

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 9, 2013

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner,

and

DAVID QUACH,
Complainant

v.

FERRAIOLO CONSTRUCTION, INC.
AND JOHN FERRAIOLO,
INDIVIDUALLY,
Respondents

DISCRIMINATION PROCEEDING

Docket No. YORK 2012-161-DM
NE MD 2012-01

Mine: Portable Pioneer Plant
Mine ID. 17-00584

ORDER

Before: Judge Rae

This case is before me upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) (2000) (“the Mine Act” or “the Act”).

On July 19, 2013, the Secretary of Labor (“Secretary”) filed a Motion to Amend the Complaint to add John Ferraiolo as a Respondent in his individual capacity. On July 26, 2013 the Respondent, Ferraiolo Construction, Inc., filed an Objection to Petitioner’s Motion to Amend Complaint. For the reasons set forth below, the Secretary’s motion is granted.

The Procedural Rules provide that the Commission’s judges shall be guided by the Federal Rules of Civil Procedure “[o]n any procedural question not regulated by Act, these Procedural Rules, or the Administrative Procedure Act.” 29 C.F.R. § 2700.1(b). Rule 15(a) of the Federal Rules of Civil Procedure provides that leave to amend a complaint shall be “freely given when justice so requires.” Fed. R. Civ. P. 15(a); *Foman v. Davis*, 371 U.S. 178, 182 (1962). The Commission has taken a liberal view when it comes to amending complaints, “especially when... they do not prejudice a party in preparing its defenses.” *Brannon v. Panther Mining, LLC*, 31 FMSHRC 1277, 1279 (2009) (ALJ).

The Secretary moved to amend the complaint to add John Ferraiolo as an individual-respondent on two grounds. First, the Secretary argues that John Ferraiolo violated Section 105(c) of the Act because he is a “person” who terminated David Quach. 30 U.S.C. § 815(c)(1). In its response to the Secretary’s motion, the Respondent does not dispute this argument.

The Mine Act prohibits a “person” from discharging, discriminating, or otherwise interfering with the exercise of the statutory rights of any miner. 30 U.S.C. § 815(c)(1). Section 3(f) of the Mine Act defines a “person” as “any individual, partnership, association, corporation, firm, subsidiary of a corporation, or other organization.” 30 U.S.C. § 802(f).

John Ferraiolo is a “person” under the Mine Act because he is an “individual.” Thus, he is prohibited from “discharging, discriminating, or otherwise interfering” with the statutory rights of the Complainant. John Ferraiolo admitted to discharging Mr. Quach during discovery. Respondent’s Responses to Sec’y of Labor’s First Request for Admissions 6.

While it is not common, individuals have been charged and penalized in discrimination complaints before the Commission and ALJs. *Sec’y of Labor on behalf of Knotts v. Tanglewood Energy, Inc., Fern Cove, Inc., Randy Burke and Randall Key*, 19 FMSHRC 833 (May 1997) remanded to 19 FMSHRC 1291 (July 1997) (ALJ Koutras); *Wagner v. Pittston Coal Group, Clinchfield Coal Company, Jack Crawford, Monroe West, Wayne Fields and Ann McLaughlin, Sec’y of Labor, Gerald Sloce and Kenneth Howard*, 12 FMSHRC 1178 (1990); *Sec’y of Labor on behalf of Bowling v. Perry Transport, Inc., Stevie Caldwell, Trucking, Inc., and Stevie Caldwell*, 15 FMSHRC 836 (1993) (ALJ).

Second, the Secretary argues that John Ferraiolo should be added as a Respondent because there is a risk that he is transferring corporate funds into his personal bank accounts leaving the Complainant without a remedy. On March 21, 2013, a Superior Court Judge found, upon ex parte motion by the Bank of Maine, that there was “a clear danger” that John Ferraiolo would remove or conceal his property in order to make it unavailable to satisfy a claim brought by the Bank of Maine. *Bank of Maine v. Ferraiolo*, No. RE-13-9 (Maine Sup. Ct. Mar. 21, 2013). In light of the Superior Court’s ruling, I have concerns about Mr. Ferraiolo’s financial propriety. Should the Complainant be successful on the merits, any monetary award or penalty would have to be sought through the Bankruptcy Court by the creditor. However, if the allegations that Mr. Ferraiolo is improperly transferring funds are true, then the Complainant may be left without a remedy he may be entitled to.

The Respondents argue they will be prejudiced because they will have to conduct additional discovery, which they argue will add additional expense and will delay the hearing.

The Commission has stated “[m]ere allegations of potential prejudice or inherent prejudice should be rejected,” and a Respondent must demonstrate more than a danger of prejudice to show actual prejudice. *Long Branch Energy*, 34 FMSHRC 1984, 1993 (2012); *PBS Coals*, 2013 WL 3152306 at *16 (May 2013). The Commission has given examples of actual

prejudice, which include the inability of witnesses to appear at hearing or “lateness so great as to unduly delay a hearing.” *Long Branch Energy*, 34 FMSHRC 1984, 1992 (2012).

I do not find the Respondents’ arguments persuasive. The Respondent has not demonstrated that witnesses will be unable to appear at the hearing or that the hearing will have to be delayed. The hearing is set three months from now. The theory under which John Ferraiolo is charged involves the same factual basis as the theory under which the company is charged- there is nothing additional that John Ferraiolo must defend against. Additionally, because the hearing is three months away, there is ample time to conduct additional discovery should the Respondent deem it necessary. The argument that they will incur additional costs of litigation while in bankruptcy is not a concern of this Court. The Act seeks to protect the rights of miners first and foremost. Any personal expense John Ferraiolo incurs will not be a factor in denying the Complainant’s rights should I find he has been discriminated against by the Respondents. Therefore, I find that Respondents will not be prejudiced by the addition of John Ferraiolo as a Respondent.

Any prejudice the Respondent may believe it will incur by this Order is far outweighed by the rights of the Complainant under Section 105(c) of the Act.

WHEREFORE, the Secretary’s Motion to Amend the Complaint is **GRANTED**. The Amended Complaint submitted by the Secretary shall be deemed filed as of the date of this Order. The Respondent, John Ferraiolo, shall have 30 days for file his Answer.

/s/ Priscilla M. Rae
Priscilla M. Rae
Administrative Law Judge

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