

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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**SEP 27 2016**

SECRETARY OF LABOR  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
on behalf of KELLY RAWLEY,  
Complainant,

v.

J.L. SHERMAN EXCAVATION CO.,  
Respondent.

DISCRIMINATION PROCEEDING:

Docket No. WEST 2016-545-DM  
MSHA Case No. WE-MD 16-07

Mine: J.L. Sherman Excavation Co.  
Mine ID: 43-03100

**NOTICE OF RESOLUTION OF 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. The complaint alleges that on or about April 12, 2016, Mr. Rawley was fired in violation of section 105(c) of the Act for engaging in protected activity in October and November of 2015. The complaint also alleges that J.L. Sherman unlawfully interfered with Mr. Rawley's exercise of statutory rights on October 6, 2015, when the owner of the company instructed Mr. Rawley not to speak to an MSHA inspector about unsafe brakes on a front-end loader and told him to leave after an argument ensued. Since filing this discrimination complaint, the Secretary has also filed with the Commission a petition for assessment of civil penalty against Mr. Rawley pursuant to section 110(c) of the Act 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 Respondent in the discrimination proceeding alleges that Mr. Rawley was terminated "for reasons entirely unassociated with any alleged protected activity," and that "[o]ne of those reasons was his ongoing complete disregard for safety," of which "[t]he incidents to which the 110(c) [petition] refers are examples." *Resp't's Resp. to Req. for Statement of Position on Conflict Issue* at 1-2.

On September 14, 2016, the court issued a Request for Statements of Position on Conflict Issue. The request noted the highly unusual nature of the Solicitor bringing an action on behalf of a claimant while suing the claimant in another case and the possible conflict of interest issues that could arise from the Solicitor's dual roles in these matters. The court asked the parties to state their positions on whether the Secretary may permissibly assume both roles simultaneously, and whether the 110(c) action against Mr. Rawley could remain extant while the 105(c) case on his behalf goes forward. The court also requested that the parties state their views as to whether and to what extent Rules of Professional Conduct are applicable to this situation. *Req. for Statements of Position on Conflict Issue* at 2-3. On September 23, 2016, counsels for the Secretary, Mr. Rawley, and J.L. Sherman filed responses to the Request.

All parties state that there is no conflict under various Rules of Professional Conduct, because such rules focus on potential conflicts among multiple clients, while the Solicitor only has one client in this case – the Secretary – and there is no attorney client relationship between the Solicitor and Mr. Rawley. *Sec’y’s Position Statement Re: Potential Conflict of Interest* at 4; *Statement of Position of Miner Kelly Rawley Regarding Conflict Issue* at 2; *Resp’t’s Resp. to Req. for Statement of Position on Conflict Issue* at 2. The Solicitor and counsel for Mr. Rawley go on to state that even disregarding the Rules of Professional Conduct, they do not believe there is a conflict because the Solicitor has implemented and followed procedures to address potential conflicts, including informing Mr. Rawley that the Solicitor’s Office represents the Secretary’s interests and does not represent him, allowing Mr. Rawley to retain his own private counsel in this matter (which he has done), and implementing a firewall between the two proceedings involving separate attorneys, in separate offices, supervised by separate managers with no communication between those attorneys. *Sec’y’s Position Statement Re: Potential Conflict of Interest* at 4-5; *Statement of Position of Miner Kelly Rawley Regarding Conflict Issue* at 4. Further, the Solicitor and counsel for Mr. Rawley state that there is no conflict in these specific proceedings because the actions that led to the 110(c) action in 2014 are irrelevant to the question of whether Mr. Rawley was retaliated against in violation of section 105(c) 14 months later. *Id.* Counsel for J.L. Sherman disagrees on this latter point and adds that it “would be extremely prejudicial to J.L. Sherman . . . [i]f it is the Solicitor’s intention to object to the admissibility of information from the 110(c) action to avoid conflict.” *Resp’t’s Resp. to Req. for Statement of Position on Conflict Issue* at 2.

The court has reviewed the responses to its request and has concluded that the case will go forward as scheduled. Any potential issues that may arise regarding the admissibility of evidence related to the 110(c) proceeding will be addressed at the hearing upon counsels’ motions. Further, while the court does not find the question of whether the Solicitor and the complainant have any attorney-client relationship in a section 105(c) discrimination proceeding to be as clear-cut as the parties represent,<sup>1</sup> the court is satisfied that the Solicitor’s Office has

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<sup>1</sup> As the Commission has previously noted,

The first stage at which attorneys from the Solicitor's Office publicly represent the interests of such a complainant is in temporary reinstatement proceedings, for which *only* the Secretary may apply. If the Secretary subsequently concludes that the anti-discrimination provisions of the Act have been violated, she must prosecute a discrimination complaint, “suing on behalf of the complainant.” *Eastern Assoc. Coal v. FMSHRC*, 813 F.2d 639, 644 (4th Cir. 1987); 30 U.S.C. § 815(c)(2). The caption in these cases always reads “Secretary of Labor on behalf of” the miner.” In addition, attorneys in the Solicitor's Office during the course of litigation of a temporary reinstatement or discrimination claim perform many of the same tasks that an attorney in such a case would perform on behalf of a client (such as acting on behalf of the miner in settlement negotiations, etc.).”

*Disciplinary Proceeding*, 24 FMSHRC 28, 34–35 (Jan. 2002) (footnote omitted)

taken sufficient steps to address the specific conflict issues raised by the Model Rules of Professional Conduct.<sup>2</sup>

That being said, the court remains concerned that the Solicitor's Office may feel inhibited from advocating effectively on Mr. Rawley's behalf and presenting the strongest arguments and evidence possible in this discrimination proceeding if the Secretary concludes that any such arguments may undermine his case against Mr. Rawley in the 110(c) proceeding. The potential for this court's findings to have preclusive effect in the 110(c) proceeding further complicates this matter. The court harbors similar concerns regarding effective communication and disclosure between Mr. Rawley and the Solicitor in this case, given the potential for such information to be used by one party against the other in the 110(c) proceeding. The screening procedures implemented by the Solicitor's Office and Mr. Rawley's retention of his own private counsel may help to mitigate these risks. However, the court urges all parties to remain mindful of these concerns and encourages Mr. Rawley's counsel in particular to alert the court at any point if he believes that the Secretary's dual role as Rawley's prosecutor and advocate is limiting effective representation or presentation of evidence in this matter.



David F. Barbour  
Administrative Law Judge

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<sup>2</sup> While Rule 1.11(d) subjects public employees to the Rule 1.7 provisions regarding conflicts among clients with directly adverse interests or among a client and a third person to whom the lawyer owes a responsibility, Comment 2 for Rule 1.11 notes that Rule 1.11(d) does not impute the conflicts of an individual government employee to other associated government employees, although "it will be prudent to screen such lawyers."