FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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February 28, 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 TO SHOW CAUSE
WHY THE COMPLAINT SHOULD NOT BE DISMISSED

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] MSHA investigated the complaint and initially determined that no violation of the Act had occurred. By notice dated December 30, 1998, MSHA advised Sargent of it's determination and his right to file a discrimination complaint with the Commission. Upon receipt of the letter, apparently on January 11, 1999, Sargent requested reconsideration of that determination and on February 1, 1999, the "no violation" determination was rescinded and the investigation was reopened. On December 21, 1999, a complaint alleging discrimination was filed with the Commission. The complaint was subsequently amended, first to correct the docket number and second to add a demand that a civil penalty be assessed.

[1] 30 U.S.C. § 815(c)(2).

Respondent filed an Answer and a motion to dismiss the complaint asserting that Sargent did not timely file his complaint with the Secretary and that the Secretary's recission of the "no violation" determination was without authority.[2] The Secretary opposed the motion , claiming that there were justifiable circumstances to excuse the late filing and that the Secretary had the authority to reopen the investigation. The opposition relied upon an affidavit by a senior investigator describing actions by and on behalf of Sargent leading up to the filing of the MSHA complaint and providing factual information regarding Sargent's receipt of the "no violation" letter and the re-opening of the investigation. In reply, Respondent challenged the legitimacy of the justifiable circumstances explanation and submitted an affidavit by Complainant's immediate supervisor describing how Complainant was notified of the disciplinary action. Attached to the affidavit was a copy of a memorandum given to Complainant on August 3, 1998, the subject of which was "Disciplinary Suspension and Probation." A copy of Sargent's original complaint to MSHA was also submitted.

Untimely Filing of the MSHA Complaint

Coteau's argument that Sargent's filing of a complaint with the Secretary of Labor's MSHA was untimely is based upon § 105(c)(2) of the Act, which specifies that:

> Any miner * * * who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection **may within 60 days after such violation occurs**, file a complaint with the Secretary alleging such discrimination. * * * (emphasis supplied.)

Here, the discriminatory actions are alleged to have occurred on August 3 and 10, 1998. Sargent's complaint of discrimination was filed on November 20, 1998, some 49 and 42 days, respectively, beyond the statutory period.

The Commission has held that the 60 day time limit in section 105(c)(2) of the Act is not jurisdictional and that non-compliance may be excused on the basis of justifiable circumstances. *Hollis v. Consolidation Coal Co.*, 6 FMSHRC 21 (1984), *aff'd*, 750 F.2d 1093 (D.C. Cir 1984) (table); *Herman v. IMCO Services*, 4 FMSHRC 2135 (1982).

The cases dealing with justification for delays in filing identify several factors that are typically considered, including: complainant's awareness of his rights under the Act, *Hollis, supra.; Secretary on behalf of Franco v. W.A. Morris Sand and Gravel, Inc.*, 18 FMSHRC 278 (1996)(Manning, ALJ)(delay of 107 days justified by prompt filing after complainant first became aware of rights under the Act, filing of substantially identical allegations in workmen's compensation and employment discrimination claims and absence of prejudice to respondent);

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[2] The motion will be treated as a motion for summary decision pursuant to Commission Rule 2700.67. 29 C.F.R. § 2700.67.

Secretary on behalf of Smith v. Jim Walter Resources, Inc., 21 FMSHRC 359 (1999) (Melick, ALJ)(10 month delay excused by filing within 65 days of first learning of rights under section 105(c), no claim of prejudice by respondent); *Secretary on behalf of Gay v. Ikard-Bandy Co.*, 18 FMSHRC 341 (1996)(Melick, ALJ)(3 month delay excused by filing 1 day after first learning of section 105(c) rights and no claim of prejudice); complainant's capacity or ability to initiate and pursue such a remedy, *See, Sinnott v. Jim Walter Resources, Inc.*, 6 FMSHRC 2445 (1994) (Maurer, ALJ); and, the length of the delay and whether it has resulted in prejudice to a respondent. *See, Sinnott, Id.* (delay of over 3 years "inherently prejudicial"); *Avilucea v. Phelps Dodge Corp.*, 19 FMSHRC 1064, 1067 (1997)(Fauver, ALJ.)("very special circumstances" required to justify delay of over 2 years). All such factors must be weighed to reach the ultimate determination of whether, on the facts of the particular case, justifiable circumstances exist to allow the complainant to pursue his claim. *Hollis, supra; Herman, supra*.

The ultimate determination to be made is whether, in fairness, a complainant who has failed to timely file a discrimination complaint should, nevertheless, be allowed to pursue his claims forcing a respondent to defend against allegations that should have been made at an earlier point in time. *Herman, supra*, 4 FMSHRC at 2138-39. Here, Coteau does not claim that it's ability to defend against the allegations has been prejudiced by either the untimely filing of the MSHA complaint or the Secretary's reopening of the investigation. It argues that a demonstration of prejudice is not required in order to defeat a claim of justifiable circumstances for late filing.

While the situation may be different when the delay has been the fault of the Secretary,[3] Respondent is correct that the Commission has not held that a respondent must demonstrate prejudice to overcome a claim of justifiable circumstances for a miner's late filing of an initial complaint of discrimination with the Secretary. However, prejudice is an important factor in the overall "justifiable circumstances" determination. As the Commission has observed, the legislative history pertinent to the 60 day time limit indicates that it was intended to avoid stale claims[4] and it is entirely appropriate and consistent with that legislative purpose to include a consideration of prejudice as a highly relevant factor in the determination of whether a miner's late filing will be excused. *Herman, supra*, 4 FMSHRC at 2137; *and see, Morgan v. Arch of Illinois*, 21 FMSHRC 1381, 1387 (1999); *cf. Boswell v. National Cement Co.*, 14 FMSHRC 253, 257 (1992). Here the delay of 49 days was neither *de minimis* nor excessively lengthy. In the absence of prejudice to Respondent, Complainant's burden of demonstrating justifiable circumstances is not exacting. Nevertheless, he has failed, at least on the present record, to satisfy it.

Sargent's opposition to the motion is troubling on many fronts. He relies upon a

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[3] *See, Secretary on behalf of Hale v. 4-A Coal Co., Inc.*, 6 FMSHRC 905 (1986).

[4] *See, Herman, supra*, 4 FMSHRC at 2137.

Declaration by Judy R. Peters, a Senior Special Investigator employed by MSHA, which relates that Sargent made numerous attempts to obtain certain information from Coteau's management and when the information was not forthcoming, he contacted an attorney. Thereafter, he was advised to notify MSHA of his complaints. He spoke with his brother, who contacted MSHA on two occasions and was advised to contact MSHA's Denver District Office, which he did on October 23, 1998. A discrimination complaint form was mailed to Complainant, was received on October 30, 1998, executed on November 15, 1998 and mailed to MSHA, where it was received on November 20, 1998.

The operable facts on this issue, as related in Ms. Peters' Declaration, are apparently not based upon her personal knowledge. While hearsay is admissible in Commission proceedings so long as it is material and relevant, it's probative value, if any, must be determined by the Administrative Law Judge, based upon factors evidencing it's reliability.[5] There are very few indicia of reliability for the facts reported in Ms. Robert's Declaration. The sources of the information are not identified, which precludes any assessment of their bias or whether statements she relied upon were made with personal knowledge. Very little detail is provided as to times, dates, locations or the identities of involved individuals. There is no indication as to whether the information provided has been verified by someone other than the source or by documentary evidence, such as contemporaneous notes of conversations or letters.

Even if it is assumed that the reported facts were reliable, many important questions remain unanswered. There is no explanation of the significance of the information that Royal Sargent was seeking or why it's unavailability impaired his ability to timely file a discrimination complaint, particularly since his complaint was eventually filed without it. At some undisclosed point, Ms. Roberts relates that Complainant contacted an attorney and was "thereafter advised to notify MSHA."[6] There is no information as to when he contacted the attorney, what he learned as a result, who advised Complainant to notify MSHA or when that advice was given. More striking is the fact that, despite the advice, he apparently did not personally contact MSHA until he filed his complaint on November 20, 1998. Ms. Roberts further relates that Complainant spoke to his brother, who then contacted MSHA, at undisclosed points in time. His brother apparently also

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[5] 29 C.F.R. § 2700.63(a); *REB Enterprises, Inc.*, 20 FMSHRC 203, 206 (1998); *Mid-Continent Resources, Inc.*, 6 FMSHRC 1132, 1135-37 (1984).

[6] Declaration of Ms. Peters, para. J. Paragraph 4 of the Secretary's opposition contains the following statement: "The attorney advised [Sargent] to contact MSHA immediately." This somewhat at variance with Ms. Peters' Declaration.

contacted MSHA's Denver office on October 23, 1998, which eventually lead to the filing of the complaint almost a month later. There is no explanation of why Complainant waited two full weeks to fill out the relatively brief complaint form at a time when he was most likely fully aware that he was well past the deadline for submitting a complaint.

In it's motion, Coteau argued that Sargent is an experienced miner and was well aware of his right to submit a claim of discrimination to MSHA within 60 days of an adverse action. It's argument is based upon Sargent's length of service, the fact that he had completed all required training, which included information on such rights under the Act, and that a poster explaining those rights was displayed on a bulletin board at Sargent's place of work.[7] In opposing the motion, Sargent did not dispute either that contention or the facts upon which it is based. The written notification of "Disciplinary Suspension and Probation" that was given to Complainant on August 3, 1998, was fairly detailed and clearly indicated the serious nature of the action that Coteau was taking. There is no question but that these actions amounted to adverse action within the meaning of the discrimination provisions of the Act.

On the basis of the record as presently constituted, I find that Complainant has not established justifiable circumstances for failing to file his discrimination complaint within the time limits established by the Act. For the reasons set forth above, on the issue of justifiable circumstances the Declaration of Ms. Peters is entitled to very little weight and, in any event, is notably deficient in many critical respects. I have little choice but to conclude that, at all relevant times, Complaint was aware of his right to file a discrimination complaint with the Secretary within 60 days of adverse action taken in violation of the Act. The August 3, 1998, memorandum in no uncertain terms, put him on notice of serious adverse action and his initial complaint of discrimination was based upon information known to him at that time. There is no reliable evidence that he brought his discrimination complaint to Respondent's attention within the statutory 60 day period, either directly, or through some other agency, or that he misunderstood or was mislead as to his rights or obligations under the Act. Despite being aware of his rights, and having been directly advised to contact MSHA regarding his complaint, he did not contact MSHA until November 20, 1998, when his complaint was received.

Complainant is in a situation comparable to that in *Herman, supra*, 4 FMSHRC at p. 2138, i.e. "he had abundant opportunity and the ability to go forward with his complaint in a more timely fashion." However, unlike the complainant in *Herman*, Sargent has had only a limited opportunity to establish justifiable circumstances for his late filing. Rather than dismissing the complaint at this time, Complainant will be afforded an additional opportunity to establish justifiable circumstances.

The Secretary's Authority to Rescind the "no violation" Determination

[7] A copy of the poster was attached to Respondent's motion.

Respondent's argument on the Secretary's authority is based upon an erroneous interpretation of the law. It contends that, section 105(c)(3) of the Act requires that, "upon issuance of a 'no violation' determination, the miner must file a complaint with the Commission within 30 days. The Mine Act nowhere provides the Secretary the authority to 'rescind' a 'no violation' determination 31 days after it has been issued." Motion, at p. 4. While the Act does specify a 30 day period within which a miner may file a complaint with the Commission, the time period runs from the date the miner receives "notice of the Secretary's determination", not the date of the notice. 30 U.S.C. § 815(c)(3). Ms. Roberts' Declaration, apparently based, in part, upon MSHA records, undercuts the factual predicate of Respondent's argument, stating that the notice was not received until January 11, 1999, and that the decision to rescind the notice was made on February 1, 1999. While the reliability of the statement regarding the date of receipt is open to question, assuming a reasonable time for receipt of the notice,[8] it appears that the decision to rescind was made prior to the expiration of the 30 day period. Respondent did not address the argument further in it's reply and appears to have abandoned it.

ORDER

Based upon the foregoing, it is therefore **ORDERED**: That **on or before March 17, 2000**, Complainant may submit evidence establishing justifiable circumstances for the late filing of his discrimination complaint, i.e. to show cause why the complaint should not be dismissed because of his failure to file a complaint of discrimination within 60 days of the adverse actions complained of. Complainant shall serve a copy of any such submission upon counsel for Respondent by facsimile and first class mail. Respondent may reply to any such submission **on or before March 28, 2000.** If Respondent intends to pursue it's argument as to the Secretary's authority to rescind a "no violation" determination, it shall address the Secretary's argument in it's reply.

Michael E. Zielinski
Administrative Law Judge

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[8] Commission Rule 2700.8 provides that: "When service of a document is by mail, 5 days shall be added to the time allowed by these rules for the filing of a response or other documents." 29 C.F.R. § 2700.8.

D.C. 20006-3096 (Certified Mail)

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