

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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January 10, 2001

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, on behalf of	:	
DEWAYNE YORK,	:	Docket No. KENT 2001-22-D
Complainant	:	BARB-CD-2000-06
v.	:	
	:	BR&D #3 Mine
BR&D ENTERPRISES, INC,	:	Mine ID 15-18028
Respondent	:	

ORDER GRANTING MOTION TO AMEND COMPLAINT **ORDER DENYING RECONSIDERATION OF ORDER DENYING** **MOTION TO DISMISS THE COMPLAINT**

This matter is before me on a Complaint of Discrimination filed by the Secretary of Labor on behalf of Dewayne York pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (the "Act"), 30 U.S.C. § 815(c)(2). By Order dated December 19, 2000, Respondent's motion to dismiss the complaint was denied. Thereafter, Respondent filed a reply to the Secretary's opposition to its motion to dismiss and included an affidavit in support of a claim of prejudice. The reply will be considered a request to reconsider the Order denying the motion to dismiss. The Secretary has moved to amend the complaint to include a demand for assessment of a civil penalty in the amount of \$7,000.00. Respondent has opposed that motion, in essence on the basis of the previously rejected timeliness argument. For the reasons set forth below, Respondent's request for reconsideration of the denial of its motion to dismiss is denied and the Secretary's motion to amend the complaint is granted.

The Motion to Dismiss the Complaint

Respondent's reply reiterates its position that the Secretary must initially demonstrate good cause for the late-filing of a discrimination complaint, before the issue of prejudice is addressed. The argument is misplaced and is again rejected. The authorities cited by Respondent are administrative law judge decisions dealing with situations where a *miner* has failed to timely file a complaint of discrimination with MSHA¹ or the Secretary did not timely file a civil penalty

¹ *Lamas v. Duval Corp.*, 9 FMSHRC 306 (February 1987).

proceeding.² Those situations are not presented here. Respondent's allegations are directed at delay by the Secretary. As noted in the original order, there is settled Commission precedent to the effect that the Secretary's failure to comply with time limits for filing a complaint of discrimination should not result in dismissal absent a showing of material legal prejudice. *Secretary of Labor on behalf of Hale v. 4-A Coal Co., Inc.*, 8 FMSHRC 905, 908 (June 1986); *Secretary of Labor on behalf of Nance v. Nally & Hamilton Enterprises, Inc.*, 16 FMSHRC 2208, 2215 (November 1994). The Secretary is not required to demonstrate good cause for the untimely filing of a discrimination complaint before the issue of prejudice is addressed.

Respondent's reply includes a specific claim of prejudice, i.e., that the delay has resulted in additional expenditures in the form of payment of wages to the Complainant pursuant to an economic reinstatement agreement. While Respondent's exposure under the economic reinstatement agreement may have been increased due to the Secretary's delay, its decision to forego performance of work by Complainant was voluntary, and, in any event, the economic detriment claimed does not constitute material legal prejudice to its ability to defend against the allegations.

The Complainant was discharged on May 25, 2000. The Secretary filed an Application for Temporary Reinstatement on behalf of Complainant and on August 29, 2000, following a hearing, a Decision and Order of Temporary Reinstatement was issued directing Complainant's immediate reinstatement to his former position at the same rate of pay and benefits. Complainant did not actually return to work, however, because the parties agreed to economic reinstatement, i.e., the Complainant would receive pay and benefits as if employed, but would not actually return to work. Respondent, therefore, agreed to forego Complainant's actual performance of work until a decision on the merits of his discrimination allegation was made.

The prejudice alleged is that the Secretary's delay of approximately two months in filing the complaint, has caused Respondent to pay more money to Complainant than it otherwise would have. Respondent argues that it "is unconscionable for the Secretary to obtain an order of reinstatement utilizing the *de minimis* standard of 'not frivolously brought,' obtain an order of economic reinstatement for the complainant to the economic detriment of the respondent, and then fail to timely act in the filing of a discrimination complaint * * *."³ While Respondent's argument has legitimate appeal from a fairness standpoint, it fails, both factually and legally, to justify dismissal of the complaint.

² *Secretary of Labor v. Hudgeons*, 22 FMSHRC 272 (February 2000), erroneously cited in the reply as *Secretary o/b/o Hudgeons v. Ash Grove Cement Co.*

³ Reply at p. 3.

Factually, the only order obtained by the Secretary on behalf of the Complainant was an order directing his reinstatement to his former position.⁴ Under that order, Respondent is obligated to pay the Complainant commensurate with his earnings prior to his discharge. Respondent, in turn, was entitled to Complainant's performance of his employment obligations. The Decision and Order of Temporary Reinstatement did not envision any economic or other detriment to Respondent, but, merely the avoidance of economic hardship to Complainant while his complaint was being investigated and resolved.

While the authority relied upon by Respondent, *Farmer v. Island Creek Coal Co.*, 13 FMSHRC 1226, 1231 (May 1991), marginally supports its argument that expenses resulting from delay can be considered in the prejudice analysis, that case makes clear that a demonstration of material legal prejudice sufficient to justify dismissal requires much more than Respondent alleges here. As *Farmer* makes clear, the type of legal prejudice that must be demonstrated to have resulted from "serious" delay is a significant impairment of a respondent's "meaningful opportunity to defend." *Id.* Cited as examples were "tangible evidence that has since disappeared, faded memories, or missing witnesses." *Id.*, quoting from *Schulte v. Lizza Indus. Inc.*, 6 FMSHRC 8, 13 (January 1984).

Respondent's demonstration fails when measured against this standard. First, it is not at all clear that the relatively minor delay of approximately two months has caused increased expenditures for Respondent. While arguable, it is far from certain that the delay in filing of the discrimination complaint will result, or has resulted, in a corresponding delay in its ultimate resolution. It is also unclear whether Respondent could have avoided unanticipated lengthening of the economic detriment that it voluntarily undertook. It might have, for example, sought relief from the economic reinstatement agreement once the theoretical last day for filing the complaint passed.

Even if Respondent suffered its claimed economic detriment, however, it is simply not the type of prejudice that could rise to the level of material legal prejudice justifying dismissal of the complaint.

Accordingly, Respondent's request to reconsider the order denying its motion to dismiss the complaint is **DENIED**.

⁴ By letter dated October 11, 2000, the parties submitted a proposed amendment to the Decision and Order of Temporary Reinstatement, entitled: "Agreed Order on Economic Reinstatement." Because of concerns about jurisdiction that were not addressed in the submission, it was returned to the parties for possible re-filing either with the undersigned or with the Commission itself.

The Secretary's Motion to Amend the Complaint

The original complaint filed in this case included a prayer for “assessment of an appropriate civil money penalty against the respondent for its violation of * * * the Act.” Complaint at pp. 3-4. The Secretary has moved to amend the complaint to specify that the amount of the civil penalty proposed is \$7,000.00, and to add allegations addressed to the penalty criteria specified in § 110(i) of the Act. Respondent has opposed the motion, advancing the timeliness argument relied upon in its motion to dismiss.

Under long-standing Commission precedent, the complaint's initial allegations as to the civil penalty were markedly deficient. In *Secretary of Labor on behalf of Hannah v. Consolidation Coal Co.*, 20 FMSHRC 1293, 1301-02 (December 1998), the Commission noted:

In 1983, the Commission held that the Secretary must propose penalties in discrimination cases, and must support such proposals with allegations on each of the criteria. *Secretary of Labor on behalf of Bailey v. Arkansas-Carbona Co.*, 5 FMSHRC 2042, 2044-48 (Dec. 1983). * * * *

Commission Procedural Rule 44(a) was promulgated to codify this holding. * * * * It requires the Secretary, in connection with any proposed civil penalty for a violation of section 105(c) she alleges in a discrimination complaint, to provide “a short and plain statement of supporting reasons based on the [section 110(i)] criteria.” 29 C.F.R. § 2700.44(a). * * * *

The amendments proposed by the Secretary would remedy the complaint's shortcomings with regard to the civil penalty allegations.

Guided by Fed. R. Civ. P. 15(a), motions to amend pleadings in Commission proceedings are to be freely granted unless the moving party has been guilty of bad faith, acted for purposes of delay, or a hearing on the merits would be unduly delayed. Prejudice to the opposing party may also bar an otherwise permissible amendment. *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1289 (August 1992); *Cyprus Empire Corp.*, 12 FMSHRC 911, 916 (May 1990). There are no allegations of bad faith or undue delay here.

As noted in the discussion of Respondent's argument that the complaint should be dismissed, there is also no legally cognizable prejudice that would be occasioned by granting of the motion. Respondent was on notice, even with the cursory allegations of the initial complaint, that it would be subject to a civil penalty of up to \$50,000.00 if it was found to have violated the discrimination provisions of the Act. 30 U.S.C. § 820(a). The proposed amendments merely specify the amount of the civil penalty proposed by the Secretary and add allegations addressing the penalty criteria.

The Secretary's motion to amend the complaint is hereby **GRANTED**. Respondent shall answer the amended complaint within ten days after service of this Order.

Michael E. Zielinski
Administrative Law Judge

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