

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 25, 1996

THOMAS L. CROWDER, : DISCRIMINATION PROCEEDING
Complainant :
 : Docket No. CENT 95-150-DM
v. :
 : Annie Creek Mine
WHARF RESOURCES (USA), INC., :
Respondent : Mine ID No. 39-01282

ORDER OF DISMISSAL

Before: Judge Cetti

This case is before me on the Complaint of Discrimination against Wharf Resources (USA), Inc. (Wharf), filed by Thomas L. Crowder under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, "Mine Act."

On December 12, 1994, Mr. Crowder filed with MSHA the discrimination complaint against his former employer, Wharf. Mr. Crowder, in his complaint filed with MSHA and later with the Commission, alleges the following under the heading Summary of Discriminatory Action:

Was removed from a supervisory position after a chemical release from faulty equipment. The equipment was new but improperly fitted to the application and failed to operate as designed.

Many parts of this facility was (sic) improperly sized or installed, that resulted in several component needing upgraded to allow the facility to function properly.

The chemical release was due to an effort to install a test gauge on a pump to determine if the pump was in fact working.

This incident happened on 2-3-93.

Review of incident and demotion 2-5-93
(Demotion at same rate).

Demotion effective 2-17-93 (after Thralls
golf vacation).

Salary cut to demotion level 3-8-93.

Salary cut effective date 3-1-93.

Demotion position eliminated 4-21-93.

Mr. Crowder's discrimination claim was investigated by a special investigator of the Mine Safety and Health Administration (MSHA). Mr. Crowder was advised on February 17, 1995, by James E. Belcher, Chief, Technical Compliance and Investigation Division, that his claim had been thoroughly investigated and after a careful review of the information gathered during the investigation, MSHA determined that the facts disclosed during the investigation did not constitute a violation of ' 105(c) of the Mine Act. Chief Belcher's letter concludes with the statement that "discrimination, within the confines of the Act, did not occur."

Thereafter on March 22, 1995, Mr. Crowder, on his own, filed his complaint against Wharf with the Commission pursuant to ' 105(c)(3) of the "Mine Act." The complaint filed with the Commission is identical to the above quoted complaint Crowder filed with MSHA.

It is undisputed that Crowder was involved in the supervision and start-up of Wharf's CCIX plant where the incident for which he was demoted occurred.

It is also undisputed and clear from the record that the incident that triggered the adverse action occurred on February 3, 1993. Higher management, on review of the incident, held supervisor Crowder responsible for the incident. Two days after the February 3, 1993, incident occurred, management demoted Crowder from his supervisory position.

The incident of February 3, 1993, involved the release of a cloud of anhydrous ammonia gas which engulfed another employee. Crowder's complaint states that the chemical release of the cloud of gas resulted from his efforts to install a test gauge on a pump to determine if the pump was working. Complainant states that the review of the incident by higher management unfairly placed the entire responsibility for the incident on him alone and resulted in his demotion on February 5, 1993, at the same rate of pay which was cut to demotion level on March 1, 1993.

Wharf admits that Complainant was demoted from a supervisory position in February 1993, and that Complainant's salary was reduced to the demotion level effective March 1, 1993. Wharf affirms that Complainant's employment with Wharf was terminated effective April 30, 1993, as the result of a reduction in work force in which 26 positions were eliminated. Wharf specifically denies that Complainant was discriminated against because of any protected safety activity.

The Respondent filed a motion for dismissal on the grounds that (1) Crowder's complaint fails to state a claim upon which relief can be granted under the Mine Act; (2) the inherent and material prejudice resulting from the miner's 20-month delay in the filing of a section 105(c) complaint and the fact that Crowder's filing of the complaint was untimely in that Crowder knew or should have known of his rights under ' 105(c) of the Mine Act, well within the 60-day period specified in that section of the Mine Act.

It is clear from the face of Crowder's application that it fails to state a claim upon which relief could be granted. Even when viewed in the light most favorable to Crowder, the allegations in the complaint do not come within the perimeters of activities protected by ' 105(c) of the Mine Act. It is clear from Crowder's own words that he was removed from his supervisory position as a result of an incident that occurred on February 3, 1993. The incident consisted of a release of a cloud of ammonia gas while he was endeavoring "to install a test gauge on a pump to determine if the pump was in fact working."

While it may have been unfair for higher management to place on Crowder the entire responsibility for this unfortunate incident and to demote him from his management position for this reason, such disciplinary action by management for an incident such as this does not come within the perimeters of activities protected by the Mine Act. In Chacon, 3 FMSHRC 2508 at 2510, the Commission stated:

The Commission and its judges have neither the statutory charter nor the specialized expertise to sit as a super grievance or arbitration board meting out industrial equity We and our judges should not substitute for the operator's business judgment our views of "good" business practice or on whether a particular adverse action was "just" or "wise".

The failure of Crowder's complaint to state a cause of action or claim upon which relief can be granted under the Mine Act requires dismissal of the Complaint. See Commissioner decision Maynard, Joseph v. Standard Sign and Signal Co., 3 FMSHRC 613 (March 1981); 2 MSHC 1186.

In addition, there is merit in Respondent's motion for dismissal on the grounds the complaint was untimely filed. Section 105(c) of the Mine Act, requires that complaints of discrimination under the Act be filed "within 60 days after such violation occurs" (emphasis added). The legislative history relevant to this provision limiting time for filings states:

While this time-limit is necessary to avoid stale claims being brought, it should not be construed strictly where the filing of a complaint is delayed under justifiable circumstances.

S. Rep. 95-181, 95th Cong., 1st Sess. 36 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 624 (1978) ("Legis. Hist.").

The time limits in section 105(c) are not jurisdictional. See Secretary on behalf of Hale v. 4-A Coal Co., 8 FMSHRC 905, 908 (June 1986). However, in that same decision, the Commission also stated that "[t]he fair hearing process envisioned by the Mine Act does not allow us to ignore serious delay" In this case we have serious delay. We are dealing with a late filing where the delay in filing is over 10 times longer than the 60 days specified by the Mine Act. As stated by ALJ Maurer in Sinnott, II, 16 FMSHRC 2445, 2447 "At some point there has to be an outer limit, if the 60-day rule contained in the statute has any meaning at all."

I have reviewed the pleadings and the papers filed by Complainant including the deposition of Mr. Crowder taken in this matter. The record does not indicate any justifiable circumstances for this extraordinary delay.

Crowder in his reply to Respondent's reply to Complainant's Response to Order to Complainant to Show Cause states:

I was seeking legal remedies for the actions of Wharf Resources in March of 1993, that was well within the 60-day statutory time period required by the 105c. The attorney I was working with on this matter could not or did

not find any laws or regulations on anhydrous ammonia or containment and equipment requirements for the handling and storage of anhydrous ammonia.

* * *

My attorney asked if I wanted to proceed with actions over the wage reduction and I said I wanted to pursue the safety aspect and find the laws governing anhydrous ammonia. Again, she was unsuccessful in finding any laws or regulations governing anhydrous ammonia. (Emphasis added).

Charles B. Wilson, Wharf's manager for Employee Relations/Safety and Security, in his affidavit states:

After Mr. Crowder's termination, I was contacted by a noted Rapid City attorney that specializes in employment law regarding Mr. Crowder's dismissal. She requested information regarding Mr. Crowder's severance pay. Additionally, Mr. Crowder contacted me requested a copy of Wharf's employee handbook for his attorney to review.

It is also worthy of note that John A. Begeman, now General Manager of Wharf, in his affidavit of February 29, 1996, shows that each of the three individuals responsible for Mr. Crowder's transfer and termination have left the employ of Wharf and are now located outside the subpoena jurisdiction of the Review Commission.

It satisfactorily appears from the record that Crowder knew or should have known of his rights under section 105(c) of the Mine Act and that under the circumstances of this case the filing of the complaint 20 months after the expiration of the statutory 60-day period is indeed untimely.

ORDER

In view of the foregoing, the Complainant's discrimination complaint under the Mine Act is found to have been untimely filed and, furthermore, does not state a cause of action within the purview or perimeters of the activity protected by the Mine Act.

The Respondent's motion to dismiss this case is **GRANTED** and the complaint is **DISMISSED**.

August F. Cetti
Administrative Law Judge

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