

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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October 3, 2000

RICHARD L. WILSON,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. SE 99-292-DM
v.	:	
	:	SE MD 99-10
	:	
C S R SOUTHERN AGGREGATES,	:	Dogwood Quarry
Respondent	:	

DECISION

Before: Judge Bulluck

This case is before me on an amended discrimination complaint filed by Richard Wilson, alleging that CSR Southern Aggregates (“CSR”) had discriminated against him in violation of section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). Wilson alleged that, on June 26, 1997, CSR terminated him from employment for having reported numerous safety violations to CSR.

Procedural History

On August 27, 1997, Wilson filed a discrimination complaint with the Equal Employment Opportunity Commission (“EEOC”), designating race as the basis, and describing his cause of action as having “been discriminatorily accused of sexual harassment and subsequently discharged on the basis of [his] race, black, a violation of Title VII of the Civil rights Act as amended.” As a consequence of the EEOC’s investigation, Wilson was issued a Dismissal and Notice of Rights on February 26, 1998, concluding that the evidence failed to establish a violation of Title VII, and notifying him of his right to file suit against CSR in U.S. District Court and the time limitation applicable thereto. Thereafter, Wilson sought legal counsel and engaged a private detective agency to investigate the circumstances surrounding his termination, and an investigative report was issued suggesting that the alleged discriminating official may have been motivated by a continued effort to reduce the number of minorities in the company.

On May 18, 1999, pursuant to telephone contact from Wilson the previous day, the Mine Safety and Health Administration’s (“MSHA”) Birmingham, Alabama, office forwarded a discrimination complaint form and cover letter to Wilson, urging him to complete and return the complaint as quickly as possible, and directing him to attach a letter explaining why it had not been filed within the 60-day statutory limitation, if he had failed to do so. Wilson filed his

discrimination complaint with MSHA on July 6, 1999, without providing the requested explanation for delayed filing. Notwithstanding this omission, MSHA investigated Wilson's complaint and on August 26, 1999, issued its determination that no violation of the Mine Act had occurred, and advised Wilson of his right to file a discrimination claim with the Commission, on his own behalf, within 30 days of said notice.

Wilson, *pro se*, filed his discrimination complaint with the Commission on September 24, 1999, and subsequently obtained counsel, whose appearance was entered on March 3, 2000. Thereafter, pursuant to unopposed Motion to Amend Complaint, filed April 24, 2000, Wilson was permitted to amend his complaint to allege protected activity under the Mine Act, which had not been raised previously.

CSR filed a Motion for Summary Judgment on June 15, 2000, seeking dismissal of Wilson's complaint for untimely filing with MSHA. Wilson's Response, filed July 3, 2000, essentially alleges that Wilson was unaware of his right to file a discrimination complaint under the Mine Act until May 18, 1999, when MSHA so advised him and sent him a discrimination complaint form. CSR's Reply, filed July 7, 2000, notes, among other things, that Wilson's EEO complaint was also untimely filed, that Wilson never provided any explanation to MSHA for delayed filing of his complaint, and that CSR would be greatly prejudiced by continued processing of Wilson's complaint. By Order Requesting Clarification, issued July 12, 2000, Wilson was afforded the opportunity to explain a course of behavior that would seem to indicate that Wilson originally believed himself aggrieved based on his race, and that he subsequently sought relief under the Mine Act only after his claim failed under Title VII. Specifically, he was asked to explain the following: 1) why he originally filed his discrimination complaint with the EEOC, rather than MSHA; 2) why he failed to allege the safety-related complaints raised in his amended complaint before the Commission, when he filed his EEO complaint; 3) why he failed to provide written explanation to MSHA, as directed, for untimely filing under the Mine Act; and 4) why he filed his complaint with MSHA seven weeks after he had received the complaint form and instructions. Complainant's Response was filed July 20, 2000, asserting that Wilson was aware that complaints could be filed with MSHA, but that he was unknowledgeable as to the legal requirements of filing or that *discrimination* complaints could be filed with MSHA, and that he essentially received no assistance and information from the EEOC and MSHA regarding filing with MSHA, as well as what appears to be legal advice of a dubious nature. CSR filed a Reply to Complainant's Response on August 7, 2000.

Findings of Fact and Conclusions of Law

Section 105(c) sets forth the time limitation applicable to filing a complaint under the Mine Act:

Any miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against in violation of this subsection may within 60 days

after such violation occurs, file a complaint with the Secretary alleging such discrimination.

The Commission has held that the 60-day time limitation in section 105(c) is not jurisdictional and that justifiable circumstances may excuse non-compliance. *Hollis v. Consolidation Coal Co.*, 6 FMSHRC 21 (1984); *Herman v. IMCO Services*, 4 FMSHRC 2135 (1982). In *Herman*, the Commission found a “prolonged hesitation” of nine months to constitute “extraordinary delay” in filing, and explained the primary objective of imposing time limitations for instituting legal proceedings as assuring 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 witnesses 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 limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

Id. at 2138-39, quoting *Burnett v. N.Y. Central R.R. Co.*, 380 U.S. 424, 428 (1995), quoting *R.R. Telegraphers v. REA*, 321 U.S. 342, 348-49 (1944).

There are several cases that examine whether untimely filing is excusable, by considering factors such as: 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) (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) (ALJ) (delay of 107 days justified by prompt filing after Complainant first became aware of his rights under the Act, filing of substantially identical allegations in workman’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) (ALJ) (10 month delay excused by filing within 65 days of first learning of section 105(c), no claim of prejudice by Respondent); *Secretary of Labor on behalf of Gay v. Ikard-Bandy Co.*, 18 FMSHRC 341 (1996) (ALJ) (3 month delay excused by filing one day after first learning of section 105(c) rights and no claim of prejudice); and the length of delay and whether it has resulted in prejudice to a Respondent, *see Sinnitt, supra* (delay of over 3 years “inherently prejudicial”). Consequently, the lengthier the day, the more substantial the justification required to overcome it. *See Roland A. Avilucea v. Phelps Dodge Corp.*, 19 FMSHRC 1064, 1067 (1997) (ALJ) (“very special circumstances” required to justify delay of over 2 years). Concrete demonstrable prejudice may also occur, e.g., unavailability of witnesses or documents. Factors such these, pertinent to the particular circumstances of each case, must be weighed in order to determine whether the delay has been justified. *Hollis, supra*; *Herman, supra*.

In the instant matter, Wilson filed his discrimination complaint with MSHA on July 6, 1999, almost two years beyond the August 25, 1997 deadline for timely filing. Wilson did file a

discrimination complaint with the EEOC 62 days after his termination, and despite representations made in this proceeding that Wilson did not “word or personally draft” the complaint (he signed it), his claim of protection and the ensuing EEO investigation were based on race alone. Likewise, according to the investigative report arising from Wilson’s engagement of a private investigation of his termination, that inquiry was made solely on the basis of race. Consequently, I conclude that Wilson did not file with the EEOC allegations substantially identical to those ultimately before the Commission. In fact, there is consistency in Wilson’s complaints before the EEOC, MSHA and the Commission, in that they allege race as the basis of the discrimination, and the allegations of activity protected under the Mine Act do not surface until April 24, 2000, when Wilson, through his attorney, was permitted to amend his complaint. The clearest indication of what was on Wilson’s mind--why he felt aggrieved--is his own words and supporting documentation he submitted to the EEOC in close proximity to his termination; all indications are that Wilson thought that he was the victim of racial discrimination. Accordingly, he initially took his complaint to the proper forum, in which, unfortunately, he did not prevail. Apparently, Wilson held the same belief when he engaged the private investigator, since there is no evidence of safety-related issues having been investigated or considered in the report.

Wilson seeks to have his delayed filing excused by claiming that he was unaware that a discrimination complaint could be filed with MSHA. *See Complainant’s Response to Order Requesting Clarification*. However, Wilson’s assertions relative to involvement, as CSR’s safety coordinator, in a previous MSHA investigation, belie his claim of lacking awareness of his rights under the Mine Act. *See Complainant’s Response to Respondent’s Motion for Summary Judgment; affidavit*. Wilson’s references to conversations with EEOC and MSHA officials respecting his case are lacking in specificity, and therefore, difficult to test for truthfulness. However, even if they were substantiated, Wilson’s rendition of both agencies’ conduct, that neither the EEOC nor MSHA advised him to file a discrimination complaint under the Mine Act, is consistent with the evidence as a whole--that Wilson had been advancing his claim on the basis of racial discrimination. Wilson bears some responsibility in articulating his claim; if he believed his termination to have been based, in any part, on safety-related complaints made to CSR, he should have said so. Had he raised these issues, it is probable that his complaint would have reached MSHA earlier in the process. It is noteworthy, when evaluating the course of events, that when MSHA sent Wilson the discrimination complaint form on May 18, 1999, Wilson displayed no diligence in filing that complaint (filed on July 6th), and provided no explanation, as requested, for the two year delay. He has yet to provide a plausible explanation: “I did not include a letter of explanation regarding the date of my filing as I was not advised that it was mandatory.” *Id.*

Clearly, because of this inordinate passage of time, CSR’s ability to defend against the allegations raised in Wilson’s amended complaint has been prejudiced. Overall, Wilson’s attempts to justify his delayed filing--that he made elections out of ignorance--simply do not pass scrutiny. The reasons that he has advanced for pursuing an EEO claim, and hiring a private investigator, suggest some sophistication or, at least, cursory knowledge of his rights under Title VII. Moreover, his own statements evidence a level of knowledge of his rights under the Mine Act. There is no credible evidence of any safety-related complaints having been raised in writing or

discussion during Wilson's pursuit of his civil rights, upon which a conclusion could be drawn that his case was mishandled or that he was ill-advised by the EEOC and MSHA. Consequently, I conclude that Wilson voluntarily elected to pursue his claim with the EEOC, rather than MSHA, in accordance with his belief that CSR terminated him because he is Black. The filing of his complaint with MSHA occurred only after he was unable to prevail under Title VII, and efforts to obtain back pay and reinstatement through a private investigator also proved futile.

ORDER

Based on the factors discussed above, Richard L. Wilson's delay of almost two years beyond the proscribed period for filing a complaint of discrimination with MSHA was not justified and is, therefore, not excused. Accordingly, this discrimination complaint is hereby **DISMISSED**.

Jacqueline R. Bulluck
Administrative Law Judge

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