

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 15, 2000

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2000-188-D
on behalf of LEVI BUSSANICH,	:	
Complainant	:	Centralia Coal Mine
	:	
v.	:	Mine I.D. 45-00416
	:	
CENTRALIA MINING COMPANY,	:	
Respondent	:	

ORDER GRANTING MOTION TO DISMISS COMPLAINT NO. DENV-CD-97-08
ORDER DENYING MOTION TO DISMISS COMPLAINT NO. DENV-CD-99-13

This proceeding was brought by the Secretary of Labor on behalf of Levi Bussanich against Centralia Mining Company (“Centralia”) under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, *et seq.* (“Mine Act”) and 29 C.F.R. § 2700.50 *et seq.* This case includes four discrimination complaints that Mr. Bussanich filed with the Department of Labor’s Mine Safety and Health Administration (“MSHA”). In the first complaint, DENV-CD-97-08, filed on January 28, 1997, Mr. Bussanich alleges that his foreman prevented him from leaving the shop without a supervisor’s escort because he had raised safety issues with MSHA. In the second complaint, DENV-CD-99-13, filed on February 16, 1999, Mr. Bussanich alleges that he was treated disparately because the company would not accept a work release from his physician when he was ready to return to work after a non-work related injury and he was also required to take a drug test before he could return. In the third complaint, DENV-CD-99-22, filed on August 23, 1999, Mr. Bussanich alleges that he was disparately subjected to a search of his vehicle at the mine. In the fourth complaint, DENV-CD-2000-06, filed December 18, 2000, Mr. Bussanich alleges that he was terminated from employment at the Centralia Mine in violation of section 105(c) of the Mine Act.

The Secretary determined that Centralia violated section 105(c) with respect to each complaint and notified Mr. Bussanich and Centralia of her determination on February 4, 2000. The Secretary filed this case with the Commission on or about February 22, 2000. Centralia filed a motion to dismiss the first two discrimination complaints that Mr. Bussanich filed with MSHA because they are untimely and Centralia was materially prejudiced by the delay. It also contends that Bussanich will not be materially prejudiced by the dismissal of the complaints. The Secretary opposes Centralia’s motion. I consider the facts surrounding each complaint below.

I. Complaint of January 28, 1997, DENV-CD-97-08

Mr. Bussanich contends that he was prohibited from leaving the shop where he normally worked to get supplies because his foreman told him that Anil Puri, a Centralia supervisor, did not want him “out running around looking for more problems.” Mr. Bussanich states that he contacted MSHA and met with an MSHA inspector on January 14, 1997, about safety concerns he had at the mine. Bussanich maintains that Mr. Puri’s actions were in retaliation for his protected activity. The Secretary did not make her determination that Centralia violated the Mine Act with respect to this complaint until February 4, 2000.

Centralia contends that the Secretary’s lengthy delay with respect to this complaint is so extraordinary as to demonstrate prejudice *per se*. It also maintains that it was prejudiced, in fact, by the delay because of changes that occurred at Centralia since Bussanich filed his complaint with MSHA. In early 1998, Centralia’s parent company, PacifiCorp, was acquired by Scottish Power. Scottish Power then sold Centralia to TransAlta in May 1999. TransAlta terminated Centralia’s top managers including Mine Manager Bart Hyita and Human Resources Manager Charles Schultz. Centralia contends that, although it could subpoena these two individuals to testify at a hearing, it could not use them to prepare for trial. Centralia states that it is prejudiced as a result.

The Secretary states that the delay in processing this complaint “occurred primarily because of investigation and personnel difficulties with the field special investigator assigned to investigate this matter.” (S. Response at 2-3). She also cites the fact that Bussanich filed other complaints in 1999 that were interrelated to this complaint. Finally, she maintains that Centralia did not demonstrate that it was prejudiced by the delay. Centralia had a copy of the complaint and interacted with MSHA during the investigation. She states that part of the delay was caused by the fact that MSHA scheduled interviews of some Centralia employees to accommodate the schedule of Centralia’s counsel. She argues that the change in ownership of the company and the fact that some of the top managers no longer work for the company is insufficient to show prejudice.

It is clear that the Secretary violated section 105(c)(3) of the Mine Act by failing to notify Mr. Bussanich of her “determination whether a violation ... occurred” within 90 days of receipt of his complaint. It is also clear that this time-frame is not jurisdictional. The legislative history of the Mine Act states that the deadlines imposed on the Secretary in section 105(c) are not jurisdictional and that the failure of the Secretary to meet them “should not result in the dismissal of the discrimination proceedings; the complainant should not be prejudiced because of the failure of the Government to meet its time obligations.” S. Rep. No. 181, 95th Cong., 1st Sess. 36 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 624 (1978).

In interpreting the deadlines imposed on the Secretary in section 105(c), the Commission concluded that the “fair hearing process envisioned by the Mine Act does not allow us to ignore serious delay by the Secretary in filing a discrimination complaint if such delay prejudicially

deprives a respondent of a meaningful opportunity to defend itself against the claim.” *Secretary of Labor for Donald R. Hale v. 4-A Coal Co., Inc.*, 8 FMSHRC 905, 908 (June 1986). Accordingly, the Commission held that a discrimination complaint is subject to dismissal when the Secretary fails to meet the statutorily imposed deadlines “if the [mine] operator demonstrates material legal prejudice attributable to the delay.” *Id.* This test requires more than a mere allegation of prejudice.

The three-year delay with respect to this complaint was more than 12 times the length of time set forth in the Mine Act. This delay is truly extraordinary. A delay of this length is inherently prejudicial to a mine operator’s ability to defend itself against the allegations contained in a discrimination complaint. The Secretary does not offer any justification for such a lengthy delay. The affidavit attached to the Secretary’s response to the motion details the investigation process in this case, but offers only bureaucratic excuses for the delay. The discrimination complaint does not raise complicated issues. I find that the delay in this complaint was so significant as to constitute prejudice *per se*. The memories of management personnel as well as Mr. Bussanich will have faded over such a long period of time. Testimony about the events will be inherently unreliable and, as a consequence, subject to fabrication.

The Secretary alleges that Mr. Bussanich’s subsequent complaints complicated her review of this complaint. It must be understood that Bussanich’s second complaint was filed two years after his first complaint. Thus, MSHA had two full years to investigate his first complaint without any such complications. The Secretary also blames Centralia for some of the delay. Centralia denies this allegation. Even if I accept the Secretary’s contention that some interviews were delayed at the request of counsel for Centralia, it cannot justify a three-year delay.

It is important to recognize that Mr. Bussanich will not be significantly harmed by dismissing this complaint. Mr. Bussanich was off work for an extended absence shortly after he filed this complaint. He also transferred out of the shop in August 1997. It does not appear that he was under any restrictions concerning travel around the mine for a significant period of time. More importantly, he is no longer working at the mine. Even if Mr. Bussanich were to prevail on this complaint, there is no remedy that I can offer him unless he prevails on his fourth complaint, which would subsume any remedies available here. The only independent remedy that I would be able to impose with respect to this complaint is a civil penalty for a violation of section 105(c) of the Mine Act. The allegations contained in this complaint will still be admissible

For the reasons discussed above, Centralia’s motion to dismiss complaint No. DENV-CD-97-08, filed Bussanich on January 28, 1997, is **GRANTED** and the complaint is **DISMISSED**.

II. Complaint of February 16, 1999, DENV-CD-99-13

Mr. Bussanich maintains that when he was released to return to work by his physician following a non-work related injury, Dave Kendrick, his supervisor, told him to report to the mine on February 5, 1999. Bussanich subsequently learned that Centralia wanted him to take a drug test and meet with the company doctor before returning to work. Mr. Bussanich alleges that after

he took the drug test, the company doctor released him to return to work without restrictions. After Bussanich returned to work, he was sent home because, according to Bussanich, Mr. Puri was “not happy with ... the doctor’s note.” Mr. Bussanich maintains that he was treated differently than other similarly situated employees because he discussed safety matters with an MSHA inspector. He also filed a grievance over the matter.

Centralia argues that Charles Shultz was a principal decision maker and a witness to the relevant events in this complaint. Mr. Shultz was terminated from Centralia’s employment when TransAlta became its parent corporation in May 1999. Centralia argues that although it knows where Messrs. Shultz and Hyita currently reside, these individuals are no longer available to help it prepare a defense to this complaint of discrimination and may indeed be uncooperative because they were terminated by TransAlta. Centralia states that without these two key managers on its “defense team, even [Centralia’s] ability to respond to the Secretary’s discovery, much less prepare [its] own defense, is badly compromised.” (C. Reply at 5). Centralia argues that the Secretary’s delay in prosecuting this complaint materially prejudiced its ability to defend itself against this complaint.

The delay in this complaint was a little less than one year. During this year, Bussanich filed two additional related discrimination complaints with MSHA. The events that Centralia relies upon to demonstrate that it was prejudiced by the delay occurred within the 90-day period set forth in the Mine Act. Thus, even if the Secretary had notified Bussanich within 90 days that she determined that a violation of section 105(c) occurred, Messrs. Shultz and Mr. Hyita would not have been available to help prepare Centralia’s defense. They were apparently terminated in May 1999 and the 90-day period would have ended on or about May 17, 1999. By the time a complaint and answer were filed and the case set for hearing, Messrs. Shultz and Hyita would be no more available than they are at present. Accordingly, I find that Centralia has not demonstrated material legal prejudice.

For the reasons discussed above, Centralia’s motion to dismiss complaint No. DENV-CD-99-13, filed by Mr. Bussanich on February 16, 1999, is **DENIED**.

Richard W. Manning
Administrative Law Judge

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