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

HARLEY M. SMITH, COMPLAINANT	DISCRIMINATION PROCEEDING
v.	Docket No. KENT 86-23-D
BOW VALLEY COAL RESOURCES INC.,	BARB CD 85-69
RESPONDENT	Docket No. KENT 86-84-D
	BARB CD 86-7
	Oxford No. 5 Mine

DECISION

Appearances: David M. Taylor, Esq., Smith & Carter Law  
Officers, Harlan, Kentucky, for the Complainant;  
Joshua E. Santana, Esq., Brown, Bucalos, Santana  
& Bratt, P.S.C., Lexington, Kentucky,  
for the Respondent.

Before: Judge Weisberger

Statement of the Case

On or about September 18, 1985, Complainant filed a Complaint with the Federal Mine Safety and Health Administration alleging that after making safety complaints to Respondent, commencing on December 13, 1984, he was required to work both as a miner's helper and also as a ventilation man. He also alleged that he was discriminated against unlawfully in that he did not receive benefits "while I was off." On October 21, 1985, Complainant was advised that the Mine Safety and Health Administration determined that a violation of Section 105(c) had not occurred. On or about November 18, 1985, Complainant filed his complaint with the Commission.

On or about November 15, 1985, Complainant filed another complaint with the Mine Safety and Health Administration alleging that he was served a letter, on November 12, 1985, terminating

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his employment, and that the termination is related to his discrimination complaint that he filed on September 18, 1985. On February 24, 1986, the Mine Safety and Health Administration advised Complainant that it determined that a violation of Section 105(c) had not occurred. On or about March 7, 1986, Complainant filed his complaint with the Commission.

Subsequent to notice, these cases were scheduled and heard in Harlan, Kentucky on November 18-19, 1986.

On April 14, 1987, I issued a decision that the Complainant had established a prima facie case that a violation by Respondent of Section 105(c) of the Act occurred when it terminated the former's employment. The decision, by its terms, was not to be final until the issuance of a further order with regard to Complainant's relief. In this connection, the decision of April 14, 1987, ordered the Complainant to do the following:

Complainant shall file a statement within 20 days of this decision indicating the specific relief requested. This statement shall show the amount he claims as back pay, if any, and interest to be calculated in accordance with the formula in Secretary/Bailey v. Arkansas Carbona, 5 FMSHRC 2042 (1984). The statement shall also show the amount he requests for attorney fees and necessary legal expenses if any. The statements shall be served on Respondent who shall have 20 days from the date service is attempted to reply thereto.

On May 8, 1987, Complainant filed a request to be allowed an additional 10 days to comply with the above Order. This request was granted. In a telephone conference call between Counsel for both Parties and the undersigned, it was agreed that the Complainant would have an extension until June 5, 1987, to file his statement with regard to the relief requested. On May 27, 1987, Complainant filed a letter asking that he be immediately reinstated to his former job. On June 15, 1987, in a telephone conference call between Counsel for both Parties and the undersigned, it was agreed that the time for the Complainant to file his statement for relief shall be extended until June 22, 1987, and the Respondent shall have 10 days from June 22, 1987, to file its response. On June 24, 1987, Complainant filed its statement for relief. On June 29, 1987, Respondent filed depositions of Mary Carroll Burnett taken on June 4, 1987, and a deposition of Harley M. Smith taken on May 5, 1987. On June 29, 1987, Respondent filed a Motion for Reconsideration. On July 2, 1987, Complainant filed its opposition to Respondent's motion. On July 9, 1987, Respondent filed its reply to the Complainant's Statement for Relief.

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On July 15, 1987, in a conference call between Counsel for both Parties and the undersigned, Counsel were ordered to submit evidence as to the proper amount of attorney fees to be awarded. Complainant filed a statement on July 15, 1987. On August 3, 1987, Respondent filed a supplement response to Complainant's request for attorney fees. No response was filed by Complainant.

## Discussion

### I. Reinstatement

Complainant has requested reinstatement, and I find that the Complainant should be reinstated to his former position at Bow Valley Coal Resources, Inc.

### II. Back pay

In its response to Complainant's request for back pay, Respondent argues that the latter failed to make a diligent reasonable effort to find new employment. In this connection, Respondent relies on the deposition of Mary Carroll Burnett, a vocational rehabilitation counselor and vocational consultant, who analyzed Complainant's work skills and concluded that he is an excellent candidate for seeking and obtaining employment. She further indicated if a person is truly motivated to obtain work such a person will make a daily effort to seek employment. The Complainant in his deposition indicated that he has searched for employment at least twice a week. Further, in his deposition, as quoted by Respondent on pages two to four of its response to Complainant's request for back pay, the Complainant has detailed some of the sources that he contacted and the frequency with which he contacted them. According to his deposition, in addition to taking two test for Toyota, he applied to nine mines and followed up with these applications at three mines. Thus, I find that the Complainant did make a reasonable effort to obtain employment.

Respondent also argues that the award to Complainant for back pay should be reduced by the unemployment benefits he received during the period of unemployment, in order to avoid unjust enrichment. I reject Respondent's argument and conclude that the Respondent's obligation to make the Complainant whole as the result of the former's acts of discrimination, in violation of Section 105(c) of the Act, should not be reduced by the amount of the Complainant's unemployment benefits. To do so would create a windfall to the Respondent. See *Boitch v. FMSHRC and Neal*, 704 F.2d 275 (6th Cir.1983); *NLRB v. Marshal Field and Company*, 318 U.S. 253, 255 (1943); *NLRB v. Gullett Gin Company*, 340 U.S. 361, 369 (1951).

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Based on the above, I find that the Complainant is entitled to back pay with interest less earned wages in the amounts set forth and calculated in Complainant's statement filed on June 24, 1987.

### III. Attorney Fees

Complainant submitted a statement, on June 24, 1987, which itemizes the time Counsel spent on this case and an "average hourly rate" of a \$100 per hour. Respondent in its reply, which was filed on July 9, 1987, argued that \$100 an hour is excessive inasmuch as Complainant's attorney was admitted to the Kentucky Bar on October 22, 1985, and does not possess any peculiar expertise in the area litigated. Respondent further asserted that there are few experienced Kentucky attorneys who charge \$100 an hour. In a telephone conference call, on July 15, 1987, the Parties were ordered to submit evidence on the issue of the proper attorney fees to be allowed. The only response received from Complainant, a statement filed on July 20, 1987, contains an assertion that \$100 an hours is ". . . . the usual rate for legal services before both the Social Security Administration and the Department of Labor, Federal Black Lung Division." No further documentation of any sort was submitted by Complainant. On August 3, 1987, Respondent filed its supplemental response to Complainant's request for attorney fees, and submitted a copy of an Order of Robert F. Stephens, Chief Justice of the Supreme Court of Kentucky, entered on March 5, 1987, suspending Complainant's Counsel for "nonpayment of dues." Also submitted was an affidavit from Robbin Brock which indicates she is a 1984 law school graduate, and that she has been practicing in Harlan, Kentucky, and that her hourly rate ranges from \$50 to \$75 per hour. Also submitted was an affidavit from Respondent's Counsel indicating that he has been licensed to practice law in the Commonwealth of Kentucky since 1976, and that he is engaged in the practice of law in Lexington, Kentucky and that in the area in which he has particular expertise, his hourly rate is \$90 per hour and that in all other matter his customary hourly rate is \$80 per hour. Further, Respondent has submitted an affidavit from H. Kent Hendrickson, President of the Harlan County Bar Association, in which affiant stated that after contacting other attorneys in Harlan, Kentucky, the range of hourly billing for attorneys in the area of the administrative law with up to 2 years of experience is from \$50 to \$75 per hour. The affiant also stated that he has an excess of 5 years experience in administrative law and bills \$75 per hour for such work.

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In calculating the amount of attorney fees to be allowed the reasonable hourly rate must first be considered. See Hensley v. Eckerhart, 103 S.Ct. 1933 (1983); Blum v. Stenson, 104 S.Ct. 1541 (1984); see also 2 Court Awarded Attorney Fees §57 16.03.

Inasmuch as Complainant is the party seeking attorney fees, he clearly has the burden of proof on this issue. I find that the Complainant has not met his burden in establishing that \$100 is a reasonable rate for an attorney with his experience. Taking into account the affidavits submitted by Respondent, the level of Complainant's Counsel's experience as indicated in the uncontradicted statements made by Respondent, and the complexity of this case, it is concluded that \$50 an hour is a reasonable amount.

Respondent also objected to Complainant's billing at one-quarter hour increments. The only evidence submitted on this issue by Complainant's Counsel is contained in a statement filed on July 15, 1987, wherein Counsel stated that the practice of billing by one-quarter hour increments ". . . is the customary practice in federal litigation, and in fact, is required by the Department of Labor's Division of Coal Mine Workers Compensation, and is also used by the Social Security Administration." Respondent's supplemental response filed on August 3, 1987, contains an affidavit by Respondent's Counsel wherein the affiant indicated that in all matters his customary billing increment is on an one-tenth hour basis. Also in a telephone conference call on July 15, 1987, Counsel for Complainant agreed to delete the last two items contained in the time sheet which were filed along with Complainant's statement on June 24, 1987. Accordingly, Complainant asked for an attorney fee predicated upon 72 total hours.

There were no novel or complex legal issues in this case, and, under the circumstances, I find that the time proffered as expended in this case was excessive, and that a reduction to 50 hours is warranted. Thus I find that Complainant be allowed a reasonable attorney fee of \$2,500 plus cost of \$89.90 as itemized in the statement filed on June 24, 1987.

I further find that the affidavit of Amato Hoskins of June 23, 1987, submitted by Respondent in support of its Motion of Reconsideration, is insufficient to cause me to reconsider my decision of April 14, 1987. Therefore, the Motion for Reconsideration is DENIED

ORDER

Based on the record in the case, it is ORDERED that:

1. The decision issued April 14, 1987, is CONFIRMED and is now FINAL.

2. Respondent shall, within 5 days of this decision, reinstate Complainant to the job that he formerly held at Respondent's Oxford No. 5 Mine.

3. Respondent shall, within 30 days of the date of this decision, pay Complainant the sum of \$2,500 for attorney fees and \$86.90 for expenses.

4. Respondent shall, within 30 days of the date of this decision, pay the Complainant \$52,880.11 representing back pay and interest from November 8, 1985 through June 30, 1987, less earnings during this period. The Respondent shall, in addition, within 30 days of this decision, pay the Complainant back pay and interest, at the rates set forth in Complainant's statement filed on June 24, 1987, for the period from July 1, 1987, until the Complainant is reinstated at his former job.

Avram Weisberger  
Administrative Law Judge