

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 16, 1996

DANIEL A. HERNANDEZ, : DISCRIMINATION PROCEEDING
Complainant :
 : Docket No. WEST 95-398-DM
v. :
 : American Girl Mine
AMERICAN GIRL JOINT VENTURE, : Mine ID No. 04-04816
Respondent :

ORDER OF DISMISSAL

Before: Judge Manning

On or about May 30, 1995, Daniel A. Hernandez filed a complaint with the Commission. The complaint was assigned the docket number set forth above and was assigned to me on July 12, 1995. In the complaint, Mr. Hernandez states that the complaint "is not a complaint of discrimination" but is a "complaint of how a mine can operate so unsafe and get away with it." It is evident from the complaint that Mr. Hernandez was terminated from his employment, but the reason is not clearly explained. Mr. Hernandez states: "I got fired because I spoke up for myself trying to get the lead miner position and then got a blasting license in order to do things right." (Complaint at 3).

Respondent contends that Mr. Hernandez failed to raise a claim that is protected by the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq. (1988) ("Mine Act"). Respondent alleges that Mr. Hernandez performed a dangerous act, drilling near loaded blast holes, and that the company terminated him for that act.

This case was set for hearing on three occasions but in each instance the hearing was canceled. In telephone conversations, Mr. Hernandez stated that he was not sure that he would proceed with this case on his own and that he looked for an attorney to represent him but was not successful. On February 29, 1996, I ordered the parties to try again to settle this case. Counsel for Respondent advised me that he attempted to contact Hernandez

but that Mr. Hernandez did not respond to his telephone calls or letters.

Because of the age of this case and the fact that Mr. Hernandez's complaint does not appear to allege a violation of section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 815(c)(1988)(the "Mine Act"), I issued an order to show cause to Mr. Hernandez requiring him to explain why this case should not be dismissed. In the show cause order, dated May 3, 1996, I advised Mr. Hernandez that it is not clear that he was alleging that his termination from employment violated the anti-discrimination provisions of the Mine Act. I asked Mr. Hernandez to send me a letter by June 28, 1996, describing his termination and explaining whether he believes that he was fired for making a safety complaint or for refusing to do work that he considered to be unsafe. I also advised Mr. Hernandez that if he did not timely respond to the order to show cause, I would assume that he no longer wishes to proceed with this case and I would issue an order dismissing the case. Mr. Hernandez did not respond to the show cause order.

Section 105(c)(1) of the Mine Act protects miners from retaliation for exercising rights protected under the Mine Act. The purpose of the protection is to encourage miners "to play an active part in the enforcement of the Act" recognizing that, "if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation." S. Rep. No. 181, 95th Cong., 1st Sess. 35 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 623 (1978).

A miner alleging discrimination under the Mine Act establishes a prima facie case by proving 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, 2799-2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981). The mine operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no way motivated by the protected activity. Secretary on Behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). If an operator cannot rebut the prima facie case in this manner, it may nevertheless affirmatively defend by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. Haro v. Magma Copper Co., 1935, 1937 (November 1982).

Mr. Hernandez has not alleged that he engaged in activities protected by the Mine Act. Instead, his complaint states that he loaded four holes with explosives and was trying to unplug a steel bit for the jack-leg drill when his supervisor entered the area. The complaint states that this supervisor believed that Mr. Hernandez was drilling another hole and that he told Hernandez that it was against the law to drill after explosives are loaded. His complaint alleges that his termination was unfair but does not allege that he engaged in protected activity. That is, Mr. Hernandez does not allege that he made safety complaints or refused a work order because he was concerned for his safety.

I dismiss Mr. Hernandez's complaint because he failed to respond to my order to show cause. 29 C.F.R. ' 2700.66. In addition, even if Mr. Hernandez was treated unfairly, he failed to allege a violation of section 105(c) of the Mine Act. I do not have the authority to determine whether Mr. Hernandez's discharge was fair or reasonable. The "Commission does not sit as a super grievance board to judge the industrial merits, fairness, reasonableness, or wisdom of an operator's employment policies except insofar as those policies may conflict with rights granted under section 105(c) of the Mine Act." Delisio v. Mathies Coal Co., 12 FMSHRC 2535, 2544 (December 1990) (citations omitted).

Accordingly, for the reasons set forth above, this proceeding is **DISMISSED**.

Richard W. Manning
Administrative Law Judge

Distribution:

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