FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

February 16, 2000

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2000-31-D
ON BEHALF OF MICHAEL JENKINS	:	HOPE CD 99-10
AND MICHAEL MAHON,	:	
Complainants	:	Mine No. 1
v.	:	Mine ID 46-08102
	:	
DURBIN COAL, INC.,	:	
Respondent	:	

ORDER

The Secretary of Labor initiated this case by filing a complaint on behalf of two miners, Michael Jenkins and Michael Mahon, alleging that they had been discriminated against in violation of Section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, (Act), 30 U.S.C. § 815(c)(1). Respondent, Durban Coal, Inc., filed a motion to dismiss, or in the alternative, for a more definite statement, contending that the complaint failed to state a claim upon which relief could be granted and otherwise failed to apprize Respondent of the basis of the claims being advanced. Complainants response to the motion further clarified their claims. In it's reply, Respondent continued to maintain that the complaint failed to state a claim upon which relief could be granted and prayed for dismissal or entry of an order directing complainants to file a more definite statement. For the reasons set forth below, Respondent's motion is denied.

The complaint sets forth more than ample allegations of jurisdiction, including that Jenkins and Mahon had a specific employment relationship with Respondent and were miners entitled to the protections of the Act, that Respondent is a mine operator as defined in the Act and that the mine's operations and products enter and affect commerce. It further alleges that:

> Respondent illegally discriminated and retaliated against Complainants by discharging or constructively discharging Complainants, on or about March 2, 1999, because Respondent suspected that complainants had made or caused to be made a Code-A-Phone complaint to MSHA which alleged health and safety violations of the mine Act at Respondent's mine. * * *

Complaint, at p.2. The complaint also advances specific demands for relief. Appended to the complaint as Exhibit A, is the initial complaint of discrimination submitted by Jenkins and Mahon to the Mine Safety and Health Administration (MSHA) on March 3, 1999, which states

that they were discriminated against by being discharged on March 2, 1999 because they "were falsely accused of reporting safety violations to inspectors and for stealing." The MSHA complaint identified the person responsible for the discriminatory action as "Forrest Newsome, Superintendent."

Respondent filed a motion to dismiss or in the alternative for a more definite statement asserting that the complaint was deficient, chiefly because it failed to allege that either of the Complainants had engaged in activity protected by the Act or that there was a causal nexus between protected activity and the adverse action complained of. Respondent also argues that the complaint fails to allege that Respondent committed an adverse action motivated by animus toward a protected activity, which is largely a re-casting of it's first argument.

Complainants opposed the motion, indicating that they were relying on *Secretary on behalf of Moses v. Whitley Development Corp*., 4 FMSHRC 1475 (1982), *aff'd. sub nom, Whitley Development Corp. v. FMSHRC*, 770 F.2d 168 (6th Cir. 1985). In *Moses*, the Commission held that "discrimination based upon a suspicion or belief that a miner has engaged in protected activity, even though, in fact, he has not, is proscribed by section 105(c)(1)." *Id.* at 1480. Complainants did not allege, either in their complaint to MSHA or in the instant complaint, that they engaged in protected activity. Rather, they contend that Respondent was motivated to discharge them by the apparently mistaken belief that they had engaged in protected activity, i.e. making, or causing to be made, a Code-A-Phone complaint to MSHA. Complainants also further explained that a second, or alternative, reason for their discharges was a false allegation that they engaged in stealing, which they contend was a pretext for the illegal personnel actions.

Under Commission Rule 2700.42, a "discrimination complaint shall include a short and plain statement of the facts, setting forth the alleged discharge, discrimination or interference, and a statement of the relief requested." 29 C.F.R. § 2700.42. This notice pleading standard is consistent with the general practice in federal litigation under Fed. R. Civ. P. 8(a) and requires no more than that an opposing party be given fair notice of the claim and the grounds upon which it is based. *Conley v. Gibson*, 355 U.S. 41, 47 (1957); *and see, Carmichael v. Jim Walter Resources, Inc.*, 20 FMSHRC 479, n. 9 at 489 (1998). A complaint need not set forth all facts upon which a claim is based or specify the precise legal theory that would entitle the complainant to relief. *E.g., Crull v. GEM Ins. Co.*, 58 F.3rd 1386, 1391 (9th Cir. 1995); *Harris v. Procter & Gamble Cellulose Co.*, 73 F.3rd 321 (11th Cir. 1996). These liberal pleading rules permit inconsistency in both legal and factual allegations. *Independent Enterprises Inc., v. Pittsburgh Water and Sewer Authority*, 103 F.3rd 1165, 1175 (3rd Cir. 1997).

A motion to dismiss for failure to state a claim, pursuant to Fed. R. Civ. P. 12(b)(6), tests only the formal sufficiency of the claims for relief under the liberal notice pleading standard and can be granted "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spaulding*, 467 U.S. 69, 73 (1984) (citing *Conley, supra*, 355 U.S. at 45-46). The complaint filed on behalf of Jenkins and Mahon easily passes this test.

There is no question that under *Moses*, a miner can state a cause of action for discrimination in violation of § 105(c)(1), by alleging impermissible motivation for adverse action, without claiming to have engaged in protected activity. *See also, Secretary on behalf of Smith, et al. v. Stafford Construction Co.,* 5 FMSHRC 618, 621 (1983). While a specific reference to *Moses* may have helped to clarify the precise legal theory relied upon, it was certainly not required. The complaint alleged that Jenkins and Mahon were subjected to adverse action based upon a motive prohibited by § 105(c)(1). If the complainants can prove facts consistent with those basic allegations, they clearly could be entitled to relief, even if they did not personally engage in protected activity.

Respondent also contends that it needs considerably more information in order to prepare a responsive answer. Without detailed allegations specifying "whether such a [Code-A-Phone] complaint was in fact made and when, whether Complainants made it, and what actions on the part of Durbin indicated that it suspected that Complainants had made it",[1] Respondent asserts that it would not be able to file a complete answer. While Respondent's desire for such information from claimants is understandable, it is difficult to understand how it would be necessary to enable Respondent to admit or deny that it discharged or constructively discharged the Complainants on the date alleged, to admit or deny that if it did so it was motivated by a suspicion or belief that they had engaged in protected activity, or to respond to other allegations in the complaint. Respondent also objects to Complainants' alternative allegations that they were either discharged or constructively discharged, contending that they cannot rely upon theories based upon essentially inconsistent factual allegations. However, as noted *supra*, pleading alternative theories of recovery based upon inconsistent factual premises is clearly permitted. *See also, Perlman v. Zell*, 938 F.Supp 1327, 1337-38 (N.D.Ill 1996). Moreover, while the evidence used to prove those alternative propositions might generally be quite different, the line between discharge and constructive discharge may not always be clear[2] and the essence of both allegations is the same, i.e. that their employment relationship with Respondent was involuntarily terminated.

Upon consideration of Respondent's motion to dismiss or in the alternative for a more definite statement, Complainants' opposition and the reply thereto, the motion be and the same is hereby **DENIED**. Respondent shall file an answer to the complaint on or before **March 3, 2000.**

Michael E. Zielinski
Administrative Law Judge

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[1] Memorandum of points and authorities in support of the motion, at p. 5.

[2] *See, Moses, supra*, 4 FMSHRC at 1479.

Distribution:

M. Yusuf M. Mohamed, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Suite 516, Arlington, VA 22203 (Certified Mail)

David J. Farber, Esq., Alexandra V. Butler, Esq., Patton Boggs, LLP, 2550 M Street, NW, Washington, D.C. 20037 (Certified Mail)

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