

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 2002-305-D
	:	DENV CD 2001-09
	:	
v.	:	Mine I.D. 48-00997
	:	Jacobs Ranch Mine
JACOBS RANCH COAL COMPANY,	:	
Respondent	:	

**DECISION GRANTING RESPONDENT’S MOTION TO DISMISS
ORDER OF DISMISSAL**

Before: Judge Manning

This proceeding was brought by Hazel Olson against Jacobs Ranch Coal Company (“Jacobs Ranch”) under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815 (“Mine Act”) and 29 C.F.R. § 2700.40 *et seq.* The complaint alleges that Ms. Olson was terminated from her employment at the Jacobs Ranch Mine (the “mine”) for engaging in activities protected under the Mine Act. In its answer, Jacobs Ranch denies that it discriminated against Ms. Olson and raises other defenses.

Jacobs Ranch filed a motion to dismiss this case on the grounds that Ms. Olson failed to timely file her complaint of discrimination as required by section 105(c)(2) of the Mine Act. Olson opposes the motion. For the reasons set forth below, the motion is granted and this case is dismissed.

I. FINDINGS OF FACT

Ms. Olson was hired by Kerr-McGee, Inc., on May 17, 1979, to work as a laborer at the mine. Ms. Olson engaged in protected activity while employed by Kerr-McGee. On August 8, 1994, she filed a complaint under section 103(g) of the Mine Act. She also filed two complaints under section 105(c) of the Mine Act, one dated October 5, 1994, and the other dated May 25, 1995. The Department of Labor’s Mine Safety and Health Administration (“MSHA”) investigated her discrimination complaints and determined that Ms. Olson was not discriminated against. She did not file discrimination complaints on her own behalf under section 105(c)(3) of the Mine Act.

On July 23, 1998, Kennecott Energy Company (“Kennecott”) became the owner of the mine. On June 4, 1999, Ms. Olson filed another discrimination complaint with MSHA. When MSHA determined that she was not discriminated against, she did not file a section 105(c)(3) case. Kennecott is the parent company of Jacobs Ranch.

Jacobs Ranch terminated Ms. Olson from her employment on December 4, 1999. It maintains that she was terminated for providing false and misleading statements during a company investigation into two incidents involving her at the mine. Ms. Olson was on a final step disciplinary warning at the time of this incident. Olson believed that she was fired for her protected activity.

On February 16, 2001, Ms. Olson filed a discrimination complaint with MSHA alleging that she was terminated for filing the complaints discussed above under sections 103(g) and 105(c) of the Mine Act. She filed the discrimination complaint after her husband, Emmett Olson, suffered a stroke on January 22, 2001. This stroke caused him to quit his job at the mine. Ms. Olson states that she delayed filing her discrimination complaint with MSHA because she feared that Kennecott would harass and intimidate her husband. She explains that, at the time she was terminated from her employment, she and her husband discussed whether she should file a discrimination complaint. They believed that “Mr. Olson would replace her as a victim of harassment and intimidation because of the protected activity [she engaged in] prior to her termination.” (Olson Opposition 1-2). Olson also believed that if she filed a discrimination complaint with MSHA, her son, Josh Olson, would not be able to obtain a summer job at the mine.

Section 105(c)(2) of the Mine Act provides that any miner who believes that he has been discharged in violation of the Mine Act “may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination.” Ms. Olson filed her discrimination complaint more than 14 months after she was terminated.

II. DISCUSSION WITH FURTHER FINDINGS AND CONCLUSIONS OF LAW

The 60-day period for filing a discrimination complaint under section 105(c)(2) is not jurisdictional. *Hollis v. Consolidation Coal Co.*, 6 FMSHRC 21, 24 (Jan. 1984), *aff’d mem.*, 750 F.2d 1093 (D.C. Cir 1984). The Commission has held that a “miner’s late filing of a discrimination complaint may be excused on the basis of justifiable circumstances, including ignorance, mistake, inadvertence, and excusable neglect.” *Perry v. Phelps Dodge Morenci, Inc.*, 18 FMSHRC 1918, 1921-22 (Nov. 1996) (citations omitted). “[T]imeliness questions must be resolved on a case-by-case basis, taking into account the unique circumstances of each situation.” *Id.* at 1922.

In this case, Ms. Olson was well aware of the 60-day period for filing discrimination complaints. (Olson Dep. at 111-12, Ex. 2 of Motion; Olson Opposition at 8). She was fully aware of her section 105(c) rights. Ms. Olson contends that she delayed filing her complaint out of fear that Jacobs Ranch would retaliate against her husband and her son. She did not file her complaint until her husband could no longer be adversely impacted by filing such a complaint.

I find that Ms. Olson's stated reason for failing to file her complaint on a more timely basis is inconsistent with the facts. She had filed several other section 105(c) complaints while her husband Emmett was employed at the mine. At her deposition, Ms. Olson admitted that Emmett had not been threatened in any way after she filed those discrimination complaints. (Olson Dep. at 109-10, Ex. 2 of Motion). She did not express any specific reasons why she believed that Emmett would suffer any adverse action by the company as a result of her complaint, other than the fact that she no longer worked at the mine. In addition, her son did not apply for a job at the mine until after she filed her discrimination complaint in this case. (Olson Dep. at 6, Ex.2 of Motion). Olson sat on her rights knowing that she had an obligation to file her complaint in a timely manner.

Mines are usually located in rural, sparsely populated areas with the result that close friends and relatives are often fellow employees as well. As a general matter, a miner cannot knowingly delay filing a discrimination complaint because she fears that the filing of the complaint may adversely affect friends and relatives who work at the mine. A delay *may* be justified upon a showing that the fear of serious reprisal can be supported by facts. Speculation that the relative may be the butt of jokes or teasing is not enough. I find that Olson's stated reason for not filing her complaint within 60 days does not qualify as "excusable neglect." A vague, unsubstantiated concern that Emmett would "replace her as a victim of harassment and intimidation" is an insufficient justification for the knowing delay. (Opposition at 1-2).

It is important to keep in mind that this case does not present a situation in which the complainant misunderstood the time constraints in section 105(c). In addition, Olson was not in any way misled about the filing requirements. Thus, the facts presented here are not at all similar to the examples set forth in the legislative history for excusing a late filing: "Circumstances which could warrant the extension of the time-limit would include a case where the miner within the 60 day period brings the complaint to the attention of another agency or to his employer, or the miner fails to meet the time limit because he is misled as to or misunderstands his rights under the Act." (S. Rep. 95-181, at 36, *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624 (1978)).

"Even if there is an adequate excuse for late filing, a serious delay causing legal prejudice to the respondent may require dismissal." *Perry*, 18 FMSHRC at 1922 (citation omitted). The time limit was placed in section 105(c) to avoid "stale claims being brought." *Legis. Hist.* at 624. Jacobs Ranch maintains that it was prejudiced by the delay in this case. It states that during her deposition, Ms. Olson could not offer specific testimony regarding events that she maintains form the basis of her discrimination complaint. Respondent explains that Ms. Olson stated about 70 times during her deposition that she was unable to recall specific facts.

Moreover, two key witnesses for Jacobs Ranch, Chad Anderson and Robert Hammond, now live in Australia. Chad Anderson was the Human Resources Manager for

Jacobs Ranch from July 23, 1998, until April 1, 2002. (Aff. of Stephan Carlisle, Ex. 1 of Motion). Robert Hammond was the General Manager at Jacobs Ranch from May 18, 1999, to May 1, 2001. *Id.* Anderson investigated the circumstances that led to Ms. Olson's termination and also investigated her discrimination complaint. The complaint that Ms. Olson filed with MSHA is short and simply states: "Chad Anderson said that I was fired for giving false information in a Kennecott investigation, I believe I was fired for filing 103s and 105s in the past." Although other individuals were involved in the events that led to her termination, Olson does not dispute that Anderson and perhaps Hammond made the ultimate decision to terminate her. (Olson Dep. at 186, Ex.2 of Motion). These two individuals would not be totally unavailable to testify at a hearing, but the passage of time and the fact that they live and work on the other side of the world will severely constrain the ability of Jacobs Ranch to defend its actions in this case.

Ms. Olson's initial complaint filed with MSHA on February 16, 2001, is found to be excessively stale. The reasons set forth for the delay do not demonstrate any justifiable circumstance for the delay, such as excusable neglect, and Jacobs Ranch suffered at least some degree of legal prejudice because of the delay.

III. ORDER

For the reasons set forth above, the hearing in this case scheduled for February 19, 2003, is **CANCELED**; Jacobs Ranch Coal Company's motion to dismiss is **GRANTED**; and the complaint filed by Hazel Olson against Jacobs Ranch Coal Company under section 105(c) of the Mine Act in this case is **DISMISSED**.

Richard W. Manning
Administrative Law Judge

Distribution:

Mark W. Nelson, Esq., Hall & Evans, 1200 17th Street, Suite 1700, Denver, CO 80202-5817
(Certified Mail)

Laura E. Beverage, Esq., Jackson Kelly, 1099 18th Street, Suite 2150, Denver, CO 80202-1958 (Certified Mail)

RWM