FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
601 NEW JERSEY AVENUE N. W., SUITE 9500
WASHINGTON, D.C. 20001

August 28, 2008

GABRIEL ROBLES,	:	DISCRIMINATION PROCEEDING
Complainant,	:	
	:	Docket No. CENT 2008-115-DM
v.	:	SC-MD-08-01
	:	
LAFARGE NORTH AMERICA, INC.,	:	Sugar Creek Plant
Respondent	:	Mine ID 23-00158

DECISION

Appearances: Gabriel M. Robles, Kansas City, Missouri, *pro se*;
Christopher Peterson, Esq., Jackson Kelly, PLLC, Denver, Colorado, on behalf of the Respondent.

Before: Judge Melick

This case is before me upon a complaint of discrimination filed by Mr. Gabriel Robles pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act", alleging that LaFarge North America, Inc. (Lafarge) terminated him purportedly in violation of Section 105(c)(1) of the Act.[1] LaFarge denies the allegations of unlawful termination and, alternatively, seeks dismissal of the complaint on the grounds that the complaint was not filed within the time limits set forth in Section 105(c)(2) of the Act. For the reasons that follow, I find that, indeed, the complaint must be dismissed for untimely filing.

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[1] Section 105(c)(1) provides as follows:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act, because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to the Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

Section 105(c)(2) provides 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 [of Labor] alleging such discrimination...". The Commission has long held, however, that this 60-day limit is not jurisdictional and a judge is required to review the facts on a case-by-case basis, taking into account the unique circumstances of each situation in order to determine whether a miner's late filing should be excused. *Hollis v. Consolidation Coal Company*, 6 FMSHRC 21, 24(January 1984), aff'd mem. 750 F.2d 1093 (D.C. Cir. 1984).

In this case there is no dispute that Mr. Robles' alleged protected activities occurred on February 15, 2007 and/or February 16, 2007, and that he was "walked off the job" at the subject mine thereby allegedly suffering discriminatory retaliation within one or two days thereafter. For purposes of this decision, the alleged discriminatory acts therefore occurred no later than February 18, 2008. There is also no dispute that Mr. Robles' letter of complaint to the Department of Labor's Mine Safety and Health Administration (MSHA)was dated September 26, 2007, or more than five months after the 60-day deadline set forth in Section 105(c)(2).[2]

In his letter of complaint to MSHA dated September 26, 2007, Robles explained his late filing as follows: "only because of my poverty am I only now able to relate or report this incident." At hearings, Robles further explained that he did not file a timely complaint because he could not afford the cost of postage needed to mail the complaint to MSHA.[3] Robles also testified at hearings however, that at the time his work at Lafarge ended he had been working for four days earning $12.00 per hour plus overtime at $18.00 per hour. He also was apparently paid for this work by his temporary agency "Labor Ready" before his next shift would have commenced at Lafarge- - presumably therefore on February 18, 2008. Robles further testified that, after being out of work for a week, he got another job for about two weeks in "construction cleanup". It is therefore clear that Robles had adequate funds to pay the postage to mail his complaint to MSHA. The credibility of his testimony in this case is further diminished by his statement that he was able to pay five or ten dollars for a telephone call at a time when he purportedly could not afford 39 or 41 cents for postage.

Under these circumstances, I am compelled to conclude that Robles' testimony- - including his claim that he did not file his complaint within the statutory time period because he could not afford the postage- -is not credible. I therefore also conclude that his late filing is not excusable and that his complaint herein must be dismissed.

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[2] MSHA Form 2000-123 shows that the complaint was filed with MSHA on September 27, 2007.

[3]Administrative notice may be taken on the fact that, during February 2007, the postal rate for one ounce of first class mail was 39 cents and, as of May 14, 2007, was 41 cents.

ORDER

Discrimination Proceeding Docket Number CENT 2008-115-DM is hereby dismissed.

Gary Melick
Administrative Law Judge
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