FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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March 6, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of RONNIE GAY, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. KENT 95-597-D
	:	BARB CD 95-08
v.	:	
	:	Perry County No. 1 Strip
IKERD-BANDY CO., d/b/a COCKRELL'S FORK MINING Respondent	:	Mine ID 15-08038

DECISION

Appearances: Anne T. Knauff, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee for the Complainant;
William I. Althen, Esq. and Donna C. Kelly, Esq., Smith, Heenan and Althen, Washington, D.C. and Charleston, West Virginia, respectively on behalf of Respondent.

Before: Judge Melick

This case is before me upon the complaint by the Secretary of Labor on behalf of Ronnie Gay under Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.,* the "Act," alleging that Ikerd-Bandy Company, Inc. (Ikerd-Bandy) violated Section 105(c)(1) of the Act when it did not hire Mr. Gay, an applicant for employment, in early July 1994.[1] In a

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[1] Section 105(c)(1) of the Act 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 this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the cola or other mine of an alleged danger or

preliminary motion to dismiss Ikerd-Bandy argues that Mr. Gay failed to meet the filing requirements under Section 105(c)(2) of the Act in that he "unjustifiably failed to file the charge of discrimination within (60) days of the date of the alleged violation, and the delay results in some specific prejudice to Respondent".

Motion to Dismiss

In relevant part, Section 105(c)(1) of the Act prohibits discrimination against a miner or applicant for employment because of his exercise of any statutory right afforded by the Act. n.1, *supra.* If a miner or applicant for employment believes that he has suffered discrimination in violation of the Act and wishes to invoke his remedies under the Act, he must file his initial discrimination complaint with the Secretary of Labor within 60 days after the alleged violation in accordance with Section 105(c)(2) of the Act.[2] The Commission has held that the purpose of the 60-day time limit is to avoid stale claims, but that a miner's late filing may be excused on the basis of "justifiable circumstances." *Hollis* v. *Consolidation Coal Company*, 6 FMSHRC 21 (1984); *Herman* v. *IMCO Services*, 4 FMSHRC

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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

Footnote 1 Continued

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 proceedings, 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.

[2] After investigation of the miner's complaint, the Secretary is required to file a discrimination complaint with this Commission on behalf of the miner or applicant for employment if the Secretary determines that the Act was violated. If the Secretary determines that the Act was not violated, he is required to so inform the individual complainant and that person may then file his own complaint with the Commission under Section 105(c)(3) of the Act.

2135 (1982). In those decisions the Commission cited the Act's legislative history relevant to the 60-day time limit:

> 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. Circumstances which could warrant the extension of the time-limit would include a case where the miner within the 60-day period brings the complaint to the attention of another agency or to his employer, or the miner fails to meet the time-limit because he is mislead as to or misunderstands his rights under the Act. (citation omitted).

The Commission noted accordingly that timeliness questions must be resolved on a case-by-case basis, taking into account the unique circumstances of each situation.

It is undisputed in this case that the alleged act of discrimination commenced on July 2, 1994, when Ikerd-Bandy did not hire Gay and that Gay did not file his complaint with the Secretary until December 13, 1994. His signed complaint is dated December 14, 1994.

Gay testified at hearing as justification for the delay that he was unaware of his rights to file a complaint of discrimination under the Act until a coincidental meeting with Federal Mine Inspector Dash on December 12, 1994. Dash was purportedly investigating an unrelated matter at the subject mine in which rock from an explosives blast struck nearby homes. A conversation ensued with Gay in which Gay related his experience at the Whitaker mine operation (predecessor to Ikerd-Bandy) concerning safety reports he prepared regarding the absence of a guard for the cooling fan on his bulldozer. Dash purportedly advised Gay of his right to file a complaint with the Mine Safety and Health Administration (MSHA) and the next day Gay filed the complaint at issue with the Hazard, Kentucky, MSHA office.

Gay's testimony on this issue is not disputed and, indeed, provides justification for the relatively brief delay in the filing of his complaint. Accordingly Gay's late filing may be excused.

The Merits

In his amended complaint filed at hearing the Secretary alleges in relevant part as follows:

> The Complainant, Ronnie Gay, was employed as a bull dozer operator by Whitaker Coal Company ("Whitaker") until June 30, 1995 and was a "miner" within the meaning of Section 3(g) of the Act [30 U.S.C. 802(g)].
>
> Between June 15 and June 27, 1994 Ronnie Gay communicated safety complaints to Whitaker through its agent, Superintendent Carson Sizemore ("Sizemore").
>
> On or about June 20, 1994 Sizemore, as Whitaker's superintendent ordered Ronnie Gay, through Whitaker's foreman Raymond Walker, to stop communicating his safety complaints to Whitaker.
>
> Ronnie Gay continued to communicate safety complaints to Whitaker.
>
> On June 30, 1994 all Whitaker miners, including Ronnie Gay, were laid off by Whitaker.
>
> As of July 1, 1994 mine operations were purchased by respondent, Ikerd-Bandy Co., Inc.
>
> Ikerd-Bandy Co., Inc. used the same equipment, same employees, and same methods of mining to extract coal from the same coal seam mined by Whitaker. Ikerd-Bandy Co., Inc. was a successor operator to Whitaker.
>
> Ikerd-Bandy Co., Inc. hired Sizemore as its superintendent as of July 1, 1994.
>
> On July 2-3, 1994 all Whitaker miners who had filed applications for work with Ikerd-Bandy were interviewed by Sizemore and another representative of Ikerd-Bandy Co., Inc.
>
> On July 1, 1994 Ronnie Gay filed an application for work with Ikerd-Bandy and on or about July 2, 1994 was interviewed by Sizemore and another agent of Ikerd-Bandy. Ronnie Gay was an applicant for employment within the meaning of the Act.
>
> Ronnie Gay was discriminated against on or about July 2, 1994, when he was denied employment by Ikerd-Bandy because, prior to this date, he had communicated safety complaints to Ikerd-Bandy's agent Sizemore while

both Ronnie Gay and Sizemore were employed by Ikerd-Bandy's predecessor, Whitaker. The safety complaints related to the condition of the bulldozer Ronnie Gay operated for Ikerd-Bandy's predecessor, Whitaker.

The Secretary is seeking, *inter alia*, an order directing Ikerd-Bandy to pay "damages in an amount equal to full back pay, all employment benefits, all medical and hospital expenses and any and all other damages suffered by Ronnie Gay as a result of the discrimination from the date of the discrimination until the date Gay was reinstated to full employment status with Ikerd-Bandy, i.e. until June 23, 1995, and a civil penalty of $6,000."

This Commission has long held that a miner or applicant for employment seeking to establish a *prima facie* case of discrimination under section 105(c) of the Act bears the burden of persuasion that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *Secretary on behalf of Pasula v. Consolidation Coal Co.,* 2 FMSHRC 2786, 2797-2800 (1980), rev'd on grounds, sub nom. *Consolidation Coal Co. V. Marshall,* 663 F.2d 1211 (3rd Cir. 1981); and *Secretary on behalf of Robinette v. United Castle Coal Co.,* 3 FMSHRC 803, 817-18 (1981). The operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. If an operator cannot rebut the *prima facie* case in this manner, it may nevertheless defend affirmatively by proving that it would have taken the adverse action in any event on the basis of the miner's unprotected activity alone. *Pasula, supra; Robinette, supra.* See also *Eastern Assoc., Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987); *Donovan v. Stafford Construction Co.,* 732 F.2d 954, 958-59 (D.C. Cir, 1984); *Boich v. FMSHRC*, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's *Pasula-Robinette* test). Cf. *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 397-413 (1983) (approving nearly identical test under National Labor Relations Act).

There is no dispute in this case that Gay filed numerous safety complaints during his four years while working for Whitaker, including as many as 200 pre-shift driver's reports citing equipment defects and the more recent pre-shift reports citing the absence of a guard over the radiator fan on his bulldozer (Joint Exhibit No. 1). It is not disputed that Gay continued to file such reports through his last day of work for Whitaker on June 30, 1994, when Whitaker closed down operations at the subject mine and released all of its workforce.

Considering this undisputed evidence it is clear that Gay had in fact thereby engaged in protected activity.

The second element of a *prima facie* case of discrimination is a showing that the adverse action (in this case the decision of Ikerd-Bandy not to hire Gay on or about July 2, 1994) was motivated in any part by the protected activity.[3] As this Commission noted in *Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508 (1981), rev'd on other grounds sub nom. *Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983), "[d]irect evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." The Commission considered in that case the following circumstantial indicia of discriminatory intent: knowledge of protected activity; hostility towards protected activity; coincidence of time between the protected activity and the adverse action; and disparate treatment. In examining these indicia the Commission noted that the operator's knowledge of the miner's protected activity is "probably the single most important aspect of the circumstantial case".

In this regard it is undisputed that former Whitaker Mine Superintendent Carson Sizemore was Gay's supervisor while Gay worked at Whitaker as a bulldozer operator until Whitaker ceased operations on June 30, 1994. Gay testified that he began filing pre-shift driver's reports on the missing fan guard as early as April or May 1994, and continued through June 30, 1994. According to Whitaker foreman Raymond Walker, it was the practice for the pre-shift reports to be completed by the equipment operators before each shift to notify management of mechanical and/or safety defects. Walker would collect these reports from the operators on his shift and turn them over to Robert Baker in the mine office. According to Walker, Baker then made a list of the reported problems and provided that list to Sizemore.

Gay testified that although Sizemore had never talked to him directly about these reports, Raymond Walker, who was his foreman, told him on June 7, 1994, that Sizemore did not want him to continue reporting the absent bulldozer fan guard. Gay testified that he told Walker that he would nevertheless continue to write the reports.

In his testimony Walker confirmed that, following complaints to Sizemore about the missing fan guard on Gay's bulldozer, Sizemore told Walker to tell Gay not to report this problem any

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[3] Gay was subsequently hired by Ikerd-Bandy and began work on June 23, 1995.

more. Walker confirmed that he reported Sizemore's response to Gay. This corroborated and credible testimony may reasonably be considered evidence not only of knowledge by Sizemore of Gay's protected activity but also of animus toward that activity. Sizemore's contrary testimony is also accordingly afforded but little weight. The Secretary alleges that Sizemore, as successor Ikerd-Bandy's new superintendent, thereafter retaliated against Gay when he presumably rejected Gay's July 1994, application for employment with Ikerd-Bandy.

The record shows that on July 1, 1994, Whitaker sold substantially all of the assets of the subject mine to Ikerd-Bandy, an unrelated business entity. According to William Rich, Ikerd-Bandy's president, two or three weeks prior to that date he told the Whitaker miners at meetings at the mine that he intended to hire from among the miners who were already working and did not intend to bring miners in from other jobs. While there is some disagreement over the precise words used by Rich, even one of the Secretary's own witnesses, Daryl Baker, agrees that Rich did not say he would hire all of Whitaker's employees. I, therefore, find Rich's testimony to be the most credible. Indeed, Rich projected that of Whitaker's work force of about 155 employees (110 of whom worked on the mine site) he planned on retaining only 65. Rich nevertheless invited all Whitaker miners to apply for jobs with Ikerd-Bandy and more than one hundred Whitaker miners, including Gay, did apply.

As noted, Ikerd-Bandy hired Whitaker's former superintendent, Sizemore, on July 1, 1994 to help with the transition. Around July 2-3, 1994, Ikerd-Bandy's operations manager, Stephen Huey, and Sizemore interviewed every Whitaker miner who applied for work with Ikerd-Bandy, including Gay. Within a week of Whitaker's closing, Ikerd-Bandy commenced mining operations at the same site but with only about sixty-five miners, not including Gay.

Indeed, while some circumstantial evidence, including knowledge of protected activity and timing, may suggest an illegal motivation for not hiring Gay in July 1994, I find that such evidence is neutralized by other credible evidence, the absence of credible evidence of disparate treatment, and, on balance that the Secretary has failed to sustain her burden of proving such unlawful motivation.[4] I have considered, in this

[4] I have also considered the subsequent purported statement on January 3, 1995, of Huey that they would not hire Gay because he filed the instant proceedings. While this statement, if made, would clearly show animus toward Gay's protected activity of

regard, the long history of Gay and co-workers, Durscle Stephens and Prentiss Baker, for filing safety complaints while employed by Whitaker and working for Sizemore but without evidence of previous retaliation. Indeed, several of these former Whitaker employees with long histories of filing safety complaints were offered jobs and hired by Ikerd-Bandy. I also find credible the testimony of Ikerd-Bandy's president, William Rich, as to the hiring procedures followed in July 1994, based upon unprotected rationale (Tr. 229-235), and that he planned to and did retain only 65 of the 155-man workforce maintained by his predecessor, and the evidence that Sizemore had no input as to Ronnie Gay (Tr. 204, 217).

It is also noteworthy that Gay himself admitted that he has no knowledge as to how Ikerd-Bandy chose its employees and was only speculating that he was not hired because he had filed pre-shift reports. Finally, there is no credible evidence of disparate treatment of Gay based upon his protected activity and, indeed, there is no credible evidence that anyone less qualified than Gay was hired by Ikerd-Bandy before Gay himself was hired.

It should be noted that even assuming, *arguendo*, the Secretary had established a *prima facie* case of discrimination, the above evidence would nevertheless establish an affirmative defense that Ikerd-Bandy would not have hired Gay in July 1994, for unprotected reasons alone.

Under the circumstances this discrimination proceeding must be dismissed.

ORDER

Discrimination Docket No. KENT 95-597-D is hereby dismissed.

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filing the instant discrimination case and could very well provide grounds for an independent cause of action, I do not, in any event, find this evidence to be sufficiently connected to the claim in this case to have any decisive bearing.

Gary Melick
Administrative Law Judge
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