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P. KREVOKUCH v. CRESCENT HILLS COAL

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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

PAUL KREVOKUCH,
COMPLAINANT

DISCRIMINATION PROCEEDING

v.

Docket No. PENN 84-198-D
PITT CD 84-11

CRESCENT HILLS COAL CO.,
INC.,

RESPONDENT

DECISION

Appearances: Richard W. Schimizzi, Esq., Law and Finance Bldg.,
Greensburg, Pennsylvania
for Complainant;
Jane A. Lewis, Esq., Thorp, Reed & Armstrong,
Pittsburgh, Pennsylvania
for Respondent.

Before: Judge Lasher

This proceeding, which was initiated by the filing with the Federal Mine Safety and Health Review Commission of a complaint of discrimination by Paul Krevokuch on August 9, 1984, arises under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., (1976 & Supp. V 1981), hereinafter "the Act".

By letter dated July 10, 1984, the Complainant had been notified that his complaint of discrimination (filed April 26, 1984) before the Mine Safety and Health Administration (MSHA), had been investigated and the determination made that a violation of section 105(c) had not occurred. Under the Act, a complaining miner has an independent right to bring a second complaint before this Commission and this proceeding is based on that right.

On September 21, 1984, the Respondent filed a motion to dismiss alleging inter alia that the complaint was not timely filed since it was filed more than 60 days after the alleged discriminatory act of Respondent, the discharge of Mr. Krevokuch on February 25, 1983.

A preliminary hearing to determine the issues raised by the motion to dismiss was held on the record in Washington, Pennsylvania on December 13, 1984, at which both parties were represented by counsel.

~1315

The MSHA complaint was filed on April 26, 1984. There is no question but that it was filed with the Secretary approximately 1-year beyond the 60-day period prescribed in section 105(c) of the Act.(FOOTNOTE.1)

The Commission has held that while the purpose of the 60-day time limit is to avoid stale claims, a miner's late filing may be excused on the basis of "justifiable circumstances," Joseph W. Herman v. IMCO Services, 4 FMSHRC 2135 (December 1982). The Mine Act's legislative history relevant to the 60-day time limit states:

While this time-limit is necessary to avoid stale claims being brought, it should not be construed strictly where the filing of a complaint is delayed under justifiable circumstances. 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. No. 181, 95th Cong., 1st Sess. 36 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 624 (1978) (emphasis added).

Timeliness questions therefore must be resolved on a case-by-case basis, taking into account the unique circumstances of each situation.

The reliable and probative evidence of record indicates that the 65-year old Complainant was hired by Respondent on May 1, 1972, as a fire boss. Thereafter he worked as a mine foreman for 9 years until he was discharged on February 25, 1983. During the 2 years he was a fire boss he was a member of the United Mine Workers of America which membership terminated when he became foreman. Complainant, who has a 7th grade education, has not worked since his discharge.

Complainant testified that as mine foreman he was responsible for safety matters but prepared no safety reports, never dealt with MSHA officials, and did not know where the MSHA

~1316

office was located. He did have dealings with the Safety Director and discussed "safety problems" with him (Tr. 24).

Complainant's son-in-law, Robert Kerin, was formerly Safety Coordinator for Respondent until approximately 1978-1979 and is currently Safety Coordinator for Gulf & Western in Tennessee. After conferring with him Complainant filed an age discrimination complaint with the Equal Employment Opportunity Commission (Tr. 15) on or about December 1, 1983 (approximately 7 months after his discharge). The EEOC referred the matter to the Pennsylvania Human Relations Commission (PHRC) where the EEOC matter was pending at the time of the hearing herein (Tr. 45, 119-120). In this complaint (Ex. R-2) Complainant alleged as follows:

I. I was laid off from my position as mine foreman at the Daisytown Mine on February 25, 1983. Since that time the company has refused to recall me. I had worked for them since May 1972. My record is excellent in production, safety and other relevant employment factors. I believe that I am the oldest foreman in the company.

II. On February 25, 1983 General Superintendent, Joseph Reggiannai laid me off. He refused to offer any reason. I have contacted the company many times concerning a recall. I am told that no work is available.

III. I believe that I am being discriminated against because of my age, 64, for the following reasons:

a. I was the oldest senior foreman at Daisytown mine. My employment record is equal superior to that of most other foremen.

b. My position was given to Mr. William Somplaskty. He is about 44 years of age.

c. My lay-off also resulted in the reassignment or promotion of two younger foreman Mr. Felechutti and Mr. Bertoty. Each of them is probably less than 40 years of age.

d. Mr. Bertoty was later laid off and replaced by Bennett a foreman who laid off during 1982. Mr. Bennett is approximately 45 years of age.

e. When Daisytown Mine closed, Mr. Bennett, Mr. Somplaskty and Mr. Reggiannai transferred to Ocean mine. Mr. Reggiannai and Mr. Bennett are still employed there in jobs that I can perform."

In his MSHA complaint (Ex. R-3), Complainant alleged:

"... I believe that I am being discriminated against because of the following:

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2. In January of 1983 I was instructed to mine beyond roof supports and refused to follow their instructions. I feel that they have discriminated against me because of my actions towards my own safety and the safety of my men." (FOOTNOTE.2)

At the hearing herein Complainant repeatedly attributed a third reason for his being discharged: his high wage level. (Tr. 19, 45-46, 144).

The following dialogue is persuasive:

"Q. Why do you think you were discharged or laid off, Mr. Krevokuch?

A. Well, I believe I stated before, I think wages had something to do with it.

Q. And what do you think wages had to do with your lay off or discharge?

A. Making too much money.

Q. You think the company wanted to get rid of you because you were making too much money?

A. Yes, Ma'am.

Q. Do you think anything else had to do with the reason for your lay off or discharge?

A. Well, do you want to get back to the wages, I want to mention one more item?

Q. Go ahead.

A. Mr. Reggianni, at the Pennsylvania Humane Relations Commission mentioned and told Belinda Stern that at the time they laid me off that for what they was paying me, they are paying two Foreman at the present time.

Q. All right. Is there anything else involved, in your opinion, in the reason that you were fired or laid off?

A. All I know is of age and wages, up to that point.

Q. And, why do you think, now, today, as you sit here, why do you think you were fired or laid off?

A. Wages."

(Tr. 45, 46).

** ** * * *

"At one time you thought you were discharged only because of your age; is that correct?

THE WITNESS: Right, Your Honor.

JUDGE LASHER: This morning you thought you were discharged only because of your high wages.

Is that true or false?

THE WITNESS: Well, I believed that that had a part in it.

JUDGE LASHER: That had a part in it?

THE WITNESS: Right, that wages was a part.

JUDGE LASHER: Okay. Is there any other part, then, besides that that you think you were discharged?

THE WITNESS: No, Your Honor.

JUDGE LASHER: You don't think it was because of these safety matters?

THE WITNESS: No. No, Your Honor."

(Tr. 144).

Complainant gave the following account of his discharge by then General Superintendent Joseph Reggianni on February 25, 1983:

"It was very brief. He told me that he was sorry, but that I was laid off." (Tr. 13).

The Complainant also testified that Mr. Reggianni did not tell him why he was being "laid off" (Tr. 14) and that he first learned that he was discharged because of 3 Section 104(d) safety violations he was responsible for from the testimony of company officials at a hearing in Pittsburgh before the PHRC on April 24, 1984 (Tr. 17, 18, 47-57). Two days later, on April 26, 1984 he

filed his discrimination complaint with MSHA.

~1319

Mr. Reggianni testified that the decision to discharge Complainant was made jointly by 3 of Respondent's officials, Mel Pelvehette, co-owner, Jacob Kassab, co-owner and president, and himself because of the 3 violations which occurred over a period of approximately 1 1/2 years. He said that other foremen had received "safety violations" but that Complainant was the only one to get 3 violations. (Tr. 77, 80-84, 122). Mr. Reggianni said that he waited until the end of a pay period on February 25, 1983, to discharge Complainant and that all he said was: "You are terminated on account of 3 104(d) safety violations ..." and that Complainant said "OK" and walked out of his office. (Tr. 77-78, 123). (FOOTNOTE.3) No written termination slip was given Complainant.

Following the occurrence of the last of the 3 violations an MSHA investigation carrying the "possibility of criminal penalties" against Complainant ensued (Tr. 85, 86). Another foreman had been discharged for safety violations approximately 2 years previously (Tr. 125). Complainant alleges, as justification for his 1-year filing delay, that he was not aware until the Pennsylvania HRC hearing that he had been accused of and discharged for "safety" reasons (Tr. 48). The Respondent's contention at that hearing was that Complainant was discharged because of his responsibility for 3 safety violations. Assuming for the sake of argument that this is so, it is not justification. Being responsible for or causing safety violations is not a protected activity under the Mine Safety Act; any delay in learning that this was a mine operator's reason for discharging a miner affords no justification for a filing delay.

Complainant's testimony as to his lack of guilt in the commission of the violations and as to his safety-consciousness in the execution of his duties as foreman does not change the nature of what he learned at the PHRC hearing on April 24, 1984. Had he learned at the PHRC hearing that he was discharged for a protected safety activity and had it been established also that it was the first time he had any reason to believe it was the reason he was discharged, some justification for the filing delay would have been manifested.

~1320

However, learning that one was discharged for committing safety violations is a direct opposite of learning that one was discharged for engaging in "safe mining practices" or exercising safety rights protected under the Act.

Again, while Complainant on the one hand contends that he did not learn he was discharged for safety reasons until April 24, 1984, he, on the other hand, repeatedly maintains that he was discharged because of his high wage level. Had he acquired, on April 24, 1984, some basis for believing that he was discharged for engagement in protected safety activities and had some good faith belief that this was the reason, some justification for his delay might have been established. The voucher for Complainant's lack of justification for his late filing is that even now he continues to believe that it was his wage level, not protected safety activities, that brought on his discharge.

The 60-day statutory limitation is not a particularly long filing period in view of the lack of sophistication of the average Complainant and the complexity of some of the legal bases for bringing a discrimination action. On the other hand, the placement of limitations on the time-periods during which a plaintiff may institute legal proceedings is primarily designed to assure fairness to the opposing party by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them. Where, as here, the filing delay is prolonged, it seems a fair proposition to require a clear justiciable explanation therefor.

The length of the time lapse as well as the illogical basis asserted for the delay mandate the conclusion that such delay in filing the complaint was not justified and that it was not timely filed.

ORDER

Respondent's motion to dismiss is granted and this proceeding is dismissed.

Michael A. Lasher, Jr.
Administrative Law Judge

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FOOTNOTES START HERE:-

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1 Although Complainant testified that he asked for re-employment with Respondent after his discharge and was turned down, I conclude that the 60-day filing period should commence on

the discharge date, February 25, 1983, since it is clear from the findings made herein that the discriminatory event occurred on that date and not on some subsequent unspecified and indeterminate date when Complainant may have asked for his job back.

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2 The quoted language, although general and conclusionary, does constitute an allegation of a cause of action cognizable under the Act.

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3 Because of the consistency of Respondent's position, and the inconsistency of Complainant's allegations for his being discharged, Mr. Reggianni's version of the discharge, conversation is accepted as having the greater weight. It is significant that, even under Complainant's account thereof, he did not inquire as to why he was being let go.