

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268

January 14, 2003

HAZEL OLSON,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEST 2002-302-D
	:	DENV CD 2001-01
	:	
v.	:	Mine I.D. 48-01355
	:	North Rochelle Mine
TRITON COAL COMPANY,	:	
Respondent	:	

ORDER DENYING MOTION FOR SUMMARY DECISION

On December 27, 2002, Triton Coal Company (“Triton”) filed a motion for summary decision in this case. In the motion for summary decision, Triton maintains that its decision not to hire Hazel Olson could not have been motivated by her protected activity at the Jacobs Ranch Mine because Triton did not know about this protected activity. The motion is supported by two affidavits and deposition testimony. Ms. Olson filed a response in which she states that two witnesses will contradict the affidavit testimony presented by Triton. Her response is supported by a copy of an interview conducted by the Department of Labor’s Mine Safety and Health Administration (“MSHA”).

The Commission’s Procedural Rule at 29 C.F.R. § 2700.67(b) sets forth the grounds for granting summary decision, as follows:

A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows:

- (1) That there is no genuine issue as to any material fact; and
- (2) That the moving party is entitled to summary decision as a matter of law.

The Commission has long recognized that summary decision is an “extraordinary procedure.” *Missouri Gravel Co.*, 3 FMSHRC 2470, 2471 (Nov. 1981). The Commission adopted the Supreme Court’s holding that summary judgment is authorized only “upon proper showings of the lack of a genuine, triable issue of material fact.” *Energy West Mining Co.*, 16 FMSHRC 1414, 1419 (July 1994) (quoting *Celotex Corp v. Catrett*, 477 U.S. 317, 327 (1986)).

After reviewing the entire record, I find that Triton did not establish that “there is no genuine issue as to any material fact.” Because Ms. Olson is proceeding on her own behalf, the fact that her statement is not contained in an affidavit should not be grounds for dismissal. Ms.

Olson states that she has witnesses who will testify that she was not interviewed for a temporary position at the North Rochelle Mine (the “mine”) because she had filed safety and discrimination complaints at the Jacobs Ranch Mine operated by another company in northeast Wyoming. She states that she has evidence that Debbie Noonan, a Triton employee, was well aware of her protected activity. She also states that Charlotte Terry, Human Resources Manager for the mine, conferred with Ms. Noonan when deciding whom to interview for temporary haul truck driver positions. She states that a witness will testify that when presented with Olson’s resume, Terry immediately rejected it without reading or reviewing it.

The Federal Mine Safety and Health Review Commission recognizes that it is very difficult to establish “a motivational nexus between protected activity and the adverse action that is the subject of the complaint.” *Sec’y on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (Sept. 1999). In determining whether a mine operator’s adverse action was motivated by the miner’s protected activity, the judge must bear in mind that “direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect.” *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (November 1981), *rev’d on other grounds*, 709 F.2d 86 (D.C. Cir 1983). “Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence.” *Id.* (citation omitted). In *Chacon*, the Commission listed some of the more common circumstantial indicia of discriminatory intent: (1) knowledge of the protected activity; (2) hostility or animus toward protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. *See also Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 530 (April 1991). In this case, Olson is alleging that the adverse action was Triton’s failure to hire her in spite of her 20-years experience in the mining industry. If she can present credible evidence to support what she has offered in her response to Triton’s motion, she may be able to establish a *prima facie* case of discrimination. Key facts at the heart of this case are in dispute.

For the reasons set forth above, Triton’s motion for summary decision is **DENIED**. The motion fails to establish that there is no genuine issue as to any material fact or that Triton is entitled to summary decision as a matter of law.

Richard W. Manning
Administrative Law Judge

Distribution:

Ms. Hazel Olson, 16 Whoop-Up Canyon Road, Newcastle, WY 82701-9702

Bradley T Cave, Esq., Holland & Hart, P.O. Box 1347, Cheyenne, WY 82003-1347

RWM