FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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April 4, 2000

SECRETARY OF LABOR	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2000-96-D
ON BEHALF OF ROYAL SARGENT,	:	DENV CD 99-03
Complainant	:	
v.	:	
	:	
THE COTEAU PROPERTIES CO.,	:	Freedom Mine
Respondent	:	Mine ID 32-00595

ORDER DENYING MOTION TO DISMISS
PREHEARING ORDER

This case is before me on an amended complaint filed by the Secretary of Labor on behalf of Royal Sargent, alleging that Respondent, The Coteau Properties Co, had discriminated against him in violation of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977 (the "Act"), 30 U.S.C. § 815(c)(1). Sargent alleged that, on August 3, 1998, he had been suspended for five days because he brought safety issues to Respondent's attention. He also claims that
on August 10, 1998, he was subjected to an involuntary job transfer and restrictions on job availability, and was placed on probationary status. Sargent filed his initial written complaint of discrimination with the Mine Safety and Health Administration ("MSHA") on November 20, 1998, 49 days beyond the statutorily prescribed 60 day period.[1] On December 21, 1999, a complaint alleging discrimination was filed with the Commission.

Respondent filed an Answer and a motion to dismiss the complaint asserting that Sargent did not timely file his complaint with the Secretary.[2] The Secretary opposed the motion , claiming that there were justifiable circumstances to excuse the late filing. On February 28, 2000, the undersigned Administrative Law Judge found that Complainant had failed to submit evidence that could establish justifiable circumstances for the late filing and issued an Order to Show Cause Why the Complaint Should Not be Dismissed. Complainant filed a response to the Order, submitting affidavits from himself, his brother and an MSHA official. Respondent

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[1] 30 U.S.C. § 815(c)(2).

[2] Respondent also argued that the Secretary lacked authority to reopen her investigation and file the eventual complaint. In response to the motion, the Secretary provided factual information that undercut the premise of that argument. By failing to address the Secretary's response, as directed in the Order to Show Cause, Respondent has abandoned this argument.

submitted a reply. For the reasons set forth below, I find that Complainant has submitted competent evidence demonstrating the existence of genuine issues with respect to facts material to whether there were justifiable circumstances for his late filing and deny Respondent's motion to dismiss.

The Motion to Dismiss

The Order to Show Cause noted that Respondent's motion to dismiss would be treated as a motion for summary decision pursuant to Commission Rule 2700.67. Section (b) of the Rule provides that the motion can be granted only if the entire record 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.

Rule 2700.67(c) further provides that: "Supporting and opposing affidavits shall be made on personal knowledge and shall show affirmatively that the affiant is competent to testify to the matters stated."

The Order to Show Cause addressed the deficiencies in Complainant's opposition to the motion, specifically, that the affidavit relied on was not based upon personal knowledge and did not show that the affiant was competent to testify to the matters stated. As a result, it was concluded that there was no reliable evidence that Complainant "misunderstood or was mislead as to his rights or obligations under the Act." Order, at p. 5.

The affidavits submitted in response to the Show Cause Order, in contrast, present direct evidence based upon personal knowledge that Complainant misunderstood his rights and obligations under the Act and was affirmatively deterred by Respondent from exercising those rights in a timely fashion. These facts, if ultimately established, would constitute justifiable circumstances for the untimely filing of his discrimination complaint with MSHA.

Respondent continues to argue that Complainant was, or at least should have been, aware of his rights and has submitted competent evidence that the rights of miners under the Act had been included as part of new miner training at the time Complainant was hired in 1985 and that notice of such rights was posted on a bulletin board in an area that Complainant frequented. However, the facts relied upon by Respondent do not conclusively establish that Complainant was fully aware of his rights under the Act. While Complainant has not directly refuted those contentions, he denies any recollection of new miner training on the topic of rights under the Act and, at least indirectly, the contents of the poster. There is no evidence that Complainant had read the poster, which had been on the bulletin board for many years. In any event, the poster does not clearly convey the concept that a discrimination complaint must be filed within 60 days of the adverse action. The poster read, in pertinent part:

> If you believe you have been punished for using your safety and health rights, you or your representative ***should*** file a complaint with MSHA. The complaint ***should be filed in writing, within 60 days.*** (Emphasis supplied)

The use of the permissive term "should" is not likely to inform an average miner that filing a complaint with MSHA within 60 days is mandatory and may be critical to his ability to pursue such a claim. There is no warning of the potentially serious consequences of failing to file a complaint within 60 days of an adverse action. The posted language also is unclear as to when the 60 day period begins to run. There is no statement identifying the beginning of the time period in the sentence that contains the "60 days" language.[3] Reference to the preceding sentence would suggest that it runs from the time the miner forms a belief that he has been punished for exercising his rights.

Complainant's denial of present recollection of training that he may have received when he was hired in 1985 is plausible. His claims that he was not aware of the 60 day filing requirement and was proceeding cautiously because of concerns about reprisals by Respondent are also plausible. His affidavit, and the other affidavits submitted in response to the Show Cause Order, establish genuine issues as to the precise extent of his knowledge and understanding, on and after August 3, 1998, of the filing requirement and the reasonableness of his actions based thereon.

Complainant further asserts in his affidavit that he was told by Respondent's area manager that he could not talk about the adverse action with anyone or he could lose his job. Respondent disputes this assertion. If Complainant's assertion is accurate, it would lend support to his statements regarding fear of retaliation and how such concerns prompted him to proceed cautiously in pursuit of his discrimination claim. It might also raise an estoppel issue with respect to Respondent's assertion of the untimely filing defense. Genuine issues exist with respect to such statements made by Respondent's agents and the reasonableness of Complainant's interpretation of them.

As noted above, the affidavits submitted by Complainant in response to the Show Cause Order present competent evidence creating genuine issues as to several facts material to the justifiable circumstances determination. Accordingly, Respondent's motion to dismiss the complaint is denied.

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[3] Compare that language with the corresponding statutory language: "Any miner * * * who believes that he has been * * * discriminated against * * * **may, within 60 days after such violation occurs**, file a complaint with the Secretary alleging such discrimination. . . . ." 30 U.S.C. § 815(c)(2) (emphasis supplied).

Prehearing Order

In accordance with section 105(c) of the Federal Mine Safety and Health Act of 1977, the "Act," 30 U.S.C. § 815(c) and 29 C.F.R. § 2700.1, *et seq*., this matter will be called for a hearing on the merits at a time and place to be designated in a subsequent notice.

In preparation for the hearing, the parties are directed to: (a) confer on the possibility of settlement and endeavor to stipulate to relevant matters not in dispute; (b) endeavor to stipulate the issues of fact and law remaining for hearing; (c) discuss exhibits, and, at the request of a party, produce exhibits for inspection and copying; (d) endeavor to stipulate to the admissibility of exhibits, and specify the grounds for any objections to any exhibit the admissibility of which is not stipulated to; and, (e) discuss the testimony expected of each witness (unless privileged). The parties are also invited to discuss proposals to expedite the submission of evidence or shorten the proceedings, e.g., the submission of witnesses' direct testimony in writing.

The parties shall notify the undersigned Administrative Law Judge of the results of their efforts on or before **May 17, 2000**. The communication may be in writing or by conference call. The notification shall include each party's: best estimate of the hearing time required to present it's case and the number of witnesses it expects to call; a hearing location preference; and, at least two agreed hearing dates, preferably within the following 30-60 days. Complainant's counsel shall assure that the notification is timely made.

Discovery requests and responses thereto, pursuant to Rule 2700.58, shall not be filed with the Commission. Deposition transcripts shall not be filed, but shall be retained and safeguarded by the party noting the deposition. Pertinent requests and responses shall be set forth verbatim in any motion to compel or for other relief regarding discovery matters.

If the matter has not been settled, each party shall file with the undersigned Administrative Law Judge on or before **May 31, 2000, a written prehearing report** setting forth: (a) a statement of the party's case, identifying each contested issue; (b) any stipulations entered into; (c) a list of witnesses expected to be called by that party and a synopsis of each witness' expected testimony (unless privileged); (d) a list of exhibits[4]; (e) a statement of the grounds of any objection to an adverse party's exhibits; and, (f) a memorandum of law on any significant or novel legal issue expected to be raised in the proceeding.

[4] Complainant's exhibits shall be prefixed with the letter "C" and Respondent's exhibits shall be prefixed with the letter "R". Exhibits shall be numbered consecutively.

Failure to comply with any part of this prehearing order may result in sanctions against the defaulting party.

Michael E. Zielinski
Administrative Law Judge

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