

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041
March 10, 1998

GLENN SADLER, : DISCRIMINATION PROCEEDING
Complainant :
v. : BIRM CD 97-05
JIM WALTER RESOURCES, INC., : No. 5 Mine
Respondent : Mine ID 01-01322

ORDER OF DISMISSAL

Before: Judge Feldman

The record reflects the complainant, Glenn Sadler, was terminated by Jim Walter Resources, Inc. (JWR), on June 7, 1989. The respondent asserts Sadler's discharge was based on his unexcused absence from work on June 1 and June 2, 1989, that allegedly violated Article XXII(i)(4) of the National Bituminous Coal Wage Agreement of 1988 between JWR and the United Mine Workers of America. Sadler did not report to work on June 1 and June 2, 1989, because he had been arrested.

Sadler's discharge was the subject of a union grievance proceeding. The arbitration decision supports JWR's contention that Sadler was terminated as a consequence of his unexcused absence from work on June 1 and June 2, 1989. The arbitrator denied Sadler's grievance on July 28, 1989. A copy of the July 28, 1989, arbitration decision was previously provided to Sadler.

On May 19, 1997, approximately eight years after his employment was terminated by JWR, Sadler filed the subject discrimination complaint with the Mine Safety and Health Administration (MSHA) under section 105(c) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. § 815(c). Sadler's complaint stated:

I was not given the opportunity to take personal days off when I had an emergency. My mental state was not stable at the time to make decisions, when confronted later, I was not given the opportunity to rectify the situation.

MSHA conducted an investigation in response to Sadler's complaint. On July 29, 1997, MSHA determined that Sadler's discharge by JWR did not violate section 105(c) of the Mine Act. On August 12, 1997, Sadler filed his discrimination complaint on his own behalf with this Commission. On November 3, 1997, JWR moved for dismissal of Sadler's complaint on timeliness and substantive grounds.

On January 8, 1998, Sadler was ordered to show cause why his discrimination complaint

should not be dismissed as untimely, or, in the alternative, why his discrimination complaint should not be dismissed for failure to state a cause of action under section 105(c) of the Mine Act. Specifically, Sadler was ordered to state why his complaint was not filed within the 60 day filing deadline, and why it was initially filed approximately eight years after his termination. Sadler was also ordered to state whether he agreed with the decision of the arbitrator that his absence from work on June 1 and June 2, 1989, was the reason for his termination. If Sadler believed his absence from work was not the basis for his discharge, Sadler was ordered to specifically describe any safety related protected activity he engaged in while employed by JWR, including the dates of such activity, and whether and why he believed that such activity was a factor in his discharge.

The January 8, 1998, Order to Show Cause was served on Sadler by certified mail. The record reflects Sadler received the Order on January 12, 1998. The Order stated, **ASadler's written response must be filed within 21 days of the date of this Order. Sadler's failure to submit a timely response may result in the entry of a default decision dismissing his discrimination complaint** (emphasis in original).@To date, Sadler has failed to respond to the Order to Show Cause. In view of Sadler's failure to respond, on February 17, 1998, JWR filed a Motion to Dismiss. Sadler has failed to oppose JWR's request for dismissal.

Timeliness Issue

Generally stated, section 105(c) of the Mine Act prohibits a mine operator from discharging a miner as a consequence of any safety related activities engaged in by that miner that are protected by the Act. Section 105(c)(2) of the Mine Act requires a complaining miner to file his discrimination complaint with MSHA within 60 days of the alleged discriminatory discharge. While this 60 day filing period is not jurisdictional in nature, there is a strong public policy against consideration of stale claims that invariably involve faded memories, unavailable witnesses and lost records. *Schulte v. Lizza Industries*, 6 FMSHRC 8, 12-13 (January 1984) (citations omitted). Thus, while reasonable filing delays may be excused on a case-by-case basis upon a showing of justifiable circumstances, Sadler's eight year filing lapse requires a showing of extraordinary circumstances to avoid dismissal of his complaint as untimely. Sadler's failure to provide any basis for his failure to file his discrimination complaint in a timely manner warrants the dismissal of his complaint as untimely.

Substantive Issues

A miner alleging to be a victim of prohibited retaliatory conduct bears the burden of proving a *prima facie* case of discrimination under section 105(c) of the Mine Act. In order to establish a *prima facie* case, a miner must establish that he engaged in protected activity, and, that the adverse action complained of (Sadler's discharge), was motivated in some part by that protected activity. See *Secretary on behalf of David Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-2800 (October 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Secretary on behalf of Thomas Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981).

Sadler's absence from work on June 1 and June 2, 1989, caused by his incarceration, is not protected by section 105(c) of the Mine Act. Moreover, Sadler's complaint fails to allege that he engaged in safety related activity protected by the Mine Act, or, that his June 7, 1989, discharge, immediately following his imprisonment and absence from work, was in any way motivated by activity entitled to Mine Act protection. Accordingly, Sadler's complaint fails to state a cause of action under the anti-discrimination provisions of section 105(c) of the Mine Act.

ORDER

In view of the above, Sadler's May 19, 1997, discrimination complaint is dismissed as untimely. Alternatively, Sadler's May 19, 1997, discrimination complaint **IS DISMISSED** for failure to state a cause of action. Accordingly, the respondent's Motion to Dismiss **IS GRANTED**, and this discrimination proceeding, docketed as Docket No. SE 97-227-D, **IS DISMISSED** with prejudice.

Jerold Feldman
Administrative Law Judge

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