

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 Pennsylvania Avenue, NW, Suite 520N
WASHINGTON, DC 20004
TELEPHONE: 202-434-9953 / FAX: 202-434-9949

SEP 14 2016

SECRETARY OF LABOR	:	DISCRIMINATION PROCEEDING:
U.S. DEPARTMENT OF LABOR,	:	
on behalf of KELLY RAWLEY,	:	Docket No. WEST 2016-545-DM
Complainant,	:	MSHA Case No. WE-MD 16-07
	:	
	:	Mine: J.L. Sherman Excavation Co.
v.	:	Mine ID: 43-03100
	:	
	:	
J.L. SHERMAN EXCAVATION CO.,	:	
Respondent.	:	
	:	

**REQUEST FOR STATEMENTS OF POSITION
ON CONFLICT ISSUE**

The court has before it a complaint of discrimination filed by the Secretary of Labor pursuant to section 105(c)(2) of the Mine Act on behalf of Kelly Rawley against J.L. Sherman Excavation Co. In the case, the Secretary alleges that Mr. Rawley engaged in protected activity on October 7, 2015, when he called the Secretary’s Mine Safety and Health Administration (“MSHA”) to complain of unsafe brakes on a front end loader and again in November 12, 2015, when he called MSHA to report he had been terminated following his report about the unsafe brakes. According to the Secretary, Mr. Rawley was later told he had been laid off for winter rather than terminated and that he would return to work in the spring. However, on or about April 12, 2016, Mr. Rawley was fired, and the Secretary asserts the April termination discriminated against Rawley in violation of section 105(c)(1) the Act. The Secretary requests a finding that Mr. Rawley’s rights were unlawfully interfered with by the company in violation of the Act. The Secretary also requests an order requiring the company to fully compensate Mr. Rawley for lost wages and pay-related benefits plus interest, an order requiring the company to compensate Mr. Rawley for consequential damages, expenses and the costs that he incurred as a result of his alleged illegal termination, an order directing Mr. Rawley’s personnel file be expunged of any disciplinary action taken against him as the result of his termination, an order awarding damages for emotional distress and loss of reputation, and the Secretary asks the court to assess a civil penalty of \$25,000 against the company for its alleged violation of section 105(c).¹ Secretary’s First Amended Complaint 3-4. The discrimination case is presently scheduled to go to hearing on October 4, 2015.²

¹ Prior to being assigned the discrimination complaint, the court was assigned an application for Mr. Rawley’s temporary reinstatement. The application was filed by the Secretary on Mr. Rawley’s behalf pursuant to section 105(c)(2) of the Act. *Secretary of Labor Mine Safety and Health Administration (MSHA) on behalf of Kelly Rawley*

Subsequent to scheduling the case for hearing, the court and counsels agreed to have settlement attorneys work with counsels to determine if the matter could be settled in a mutually agreeable way. Order of Assignment to Settlement Attorneys (August 22, 2016). The court has been advised by the settlement attorneys that a settlement does not appear possible and if this remains the case the authority of the settlement counsels will end no later than September 23, 2016. *Id.*

In the meantime, and unbeknownst to the court at the time, in addition to proceeding on Mr. Rawley's behalf in the temporary reinstatement case (Docket No. WEST 2016-467) and in the discrimination case (Docket No. WEST 2016-545-DM), the Secretary filed with the Commission a petition for assessment of civil penalty AGAINST Mr. Rawley. The case is *Secretary of Labor v. Kelly S. Rawley*, Docket No. WEST 2016-605-M. The Secretary's case against Mr. Rawley is brought pursuant to Section 110(c) of the Act and requests the Commission to assess Mr. Rawley with total civil penalties of \$4,700 for violations of the Secretary's safety standards for surface metal and nonmetal mines (30 C.F.R. Part 56) as set forth in a section 104(d)(1) citation and in a section 104(d)(1) order issued on October 15, 2014. The case is presently assigned to Commission Administrative Law Judge Richard Manning and the Secretary is represented in the case by Winfield J. Wilson of the Arlington, Virginia Solicitor's Office, Department of Labor.

The situation is highly unusual. Indeed, the undersigned, who has heard Mine Act cases for over twenty years, recalls no prior instance of assignment to a case in which the Solicitor has brought an action on behalf of a claimant while suing the claimant in another case. In the court's view the situation raises possible conflict of interest issues that should be addressed before the merits of the discrimination complaint are heard.

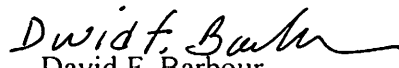
It seems certain to the court that an attorney and his or her law firm could not both represent a client in a case and at the same time sue the claimant in another case. Basic conflict principles would prevent it. *See, e.g., Model Rules of Professional Conduct, Rule 1.* However, the court recognizes that legitimate arguments can be made that conflict principles barring a firm from participating in such dual actions may not be applicable to the Solicitor when she proceeds under the Mine Act. The court is mindful that the Commission, when confronted with a

v. J.L. Sherman Excavation, Docket No. WEST 2016-467-DM. The complaint was the subject of good faith negotiations by counsels for the Secretary and the company. The negotiations resulted in a settlement pursuant to which the company agreed, *inter alia*, to economically reinstate Mr. Rawley to his position as a crusher supervisor at a specified rate, and to provide benefits associated with Mr. Rawley's employment and consistent with those provided pre-termination. On May 26, 2016, the court approved the settlement and the economic reinstatement of Mr. Rawley went into effect. *Approval of Settlement and Orders to Comply* (May 26, 2016).

² After the Secretary filed his discrimination complaint, Mr. Rawley, obtained his own counsel who entered an appearance on Mr. Rawley's behalf.

situation in which the Secretary delayed filing a temporary reinstatement proceeding for a complainant while a section 110(c) investigation was pending against the same complainant, acknowledged the primacy of section 105(c) and proceedings brought under it. *Disciplinary Proceeding*, 24 FMSHRC 28 (January 2002). While not denying the presence of a conflict of interest, the Commission also implied that situations can arise in which the Secretary might properly carry out his responsibilities under both sections 105(c) and 110(c) of the Act. 24 FMSHRC at 33. The Commission's observations, however, are dicta and may, or may not, be applicable to the situation before the court.

The court also notes that when the referenced disciplinary proceeding was at issue the Solicitor expressed her desire to "avoid a conflict of interest between the Solicitor's prosecutorial role as the Secretary of Labor's counsel, and the Solicitor's role in representing miners under the anti-discrimination provision of the Mine Act." 24 FMSHRC at 31. It is not clear to the court whether the Secretary still entertains such a desire. It may be the Solicitor believes that in the case before the court no such conflict exists. Or, it may be she recognizes the conflict but believes she has taken appropriate steps to neutralize it. It will be helpful to the undersigned and to the parties if the parties will state their positions regarding whether or not the Solicitor's representation of the claimant under section 105(c) of the Act and the Secretary's simultaneous suit of the claimant under section 110(c) is permissible and whether the section 110(c) action against Mr. Rawley can remain extant while the Solicitor's section 105(c) case on his behalf goes forward. It will also be helpful to the court if the parties will state their views as to whether and to what extent the Model Rules of Professional Conduct are applicable to the situation. The parties should respond on or before **September 23, 2016**, and they are requested to file their responses by email and to submit hard copies via the United States Postal Service.


David F. Barbour
Administrative Law Judge

Distribution: (1st Class Mail)

Katherine M. Kasameyer, Esq., U.S. Department of Labor, Office of the Solicitor, 300 Fifth Avenue, Suite 1120, Seattle, Washington 98104

Stephen A. Teller, Esq., Teller & Associates, PLLC, 1139 34th Avenue, Suite B, Seattle, Washington 98122

Robin R. McCrosky, Attorney at Law, W. 405 Walnut, Suite 4, Newport, Washington 99156

Jeffrey Sherman, J.L. Sherman Excavation Co., P.O. Box 250, Newport, Washington 99156

Kelly Rawley, P.O. Box 0045, Laclede, Idaho 83841

/db