

CCASE:
DONALD BOWLING V. PERRY TRANSPORT
DDATE:
19921228
TTEXT:

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 92-1052-D
ON BEHALF OF	:	
DONALD BOWLING,	:	
Complainant	:	Mine ID 15-13937 and
	:	15-13937 AFW
and	:	
	:	MSHA Case No. BARB CD 92-28
DONALD BOWLING,	:	
Intervenor	:	
	:	
v.	:	
	:	
PERRY TRANSPORT, INC.,	:	
a Corporation; STEVIE CALDWELL,	:	
TRUCKING, INC., a Corporation;	:	
and STEVIE CALDWELL,	:	
an Individual,	:	
Respondents	:	

DECISION

Appearances: Stephen D. Turow, Esq., Office of Solicitor, U.S. Department of Labor, Arlington, Virginia, for Complainant; Tony Opegard, Esq., Lexington, Kentucky, for Complainant; and Sara Walter Combs, Esq., Stanton, Kentucky, for Respondents.

Before: Judge Fauver

This is an application for temporary reinstatement pending final determination of the merits of a miner's complaint of discrimination, under 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq.

The application, filed on September 15, 1992, states that the Secretary reviewed Mr. Bowling's complaint to MSHA and determined that it was not frivolous.

With the parties agreement as to the date, a hearing on the application was held on October 20, 1992. The parties did not object to a posthearing briefing schedule after receipt of the transcript rather than oral arguments and a decision without the transcript. Pending briefs, the Secretary moved that temporary reinstatement, if granted, be made retroactive to October 27, 1992. Respondents filed an opposition to the motion.

At all relevant times, Lost Mountain Mining Co. operated coal mines in Kentucky, producing coal for sale or use in or substantially affecting interstate commerce.

Donald Bowling was employed by Stevie Caldwell Trucking, Inc., from February 1990, to February 7, 1992. He drove a coal truck under the corporation's contract with Perry Transport, Inc., which has had a longstanding contract with Lost Mountain Mining Co. to transport coal produced at its mines.

Stevie Caldwell Trucking, Inc., is a Kentucky corporation that owns one truck. The corporation was established by Stevie Caldwell upon the suggestion and guidance of his father, David Caldwell, as a means of contracting with Perry Transport, Inc., to deliver coal under its contract with Lost Mountain Mining Co. The principal officers of Perry Transport, Inc., are Dewey Grigsby (President), David Caldwell (Vice President) and Zack Caldwell (Secretary-Treasurer).

I find that Stevie Caldwell Trucking, Inc., and Perry Transport, Inc., have close economic and family ties warranting their treatment as co-employers of Donald Bowling as a truck driver. I also find that the history and nature of Stevie Caldwell Trucking, Inc., warrants treating its owner, Stevie Caldwell, individually as a co-employer of Donald Bowling.

The scope of a hearing on an application for temporary reinstatement is "limited to a determination by the Judge as to whether the miner's complaint is frivolously brought" and "the burden of proof shall be upon the Secretary to establish that the complaint is not frivolously brought." 29 C.F.R. 2700.44.

To prevail on a petition for temporary reinstatement, the complainant need only (1) advance a legal theory of discrimination that is not frivolous and (2) produce sufficient evidence to convince the trier of fact that the evidence supporting the legal theory is not frivolous. C H Mining Company, Inc., 14 FMSHRC 1362, 1364-5 (1992).

There can be no argument regarding the sufficiency of Mr. Bowling's legal theory of discrimination: that the Mine Act prohibits discharging a miner for making safety complaints to MSHA. The question is therefore the sufficiency of the evidence to show that the complaint was not "frivolously brought."

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The term "frivolous" describes something "of little or no worth" or something that is not "worthy of serious" consideration; "trifling," "petty," "paltry" and "trivial" are all terms that are synonymous with the word "frivolous." Random House College Dictionary, Revised Edition, 531 (1980). The common meaning of "frivolous" applies and temporary reinstatement should be granted unless the Complainant's position is "clearly without merit." Price and Vacha v. Jim Walter Resources, 9 FMSHRC 1305, 1306 (1987). In applying the term "frivolous" in a similar context, the Supreme Court ruled that a complaint is not frivolous from an evidentiary standpoint unless "the factual allegations [supporting the complaint] are clearly baseless" or "fanciful." Neitzke v. Williams, 490 U.S. 319, 325-7 (1989) (establishing a test for dismissing frivolous prisoner complaints under 28 U.S.C. 1915 (d)); see also: Young v. Kann, 926 F.2d 1396, 1404 (3rd Cir. 1991) (refusing to dismiss a prisoner's complaint as frivolous since the claim was not based upon "completely baseless factual contentions").

The hearing evidence shows a sharp dispute of the facts concerning the termination of Mr. Bowling's employment. Mr. Bowling's version of the facts shows a discharge because of his safety complaints to MSHA. Mr. Caldwell's version shows a voluntary quit having nothing to do with complaints to MSHA.

I do not find that Mr. Bowling's testimony is so incredible or unworthy of belief as to amount to a "frivolous" complaint.

I therefore conclude that the special concern Congress has shown to require temporary reinstatement of a miner unless his claim is frivolous requires temporary reinstatement in this case. This decision is reached without any opinion as to the ultimate merits of the complaint of discrimination.

I also find that the Secretary's motion is well taken to grant temporary reinstatement retroactive to five days after the hearing on the petition, i.e., to October 27, 1992.

ORDER

WHEREFORE IT IS ORDERED that:

1. Respondents, jointly and severally, shall, within 10 days from the date of this Order, reinstate Donald Bowling, pending final determination of the merits of his complaint of discrimination, to the employment position he held immediately before the termination of his employment on February 7, 1992, with the same pay, benefits, duties, and other features of employment that would apply had his employment not terminated. The reinstatement shall be retroactive to October 27, 1992, and shall continue until dissolved, modified, or made permanent by further order.

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2. Respondents, jointly and severally, shall compensate Donald Bowling for any lost wages due to the termination of his employment computed from October 27, 1992, until (1) Donald Bowling is reinstated in compliance with this Order, (2) he refuses an offer of reinstatement, or (3) he fails to accept an offer within five days after receiving a written offer of reinstatement. Interest shall accrue on the back pay in accordance with the Commission's decisions on interest. Provided: Back pay due under this Order shall be reduced by earnings made by Donald Bowling from other employment since October 27, 1992, and may be reduced further by proof of failure to mitigate damages by reasonable and diligent efforts to find other gainful employment since October 27, 1992.

3. The parties shall confer within seven days of receipt of this Order in an effort to stipulate damages and interest due under this Order, and within another seven days report any agreed amount to the judge. If the parties do not agree, counsel for the Secretary and Complainant shall promptly file a statement of proposed damages and interest. After an opportunity to reply, a hearing may be held on any issues of fact concerning damages.

4. Counsel for the Secretary and Complainant shall promptly file a Satisfaction of Order upon Respondents' compliance with this Order.

5. The Secretary's motion for temporary reinstatement retroactive to October 27, 1992, is GRANTED. Provided: the 90-day period for the Secretary to file a complaint for permanent reinstatement (provided in 29 C.F.R. 2700.44(f)) shall run from October 27, 1992. If such a complaint is not filed within 90 days from that date, this Order hereby constitutes a Show Cause Order to the Secretary to show cause in writing why this temporary reinstatement order should not be dissolved effective the 91st day after October 27, 1992.

7. This Decision and Order shall not constitute the judge's final disposition of this proceeding until a decision on damages is issued.

William Fauver
Administrative Law Judge

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Distribution:

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