

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 Pennsylvania Avenue NW, Suite 520N
Washington, D.C. 20004

November 3, 2015

SANDRA G. MCDONALD,
Complainant,

v.

TMK ENTERPRISE SECURITY,
Respondent.

DISCRIMINATION PROCEEDING

Docket No. WEVA 2014-387-D
HOPE-CD 2013-10

Frasure Creek Mining, LLC
Mine ID 46-07014 5G1

ORDER ON REMAND

Before: Judge Feldman

This case is before me based on a discrimination complaint filed on January 7, 2014, pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c)(3) (2006) (Mine Act). The complaint, filed by Sandra G. McDonald under section 105(c)(3), concerns her employment as a security guard by a security services contractor at a mine site operated by Frasure Creek Mining, LLC, (“Frasure Creek”) during the period, on or about, May 2011 through September 3, 2013. McDonald seeks to recover appropriate relief, including employment reinstatement and back pay under Section 105(c) of the Mine Act,¹ from TMK Enterprise Security Services, Inc. (“TMK”), a business entity that had been incorporated in West Virginia.

However, the evidence of record reflects that TMK’s corporate status was terminated by the state of West Virginia on June 12, 2009. Consequently, McDonald was never employed by TMK prior to its termination as a corporate entity. Rather, McDonald was employed by George King and Mark Toler, the former principles of TMK, who continued to operate their security services business as a non-corporate entity.

Consequently, on February 3, 2015, I issued a stay order to provide counsel with an opportunity to amend the pleading by adding King and Toler as the proper respondents. However, rather than amending the complaint to include King and Toler—who during several

¹ Section 105(c)(1) provides, in pertinent part:

No person shall discharge or in any manner discriminate against ... any miner ... because such miner ... has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator’s agent ... of an alleged danger or safety or health violation in a coal or other mine ... or because such miner ... instituted any proceeding under or related to this Act

30 U.S.C. § 815(c)(1).

telephone conferences had asserted a financial inability to pay any relief claimed by McDonald—McDonald’s counsel sought to substitute Frasure Creek as an entirely new respondent, under a new theory of the case. Specifically, McDonald’s counsel alleged:

Frasure Creek was intimately involved in and had direct knowledge of all of the hazard complaints at issue in this discrimination case, and had a direct role in effectuating an illegal and discriminatory course of conduct, by communicating and consummating an adverse employment action against the Complainant in retaliation for protected activity.

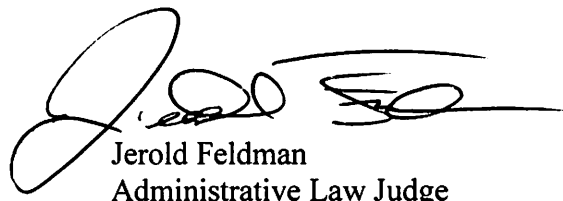
Mot. to Lift Temp. Stay and to Amend Compl., at 2 (Feb. 18, 2015).

On March 12, 2015, I issued an Order Denying McDonald’s Motion to Amend Complaint, which sought to substitute Frasure Creek for TMK, rather than add King and Toler as respondents. McDonald’s motion was denied because McDonald was precluded from bringing a discrimination action against Frasure Creek in a 105(c)(3) proceeding as the allegations of discrimination against Frasure Creek had not been investigated by the Secretary under section 105(c)(2) of the Mine Act. 37 FMSHRC 683, 685 (Mar. 2015) (ALJ); *Hatfield v. Colquest Energy, Inc.*, 13 FMSHRC 544, 546 (Apr. 1991) (citations omitted). The case was dismissed because McDonald’s counsel elected not to amend the complaint to include King and Toler as respondents. *Id.* However, the March 12, 2015, Order noted that the dismissal was *without prejudice* to any subsequent reopening of McDonald’s 105(c)(3) discrimination complaint against King and/or Toler, as individuals. *Id.*

On March 23, 2015, McDonald filed a Petition for Reconsideration with the undersigned that sought to set aside the March 12, 2015, dismissal order by allowing McDonald to add King and Toler as respondents. Shortly thereafter, on March 31, 2015, the Commission exercised review *sua sponte* of the March 12, 2015, Order. On October 23, 2015, the Commission remanded this matter granting leave to McDonald to “amend the complaint to add other relevant parties, including King and Toler,” an opportunity that was essentially previously extended by the undersigned and initially rejected by McDonald. 37 FMSHRC __, slip op. at 5 (Oct. 23, 2015).

ORDER

Consequently, consistent with the Commission’s remand, **IT IS ORDERED** that leave is granted for McDonald to amend her complaint to include King and Toler, as well as any other relevant parties. *Id.* Failure to file an amended complaint **within 30 days of the date of this Order** may result in the issuance of an Order to Show Cause why McDonald’s discrimination complaint should not be dismissed for a failure to prosecute.


Jerold Feldman
Administrative Law Judge

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