FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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October 13, 1999

JAMES C. KEYS, JR.,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. CENT 99-267-DM
	:	
REINTJES OF THE SOUTH, INC.,	:	SC MD 99-07
Respondent	:	
	:	Ormet Primary Aluminum
	:	Mine ID 16-00354 FDP

DECISION

Before: Judge Zielinski

James C. Keys, Jr. ("Keys" or "Complainant") initiated this proceeding by filing a complaint of discrimination pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 (the "Act"), 30 U.S.C. § 815(c)(3). Complainant alleges that Reintjes of the South, Inc.("Reintjes" or "Respondent"), discriminated against him as a result of his complaints regarding alleged violations of the Act made on November 22, 1996, the day he allegedly suffered a work-related injury when a fellow employee deliberately sprayed him with caustic material. The essence of his cause of action, as deduced from the *pro se* complaint and attached documents, is that he was fired on November 22, 1996, after complaining to a Reintjes official that it had failed to train employees as required by the Act.[1]

Keys filed a discrimination complaint with the Mine Safety and Health Administration ("MSHA") on February 16, 1999, more than 2 years beyond the 60 days allowed by section 105(c)(2) of the Act. In the interim he failed in an attempt to secure workmen's compensation benefits beyond payment of some medical expenses associated with his initial treatment. MSHA determined that no violation of the Act had occurred and by notice dated May 24, 1999, advised Complainant of that determination and his right to file an action with the Commission on his own behalf. Complainant filed the instant complaint with the Commission on June 30, 1999.

In response to the complaint, Reintjes filed an answer and a motion to dismiss or in the

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[1]/ The complaint states a cause of action of discrimination under the liberal construction accorded *pro se* pleadings. See, *Clyde Perry v. Phelps Dodge Morenci, Inc.*, 18 FMSHRC 1918 (1996).

alternative for summary judgement, arguing, *inter alia*, that Keys did not timely file either his complaint with the Secretary or the Commission and that it suffered prejudice as a result.

Complainant failed to timely respond to the motion, the service copy of which was eventually returned to Respondent marked "unclaimed." On August 24, 1999, an order was issued directing Complainant to show cause why Respondent's motion should not be granted. The Order to Show Cause was mailed to Complainant by both certified and regular mail and included a copy of Respondent's answer and motion. Complainant was specifically directed to address Respondent's timeliness arguments and "whether any untimely actions were justified." During a telephonic status conference on September 1, 1999, the parties acknowledged receipt of the August 24, 1999 order and the issues raised in the motion were discussed. Particular emphasis was placed on Complainant's need to justify any delay in filing his complaints. On September 2, 1999, a Scheduling Order was entered, reflecting the substance of the discussions and reiterating the directive that Complainant address the timeliness issues and "submit any facts or arguments that he relies on as justification for any untimely filing."

Complainant's response to the show cause order and motion was received on September 7, 1999. Respondent filed a reply on September 20, 1999, including affidavits supporting its claims of prejudice. Complainant did not file a response, as permitted by the scheduling order.

Filing with the Commission

Reintjes' argument that Keys' complaint was not timely filed with the Commission is easily disposed of. While the complaint was filed 37 days following the date of the letter noting MSHA's finding of no discrimination, the 30 day time period prescribed in section 105(c)(3) of the Act and Commission Rule 2700.41[2] commences with *receipt* of the determination, not the purported mailing date. Complainant asserts, in his response to the show cause order, that "someone else" was allowed to sign for the original delivery and that the copy he received was mailed on June 24, 1999. There is no evidence in the record establishing that Keys actually received the MSHA letter before June 1, 1999. I find that the complaint was timely filed with the Commission.[3]

Filing with the Secretary

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[2]/ 29 C.F.R. § 2700.41.

[3]/ Respondent claims that its ability to rebut complainant's explanation for the allegedly untimely filing of his complaint was prejudiced because it determined during a phone call on September 10, 1999, that a witness was then deceased. However, Respondent failed to establish whether the unavailability of information from the witness is attributable to Keys' alleged delay of a few days, or it's own determination to not pursue an investigation or formal discovery upon receipt of the complaint. The prejudice claim is rendered moot by the finding that the complaint was timely filed.

Reintjes argument that Keys' filing of a complaint with the Secretary of Labor's MSHA was untimely carries considerably more weight. Section 105(c)(2) of the Act 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 alleged discriminatory action, Respondent's firing of Complainant, occurred on November 22, 1996. Under section 105(c)(2), Complainant's allegation of discrimination should have been filed with MSHA on or before January 22, 1997. However, the complaint was not filed with MSHA until February 16, 1999, 2 years and 26 days beyond the statutory deadline.

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); *Herman v. IMCO Services*, 4 FMSHRC 2135 (1982). As the Commission stated in *Herman*, 4 FMSHRC at pp. 2138-39*:*

> The placement of limitations on the time-periods during which a plaintiff may institute legal proceedings is primarily designed to assure fairness to the opposing party by :
>
> > Preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witness have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitations and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.
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> *Burnett v. N.Y. Central R.R. Co.*,380 U.S. 424, 428 (1965), *quoting R.R Telegraphers v. REA*, 321 U.S. 342, 348-49 (1944). * * *

The cases dealing with justification for delays in filing identify several factors that are typically considered, including: complainant's capacity or ability to initiate and pursue such a remedy, *See, William T. Sinnott, II v. Jim Walter Resources, Inc.*, 6 FMSHRC 2445 (1994) (Maurer, ALJ); complainant's awareness of his rights under the Act, *Id.; Hollis, supra.; Secretary of Labor 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); *Secretary of Labor 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 of Labor 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); and, the length of the delay and whether it has resulted in prejudice to a respondent. Prejudice is inherent in any delay, because witnesses' recollections fade. *See, Sinnott, supra,* (delay of over 3 years "inherently prejudicial"). Consequently, the lengthier the delay, the stronger the justification required to overcome it. *See, Roland A. Avilucea v. Phelps Dodge Corp.*, 19 FMSHRC 1064, 1067 (1997)(Fauver, ALJ.)("very special circumstances" required to justify delay of over 2 years). Concrete demonstrable prejudice may also occur, e.g. the unavailability of witnesses or documents. All such factors must be weighed to reach the ultimate determination of whether, on the facts of the particular case, the delay was justified. *Hollis, supra; Herman, supra*.

The delay here, in excess of 2 years, is truly extraordinary. Complainant has made no attempt to justify the delay, despite the instructions in the show cause and scheduling orders. While he claims significant injury, he clearly was not incapacitated and actively pursued his workmen's compensation case. He does not claim to have been unaware of his rights under the Act, and his complaint and related papers evidence considerable familiarity with it's provisions.[4]

Respondent's ability to defend against the allegations has been prejudiced by the delay. Evidence of any discussions that Keys may have had with Reintjes officials on or about November 22, 1996, the only protected activity claimed by Keys, would be critical to prosecution and defense of the claim. Recollections of any such discussions are likely to have faded considerably. Respondent has also submitted affidavits establishing that training records and potential witnesses may no longer be available. However, whether or not there were training violations and whether or not Keys was injured in the manner he claimed would not likely become issues in this proceeding. *See, Munsey v. FMSHRC*, 595 F.2d 735, 742-43 (D.C.Cir 1978)(safety complaints are protected activity even if frivolous or not made in good faith).[5]

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[4]/ His papers reference; a "Guide Manual to Miners' Rights and Responsibilities Under the Federal Mine Safety and Health Act of 1977;" section 110(f)'s criminal penalties for making false statements; and, training and posting requirements.

[5]/ There is no merit to Respondent's claim of prejudice because its exposure to a back pay award has been substantially increased by the delay. Respondent is adequately protected by the requirement of proof of causation for any claimed relief and the doctrine of mitigation of damages.

Complainant's primary interest in the present action appears to be obtaining compensation for damages resulting from the November 1996 injury.[6] He was involved in a lengthy workmen's compensation proceeding in an attempt to secure compensation. His complaint to MSHA was submitted only after his workmen's compensation claim was denied, a delay of more than 2 years for which he has offered no justification.

ORDER

Based upon the factors discussed above, Complainant's delay of more than 2 years beyond the prescribed period for filing a complaint of discrimination with MSHA was not justified. Accordingly, the complaint is hereby dismissed.

Michael E. Zielinski
Administrative Law Judge

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[6]/ The response to the Show Cause Order itemizes relief claims of medical expenses of $4,662.98, lost wages of $83,835.00 and $40,000.00 for pain and mental distress, and states:

> * * * * By law, I was injured badly and I am entitled to medical treatment and wages by the LWCC. I am demanding that they pay me what is owed. * * * *