

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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July, 12, 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	:	

ORDER REQUESTING CLARIFICATION

This case is before me on an amended complaint filed by Richard Wilson, alleging that Respondent, 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.

Wilson filed a discrimination complaint with the Equal Employment Opportunity Commission ("EEOC") on August 27, 1997, and was issued a Right to Sue letter by the EEOC on February 26, 1998, pursuant to the EEOC's determination that Wilson had not been discriminated against on the basis of his race. Subsequently, on May 18, 1999, pursuant to contact from Wilson the previous day, MSHA forwarded a discrimination complaint form to Wilson, along with a letter urging him to complete and return the form as quickly as possible and to attach a letter of explanation for failure to timely file his complaint, if 60 days had elapsed. Wilson filed his discrimination complaint with MSHA on July 6, 1999, without providing the requested explanation for his delayed filing. Despite this deficiency, 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 and the time limitation applicable thereto.

Wilson, *pro se*, filed his complaint of discrimination 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 never been raised previously, and a hearing on the merits was rescheduled for June 27, 2000.

On June 15, 2000, CSR filed a Motion for Summary Judgment, seeking dismissal of Wilson's discrimination complaint for untimely filing with MSHA. Wilson's Response to Respondent's Motion for Summary Judgment, 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 filed its Reply on July 7, 2000, noting, among other things, that Wilson's EEO complaint was also untimely filed, that Wilson never provided any explanation to MSHA for failure to file within the proscribed time, and that CSR would be greatly prejudiced by continued processing of Wilson's complaint.

Wilson's Response raises more questions than it answers. By affidavit, Wilson asserts that, as Quality Control/Site Safety Coordinator at CSR, he had been involved in a previous MSHA investigation of a terminated employee, and because the MSHA investigator had told him that the EEOC had forwarded the discrimination complaint to MSHA because the employee had filed with the wrong agency, he (Wilson) assumed that "filing a complaint through the EEOC was the same as filing an MSHA complaint." Aside from the question of whether Wilson's assumption was reasonable, it would seem curious, at first blush, that Wilson did not initially file his complaint with MSHA, the agency with which he had some familiarity, until one considers that Wilson raised, as CSR's sole motive for terminating him, a basis protected by Title VII of the Civil Rights Act, rather than any safety related activity protected by the Mine Act. Troubling, as well, is Wilson's assertion that sometime around the filing of his EEO complaint, he had contacted MSHA, outlined the facts of his termination and, upon advising MSHA that he had filed a discrimination complaint with the EEOC, was at no time advised that he needed to file a different complaint with MSHA. Assuming that Wilson's rendition of his case to MSHA was consistent with the substance of his EEO race discrimination complaint, it is conceivable and reasonable that he would not have been advised to file a complaint with MSHA at that time. There is no getting around the fact that Wilson selected the proper forum in which to file his discrimination complaint, given his belief that CSR terminated him because he is Black. Equally evident is that, had Wilson initially raised any safety related complaints as bases for his termination, the EEOC, lacking jurisdiction, would have transferred those allegations to MSHA for administrative processing.

In any case, before ruling on CSR's Motion for Summary Judgment, Wilson shall be afforded the opportunity to provide the reasons, with specificity, for the following course of action on his part: 1) selection of the EEOC, rather than MSHA, for filing his discrimination complaint; 2) failure to allege the safety related complaints raised in his amended discrimination complaint before the Commission, when he initially filed his discrimination complaint with the EEOC; 3) failure to provide written explanation to MSHA, as directed, for untimely filing his discrimination complaint; and 4) filing his discrimination complaint with MSHA seven weeks after he had received the complaint form and instructions.

ORDER

Accordingly, it is **ORDERED** that Wilson respond to and/or provide information on the questions specified above **on or before July 21, 2000**. Filing by facsimile is permissible, accompanied by mailed original. Failure to timely and completely respond to this Order may result in issuance of an Order to Show Cause Why the Complaint Should Not Be Dismissed.

Jacqueline R. Bulluck
Administrative Law Judge
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