Thus, there are two limiting factors: (1) only those non-extraneous, cognizable, grounds claimed by the miner when the complaint of discrimination is made to MSHA may be raised when appealing a determination by MSHA that it believed there was insufficient information to establish by a preponderance of the evidence that a violation of Section 105(c) occurred; and (2), the corollary factor that, upon such an appeal of MSHA’s determination, one may not attempt to broaden the original basis for the complaint. The latter limitation exists because MSHA’s investigation is based upon the grounds alleged in the discrimination complaint.

In this instance, Complainant Jackson did allege a cognizable basis for discrimination under the Mine Act by expressing his safety concerns relating to working on the river at night time due to the recent sinking of a boat on July 28, 2015. The other expressed grounds in his complaint, to wit, his allegation of discrimination based on his ethnicity as a registered Choctaw Nation Tribal Member, as it is not a cognizable protected activity, will not be considered by the Court.

⁴ In *Hatfield*, the operator argued that the complainant’s amended filing pursuant to Section 105(c)(3) differed too substantially from his complaint filed with the Secretary. The Commission agreed that the proceeding under Section 105(c)(3) must be based on the matter initially investigated by the Secretary under section 105(c)(2) or else “the statutory prerequisites for a complaint pursuant to § 105(c)(3) have not been met.” *Hatfield*, 13 FMSHRC at 546.

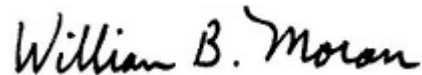
Accordingly, the complaint filed by Jackson before MSHA continues to be his complaint before this Court. Although the Court has noted that some of the grounds in that complaint are not cognizable, other aspects do not have such an infirmity. As the Commission has observed:

Although section 105(c)(3) refers to an ‘action’ before the Commission, the person who files this action is referred to in that section as the “complainant.” 30 U.S.C. § 815(c)(3) (emphasis added). . . . The reference to ‘complainant’ is an acknowledgment that the proceeding under section 105(c)(3) involves the same alleged discriminatory conduct that prompted the miner's complaint to the Secretary under section 105(c)(2). The statute does not direct the miner to file a complaint under section 105(c)(3) because the miner has already filed a complaint. That is why the miner is referred to in section 105(c)(3) as the ‘complainant.’

Sec’y. o/b/o Gray v. North Fork Coal, 33 FMSHRC 27, 37 (Jan. 2011).

The parties are directed to continue preparation for the scheduled hearing in a manner consistent with the directions set forth in this Order.

So Ordered.



William B. Moran
Administrative Law Judge

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