

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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August 27, 2014

MONA KERLOCK,
Complainant,

v.

ASARCO, LLC,
Respondent

DISCRIMINATION PROCEEDING

Docket No. WEST 2014-851-M
RM-MD 14-10

Ray Mine
Mine ID: 02-00150

ORDER DENYING RESPONDENT’S MOTION TO DISMISS

Before: Judge Miller

This case is before me on a Complaint of Discrimination brought by Mona Kerlock, on her own behalf, pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c) (the “Mine Act” or “Act”). The Respondent, Asarco, LLC, has filed a motion to dismiss for failure to state a claim. For reasons that follow, I **DENY** Respondent’s motion.

On March 31, 2014 Complainant, Mona Kerlock, filed a discrimination complaint with the Secretary of Labor, Mine Safety and Health Administration. MSHA investigated the complaint and, based upon its review of the information gathered, determined that there was not sufficient evidence to establish that a violation of section 105(c) occurred. Subsequently, on June 17, 2014, Complainant sent to the Commission a letter stylized as a “Request for Appeal” in which she sought to proceed pro se pursuant to section 105(c)(3) of the Act. On August 12, 2014 Respondent filed a motion to dismiss for Complainant’s failure to state a claim. Complainant did not file a response to the motion. As a result, and given that Kerlock is proceeding pro se, information found in the original complaint, and file in general, is relied upon as a part of the basis for this decision.

Asarco argues that this matter should be dismissed due to Complainant’s failure to state a claim of discrimination under section 105(c) of the Mine Act. Specifically, Asarco argues that Complainant failed to allege that she engaged in activity protected under the Act and also failed to allege that she suffered an adverse action as a result of protected activity. Asarco Mot. 1, 7.

Asarco asserts that Complainant did not allege, and did not engage, in protected activity since her complaints involved personal health issues, and not safety hazards specific to the mine. Since the Mine Act protects against hazards in the work environment controlled by the mine operator, and not against problems related to a particular miner, Complainant’s allegation of adverse treatment due to her illness falls outside of the scope of the Mine Act. *Id.* At 8. Next, Respondent contends that the other non-personal-health-related claims of protected

activity cannot be considered protected activity under the Act given that those actions were never brought to the attention of Asarco. *Id.* at 9.

Finally, Asarco argues that Complainant did not allege, and did not suffer, an adverse action given that Respondent's placing of Complainant on short term disability was not an adverse action, and was motivated solely by her doctor's notes and medical condition. *Id.* at 10-11. Based on Complainant's doctor's notes and medical condition, Respondent made a business decision in the interest of safety to place her on paid leave. Doing so prevented any risk of Complainant suffering a severe reaction while driving a haul truck, which would have endangered both Complainant and others. *Id.*

Respondent's motion to dismiss for failure to state a claim is treated as a motion for summary decision for purposes of this order. The Commission's procedural rules do not provide formal guidance on a motion to dismiss for failure to state a claim. However, Commission judges addressing similar motions have been guided by Federal Rules of Civil Procedure 12(b)(6) and 12(c) and treated those filings as motions for summary decision. *See e.g., Sec'y of Labor on behalf of Chaparro v. Comunidad Agrícola Bianci, Inc.*, 32 FMSHRC 1517 (Oct. 2010) (ALJ). I agree and address Respondent's motion to dismiss, first, as I would a motion for summary decision under Commission Procedural Rule 67.

Commission Procedural Rule 67 sets forth the grounds for granting summary decision and requires that it shall be granted only if the entire record 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.

29 C.F.R. § 2700.67. The Commission has explained that summary decision is an extraordinary procedure, and, in reviewing the record, the judge should do so in the light most favorable to the non-moving party. *Energy West Mining Co.*, 16 FMSHRC 1414, 1419 (July 1994); *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007).

In order to establish a prima facie case of discrimination under section 105(c)(1), a complaining miner must show: (1) that they engaged in protected activity; and (2) that the adverse action they complain of was motivated at least partially by that activity. *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (Apr. 1981); *Secretary on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981). A material fact is one that is indispensable to the case, the absence of which would render the case unsupported. *Black's Law Dictionary* 881 (5th ed. 1979). Accordingly, facts addressing these two elements of a 105(c) claim are generally "material" for purposes of a summary decision analysis. In this case, after review of the entire record, I find that there are genuine issues as to material facts.

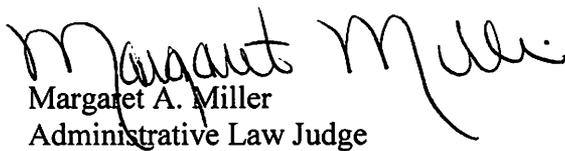
I find that Complainant has alleged facts which contradict those offered by Respondent, and support a finding that material facts are in dispute. Respondent asserts that Complainant did

not allege, and did not engage, in protected activity, nor did she suffer an adverse action. However, Complainant did allege that she, along with others at the mine, complained about dust in the area of 2 Shovel and 5A Dump, and that, subsequently, she was placed on medical leave, without full pay, and sent home despite her contention that she could have worked in other areas at the mine. Kerlock Request for Appeal 1, 3-5. While Respondent asserts that Kerlock's complaints involved personal health issues and not safety hazards specific to the mine, it acknowledges in its motion that driving the haul truck after being exposed to dust could create a hazard. Further, Respondents' argument regarding a lack of adverse action is premised more on its belief that any adverse action was motivated not by protected activity, but rather by other factors, namely doctor's notes and Complainant's medical condition. However, I find that Complainant has alleged facts that could support a viable claim that placing her on medical leave was motivated by her dust complaint. Accordingly, I find that material facts remain in dispute and the Respondent has not demonstrated that there are no facts which could support the claims of protected activity and adverse action.

I also find that the original complaint and subsequent Request for Appeal satisfy the minimal burden for pleadings in a 105(c) proceeding. *See Ribble v. T & M Dev. Co.*, 22 FMSHRC 593, 595 (May 2000). In order to satisfy the Commission's procedural rules, the discrimination complaint need only "include a short and plain statement of the facts, setting forth the alleged . . . discrimination or interference, and a statement of the relief requested." 29 C.F.R. § 2700.42. As discussed above, I find that Complainant has alleged that she engaged in protected activity and suffered an adverse action. Further, I find that her pleadings clearly set forth the relief she is requesting. Kerlock Request for Appeal 4-5. Accordingly, I find that Complainant's pleadings satisfy the Commission's procedural rules. I note that the Commission has acknowledged that, given the difficulty with establishing whether adverse action is motivated by the protected activity, it would be inappropriate to require a pro se litigant to prove the motivation behind the alleged discrimination at such a preliminary stage of the proceeding when only a basic pleading pursuant to Commission Procedural Rule 42 is required. *Perry v. Phelps Dodge Morenci, Inc.*, 19 FMSHRC 1918, 1921 (Nov. 1996).

Finally, I find that Complainant's status as a pro se litigant affords her certain protections from Respondent's challenge to the adequacy of her pleadings. Commission judges have recognized that pro se litigants may not be equipped to make factual and legal determinations. *Fred Estada v. Freeport McMoRan Tyrone, Inc.*, 35 FMSHRC 2313, 2315-2316 (July 2013) (ALJ). The Commission has explained that, in pro se discrimination proceedings under section 105(c)(3) of the act, a complainant's pleadings should be held to a lower standard than those prepared by attorneys, and motions to dismiss for failure to state a claim should be viewed with disfavor and rarely granted. *Perry v. Phelps Dodge Morenci, Inc.*, 19 FMSHRC 1918, 1920 (Nov. 1996); *see also Ribble v. T & M Dev. Co.*, 22 FMSHRC 593 (May 2000). Further, Congress has directed that section 105(c) be "construed expansively" so as to assure that miners not be inhibited from exercising rights under the Mine Act. S. Rep. No. 95-11, at 36 (1977), *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)). Given the leniency advocated by the Commission with regard to review of pro se complainants' pleadings, and Congress' direction that section 105(c) be construed expansively, I find that summary dismissal of this proceeding is inappropriate.

I find that, based on the record before me, a dispute of material fact exists. Further, I find that, while Complainant may have engaged in other protected activities, and suffered other adverse action, she need only allege one set of facts which support her claim, which she has done. Finally, I find that, given Complainant's status as a pro se litigant, it would be inappropriate to summarily dismiss this matter. Asarco's motion is therefore, **DENIED**.


Margaret A. Miller
Administrative Law Judge

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