FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9933 / FAX: 202-434-9949

February 3, 2016

MICHAEL WILSON, Complainant, v. JARROD FARRIS, DAVID TAYLOR, & ROSS GLAZER, Respondents.	DISCRIMINATION PROCEEDING Docket No. KENT 2015-672-D MSHA Case No. MADI-CD-2015-13 Mine: Parkway Mine Mine ID: 15-19358

ORDER GRANTING RESPONDENTS' MOTION FOR SUMMARY DECISION

Before: Judge Moran

Summary of Order

In this Section 105(c)(3) action brought under the Mine Safety and Health Act, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"), the Respondents have filed a Motion for Summary Decision regarding Michael Wilson's complaint of discrimination. Although discussed more fully *infra*, Wilson's Complaint can be fairly described in a nutshell.

On May 12, 2015, Wilson, a non-employee representative of miners at Armstrong Coal's Parkway Mine, while traveling underground with an MSHA inspector, asserts that three miners, whom he later determined to be employed as ram car drivers at the mine, approached an MSHA inspector and asked the inspector how they could get rid of him as a miners' representative and keep him off of mine property. Wilson contends that, by asking the MSHA inspector how to remove him as a miners' rep, the miners violated section 105(c) of the Mine Act. For this, Wilson seeks to have those miners take training in "miners' rights," including the rights of representatives of miners, and to be ordered to cease and desist from further interference with his rights as a miners' representative. Wilson stated that his complaint is against those three miners, adding expressly that it is not made against Armstrong Coal.

Because Wilson suffered no adverse action, an essential and required element of a section 105(c) complaint, his complaint, fully accepted for the purposes of this Order as factually accurate, fails to make out a prima facie case and therefore the Motion for Summary Decision must be granted and Wilson's Complaint must be dismissed.

Wilson's Complaint of Discrimination

To avoid any suspense or concerns that the preceding summary of Complainant Wilson's claim has been misconstrued, the full text of his June 18, 2015, complaint provides:

> I am a non-employee 'representative of miners' at Armstrong Coal Company's Parkway underground mine. I worked for Armstrong at the Parkway mine from August 2009 until May 6, 2015. Since my employment with Armstrong Coal ended, I have continued to act as a 'representative of miners' at the mine.
>
> On or about May 12, 2015, I traveled underground with a MSHA inspector. That same day, three ram car drivers from the unit approached MSHA Inspector Jeremy Walker and asked Walker how they could get rid of me as a miners' rep and keep me off of mine property.
>
> These actions constitute interference with my rights as a 'representative of miners' under the Mine Act, and violate section105(c) of the Act.
>
> I will provide MSHA with the names of the ram car drivers on the unit and ask that the MSHA Special Investigator interview each of them. When it is determined which miners asked the MSHA inspector how to remove me as a miners' rep, I will amend my discrimination complaint to include their names.
>
> I want each of these miners to be fined for violating section 105(c) of the Mine Act, and I want each of them to be required to take training – taught by MSHA personnel – in miners' rights under the Act, including the rights of 'representatives of miners'. I also want each of the miners to be ordered to cease and desist from interfering with my rights as a 'representative of miners'.
>
> I am not filing this complaint against Armstrong Coal. I am filing it against the three ram car drivers individually.

Compl. of Discrimination Ex. A, at 2.

Respondents' Contentions in Support of Its Motion for Summary Decision

Respondents first contend that, in the context of discrimination claims, there is a significant distinction between words and actions, and that the words ascribed to the Respondents "cannot serve as the underpinnings of a claim of discrimination or interference." Resp'ts' Mem. Supp. Summ. Decision 5. Thus, Respondents argue that the "words," that is to say, the "speech," as "alleged in the complaint cannot constitute action as the term adverse action is used in § 105(c)." *Id.* at 7. That is the case because the exercise of speech in this instance was "'communication' and not 'action' in the § 105(c) context." *Id.*

Beyond that, Complainant cannot show that any adverse action occurred against him from those words. In fact, Respondents note that Wilson did not even plead that there was any adverse action against him.[1] *Id.* As Respondents point out,

> Complainant has totally failed to identify any adverse action that has befallen him as a result of that question. . . . Mr. Wilson does not claim that he was laid off, terminated, sanctioned, reassigned, demoted, removed from the mine, hampered in his movements throughout the mine, physically or economically threatened, or otherwise impacted in any way by the alleged question. He claims no lost wages.

Id. at 6.

Respondents urge that "even if the speech at issue in the instant matter could be deemed 'action' under the law, the legitimate and substantial reasons for Respondents' alleged question to an MSHA representative far outweigh any harm[2] that Mr. Wilson perceives." *Id.* at 7.

<u>The Constitutional Dimension</u>

Respondents note that restrictions on free speech have been consistently circumscribed as limited to the categories of "obscenity, defamation, fraud, incitement, and speech integral to criminal conduct," with the inverse being that the "Constitution demands that content-based restrictions on speech be presumed invalid." *Id.* at 7-8 (quoting *United States v. Stevens*, 559 U.S. 460, 468 (2010); *Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004). Respondents' central point is that "[w]hether the alleged question at issue in the case at bar be deemed an assertion (*i.e.*, overt speech) or an attempt to receive information from MSHA . . . , the United States Supreme Court is steadfast – that question may not be regulated." *Id.* at 8. In this instance, the speech attempted to be silenced is the right of a miner to "question . . . an MSHA inspector about his rights under the Mine Act" and, as that is not within the limited categories of speech which can be restricted, such speech "must likewise be protected." *Id.* at 8.

[1] Respondents assert that the Complainant has failed to plead an essential element of his discrimination and interference claims — namely protected activity. Citing Wilson's Complaint at page 3, paragraph 11, they contend that "[a] close reading of Mr. Wilson's complaint shows that, at best, he claims he was "underground with a [sic] MSHA inspector." Mem. Supp. 6. From this, Respondents assert that Wilson never: "(a) articulates that he was engaged in protected activity at the time of the alleged utterance; (b) identifies what sort of activity he was then conducting; or (c) proffers a causal link or motivation between the alleged utterance, the protected activity, and any purported interference or discrimination." *Id.* The Court rejects this argument. Wilson was engaged in protected activity *per se* by functioning as a miners' representative on the day in question.

[2] In the Court's view, Respondents also correctly point out, Wilson has not identified any articulated harm visited upon him from the question posed by the three miners to the MSHA inspector, and they take special note that his complaint fails to plead or identify any such harm. Mem. Supp. 7.

Respondents also cite to *UMWA, Local Union 9800 v. Secretary of Labor, MSHA or Thomas Dupree*, 3 FMSHRC 958 (Apr. 1981) (ALJ) ("*Dupree* "). Mem. Supp. 9-10. Involved there was a section 105(c) complaint alleging "that the Mine Safety and Health Administration (MSHA) or Thomas Dupree violated [that section] of the Mine Act by threatening a lawsuit against [the local UMWA union] in retaliation for the local notifying MSHA of alleged irregularities in inspections at Peabody Coal Company's Riverview Mine."[3] *Id.* at 958.

As pertinent to this case, the judge, having found that Dupree, an MSHA inspector, was not speaking on behalf of MSHA when he threatened a lawsuit, then examined Dupree's remarks to determine if they constituted a violation of section 105(c), and concluded that those remarks did not constitute interference with the exercise of the statutory rights of any miner, representative of miners.

Of significance to this proceeding, the judge also spoke of First Amendment implications, holding that "[g]rave questions involving the [F]irst [A]mendment protection of the right of free speech would be presented if [he were to] conclude[] that the Mine Safety Act authorized the Commission to punish . . . speech of the kind shown in this record." *Id.* at 962. The judge noted, "It is firmly established that a significant impairment of First Amendment rights must survive exacting scrutiny." *Id.* (quoting *Elrod v. Burns*, 427 U.S. 347, 362 (1975)).

As with this case, the complainant in *Dupree* sought disciplinary action for Dupree's speech, which the judge characterized as communication, not action. Dupree's speech, he determined, "was not physically or economically coercive, nor did it threaten such coercion," and as such it was "'communication' and not 'action' and [therefore] entitled to rigorous [F]irst [A]mendment protection." *Id. at* 962-63.[4] Accordingly, in dismissing the case, the judge rejected construing "the Mine Safety Act in such a way that it would direct punishing the speech found herein to have taken place, even if possible under norms of statutory construction, [as it] would bring it in conflict with a most basic constitutional right." *Id.* at 963.

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[3] As in this case, with this Court's finding that Wilson was engaged in protected activity since he was acting as a miners' representative at the time the miners inquired how they could get rid of Wilson as a miners' representative, the judge in *Dupree* similarly found that the union's notifying activities "were related to safety in the mine and therefore were protected under the Act." *Dupree*, 3 FMSHRC at 961.

[4] The judge also cited Thomas I. Emerson, *The System of Freedom of Expression*, 423-25 (1970), and quoted from Laurence H. Tribe, *American Constitutional Law* 582 (1978):

> [G]overnment regulation *** aimed at the [communication] *** is unconstitutional unless government shows that the message being suppressed poses a "clear and present danger" constitutes defamatory falsehood, or otherwise falls on the unprotected side of one of the lines the court has drawn to distinguish those expressive acts privileged by the [F]irst [A]mendment from those open to government regulation with only minimal due process scrutiny.

Dupree, 3 FMSHRC at 963 (first line alterations in original).

Respondents contend that "[m]aking pure speech such as that alleged by Complainant Wilson actionable under the Mine Act would undermine the very purpose of the Act, itself." Mem. Supp. 10. Pointing to section 2(a) of the Mine Act, which identifies that "the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource – the miner," Respondents assert that Wilson's claim

> runs counter to this first priority of the Mine Act to suggest that a miner working in a dangerous, intensively regulated workplace could somehow be prohibited from asking an MSHA inspector – a lawful representative of the United States Department of Labor and a regulator of the workplace – about his rights in and affecting that workplace.

Id.

Making matters worse, the effect of attempting to silence Respondents' speech is the adverse impact it will have on all miners because any

> miner who [becomes] aware of the instant suit [will] think[] twice about speaking to MSHA about workplace concerns. If asking a simple question about one's rights under the Mine Act is found to be enough to put a hardworking miner through the embarrassment, anxiety, expense, and risk of a Federal Mine Safety and Health Review Commission suit, then miners nationwide would be fools to ever speak up to MSHA.

Id.

Thus, Respondents contend that miners who have developed concerns about a miners' representative at their mine will be intimidated from voicing those concerns. Such a chilling effect, Respondents maintain, runs counter to "the very purpose of the Mine Act." *Id*. at 11.

Last, citing provisions such as section 103(g), the miner informant/witness secrecy provisions of 29 C.F.R. §§ 2700.61 and 2700.62, and section 105(c) itself, Respondents assert that the "Mine Act not only contemplates, not only permits, but encourages miners like Respondents to communicate with MSHA representatives, particularly inspectors."[5] Mem.

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[5] Respondents, observing that "[t]he Mine Act sets forth the circumstances under which a miner may be designated as a representative of miners with the assent of at least two of his/her miner peers," argue that "just as it provides for the designation of representatives of miners, the Mine Act also recognizes that there are circumstances under which they may be removed." Mem. Supp. at 11 (citing 30 C.F.R. § 40.1-.5).

> On or about February 27, 2014, Complainant Michael Wilson ostensibly employed those provisions to have at least two of his fellow miners designate him as a representative of miners. But just as it provides for the designation of representatives of miners, the Mine Act also recognizes that there are circumstances under which they may be removed. 30 C.F.R. 40.5. Respondents' alleged query about how they might go about exercising their rights to remove a

Supp. 11-12. Thus, Respondents here "exercised their protected rights under the Mine Act to communicate with an MSHA representative." *Id.* at 12.

Complainant's Response

The Complainant begins by repeating his objection to the Court's January 12, 2016, Order denying its motion for leave to take discovery:

> Because discovery has not been allowed in this case, the Complainant does not have access to any statements taken by MSHA of the Respondents. Complainant is also not aware if a statement of the MSHA inspector in this case was taken or if a memorandum of interview was prepared. Without any discovery, Wilson only has access to his own statement in this case and to the statement of Brandon Shemwell, and thus, cannot fully and properly respond to Respondents' instant motion.

Compl't's Resp. Opp'n Mot. Summ. Decision 2 ("Response"). As this issue has been decided, the Court proceeds to Complainant's other contentions.

Protected Activity

Complainant alleges that he was engaged in protected activity at the time of the event in issue. The Court agrees that Wilson, simply by being a miners' representative and acting as such at the time of the miners' statements, was engaged in protected activity.[6]

> representative of miners was no more a moment of discrimination and interference than were the conversations Complainant Wilson doubtlessly had with the miners who designated him as a representative or the communications he was required to have with MSHA administrators and mine operators to formalize his designation as a representative of miners. *See, e.g.,* 30 C.F.R. 40.2 and 40.3 (setting out various notifications a representative of miners must give to MSHA and operators upon designation). Whether they involve installing or removing a representative of miners, all such communications are simply the lawful operational outgrowths of the Mine Act. As such, they can never be actionable.

Mem. Supp. at 11. The Court would observe that, while it is easy to note now, in hindsight, at the time Part 40 was promulgated, no one apparently had the foresight to provide any procedure for those who wished to challenge the appropriateness of a miners' representative continuing to serve in that role. In the Court's view, this was a significant omission.

[6] The Court was imprecise in its December 17, 2015, email response, cited by Complainant, when it remarked that "even assuming arguendo that everything in Wilson's Summary of Discriminatory Action is true, it cannot constitute protected activity, for the purposes of a discrimination claim, under the Mine Act." Response at 3. As this Order, the only order addressing the motion for summary decision, makes clear, Wilson was engaged in protected activity. It is the adverse action element that the Court finds wanting.

Adverse Action

Complainant contends that:

> Respondents were attempting to have Wilson removed from the mine property and as a representative of miners in this case. Although the Respondents' attempt to have Wilson removed as a representative of miners and from the mine property was not successful, it nonetheless could be found to have tended to interfere with Wilson's rights as a miners' representative. The report of the Senate Committee provides that '[i]t is the Committee's intention to protect miners against not only the common forms of discrimination, such as discharge, suspension, demotion …, but also against the *more subtle forms of interference*, such as promises of benefits or *threats of reprisal*." S. Rep. No. 95-181 at 36, reprinted in Leg. Hist. at 624 (emphasis added).

Resp. 7.

These contentions mischaracterize what transpired. Respondents were not literally *attempting* to have Wilson removed. Rather, they were *inquiring* about the process to achieve that end. This is an important distinction. Complainant also glides over the fact that Wilson was not removed as the miners' representative. While Complainant *alludes* to the *more subtle forms of interference*, this ignores that the examples he cites — discharge, suspension, or demotion — did not occur, and no analogous *subtle form of interference* form is identified.

Complainant then posits that "[i]f the statutory rights of a representative of miners' are to be construed expansively under the Mine Act, then it follows that an action that interferes with a protected safety right is prohibited, whether the attempted action is successful or not." Resp. 8.

While the Court agrees that the statutory rights of a miners' representative are to be construed expansively, those rights are not limitless. Further, while it follows that an action that interferes with a protected safety right is prohibited, *there was no interfering action here* — the Respondents only inquired how they could get rid of Wilson as a miners' representative and keep him off of mine property.

Complainant next argues that in the context of Respondents' conversation with the MSHA inspector, "not all speech is accorded blanket First Amend[]ment protection [and that] [t]he Commission has repeatedly held that a person's speech can unlawfully interfere with a miner's or representative of miner's protected rights under the Mine Act," citing, among other cases, *Moses v. Whitley Development Corp*., 4 FMSHRC 1475 (Aug. 1982). Resp. at 8.

To be generous, *Moses v. Whitley* is of no value to the analysis of this case. In that case, the Commission addressed "whether an operator violates section 105(c)(1) by interfering with a miner's exercise of a protected right through coercive interrogation and harassment, and whether an operator violates that section by discharging a miner on the suspicion or belief that he has exercised a protected right." *Moses*, 4 FMSHRC at 1475. No coercive interrogation, harassment, or firing occurred here, nor could the inquiry by Respondents "logically result in a fear of reprisal [or] a reluctance to exercise the right in the future." *Id.* at 1479. Thus, the facts

in *Moses v. Whitley* simply are not translatable, nor otherwise at all instructive, to the matter at hand.

Complainant then addresses Respondents' First Amendment arguments, pointing to *Pendley v. Highland Mining Co.*, 37 FMSHRC 301 (Feb. 2015) (ALJ),[7] where an "Administrative Law Judge found that an hourly employee's comments to a non-employee representative of miners constituted unlawful interference under the Mine Act." Resp. 9. As with *Moses v. Whitley*, *Pendley* is not at all analogous. In *Pendley*, the judge found that the miners' representative "faced interference with his walk-around rights, his right to examine books, and his right to make safety complaints." 37 FMSHRC at 311. In contrast to the right to make an inquiry, as in this case, in *Pendley* the miners' representative had his walk-around rights repeatedly interfered with by an individual who conducted himself in an intimidating manner. That individual had a multi-year feud with the miners' representative. *Id.* at 312.

Complainant creates a straw man with his mischaracterization that the "Respondents' 'question' wasn't just about a theoretical right of the miners; it was specifically about how to interfere with Wilson's rights under the Mine Act by having him removed as a miners' rep and removed from mine property." Resp. 8 n.4. In short, Complainant's position is that *no questions at all* may ever be asked about the process for removal of a miners' representative. As discussed further, below, Complainant's contention would place miners' representatives in an exalted, inviolable position.[8]

Complainant also points to *Secretary of Labor on behalf of Mark Gray v. North Star Mining, Inc*., 27 FMSHRC 1 (Jan. 2005), and the Commission's comment that "[w]hether an operator's question or comments concerning a miner's exercise of a protected right constitute coercive interrogation or harassment proscribed by the Mine Act 'must be determined by what is said and done, and by the circumstances surrounding the words and actions.'" Resp. 11 (quoting *Gray*, 27 FMSHRC at 8).

Borrowing dicta from *Gray* is not useful. *Gray* involved a section 105(c)(2) action and whether Gray was threatened by a supervisor and constructively discharged. The events also occurred in the context of federal grand jury investigation. As it relates to the Commission's analysis, its focus involved "[w]hether an operator's question or comments concerning a miner's exercise of a protected right constitute coercive interrogation or harassment proscribed by the Mine Act [with the Commission concluding that the question] must be determined by what is

[7] It goes without saying that decisions by administrative law judges are not precedential. *See Tilden Mining Co.*, 36 FMSHRC 1965 (Aug. 2014); *Campbell Cty. Highway Dept.*, 36 FMSHRC 2579 (Sept. 2014) (ALJ); 29 C.F.R. § 2700.69(d).

[8] At least the Complainant makes his position clear. He cites to the ALJ's decision in *Pendley* in which the respondent "demanded the removal of Pendley as a miners' representative, *which is a remedy beyond MSHA's authority*." Resp. 9 n.5 (quoting *Pendley*, 37 FMSHRC at 314) (emphasis added). Thus, Complainant asserts that "Respondents were likewise seeking an action for which there is no authority" — that is to say, according to Complainant, a miners' representative occupies an unassailable position and *even asking questions* about it constitutes discrimination.

said and done, and by the circumstances surrounding the words and actions." *Gray*, 27 FMSHRC at 8. While Complainant asserts that it is necessary to have discovery concerning, among other lines of inquiry, the circumstances under which the miners made their inquiry, the four corners of Wilson's discrimination report demonstrate that is completely unnecessary.[9] Resp. 11-12. Wilson's discrimination report provides the information necessary to answer the Commission's question.

Discussion

As pertinent here, the Commission's Procedural Rules, at 29 C.F.R. §2700.67(b), provides:

> A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows:
>
> (1) That there is no genuine issue as to any material fact; and
>
> (2) That the moving party is entitled to summary decision as a matter of law.

29 C.F.R. § 2700.67(b).

As the Court noted in its recent Order Denying Complainant's Motion for Leave to Take Discovery, Complainant has asserted that "without taking depositions of the three respondents and the inspectors, th[e] case [would not be] ripe for summary decision because it will rest on speculative facts." *Wilson v. Farris*, No. KENT 2015-672-D, 2016 WL 197491, at *1 (FMSHRC Jan. 12, 2016). Respondents' opposition countered that Rule 67(b) merely provides examples of what may "typically be in a record ripe for summary decision, but those are not required if . . . the Court cognizes legal grounds from which to independently resolve the matter." Resp. to Mot. for Leave to Take Discovery 1. Respondents added that discovery may not be used as an "ever-expansive fishing expedition" and, a related concern, they assert that allowing depositions under these circumstances would put them to inordinate expense. *Id*. at 2.

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[9] From Respondents' very basic and legitimate inquiry about their own rights vis-à-vis those who act as miners' representatives, the fishing expedition would be on, as Complainant would delve into matters such as if the Respondents knew

> anything about what Wilson did as a miners' rep or if they had seen him acting as a miners' rep. Wilson would also inquire if any of the Respondents had any concrete reason – other than being sympathetic towards Armstrong Coal – as to why they wanted him removed as a miners' rep and removed from the mine property. Wilson would also want to know whether Respondents first talked to any members of management at Armstrong Coal about having Wilson removed as a miners' rep and/or removed from the mine property.

Resp. 11-12. Effectively, if permitted, Complainant would be engaging in his own private sector investigation under the guise of discovery.

Finally, Respondents made the point that "a complainant who initiates his own proceeding before the Commission is confined to the four corners of his complaint as it was presented to and investigated by MSHA." *Id.* (citing *Hatfield v. Colquest Energy, Inc.*, 13 FMSHRC 544, 546 (Apr. 1991)).

In its order denying discovery, the Court stated:

> Although [Rule 67(b)] speaks to summary decision, it does not grant to parties an unequivocal right to take discovery prior to the Court ruling on a motion for summary decision. Instead, the ruling on discovery is connected to the nature of the complaint. In section 105(c)(3) discrimination complaints in particular, per the Commission's decision in *Hatfield*, such matters are confined to the miner's complaint to MSHA.

Id. The Court concluded that "where such discovery will not alter the core facts nor materially change the basis of the discrimination claim, [it] would not only be an undue expense on the party burdened by it, but also a waste of time, [and under such circumstances] it should be denied." *Id.* at 3.

In ruling upon Respondents' Motion for Summary Decision, the Court works from the proposition that each of Wilson's allegations in his complaint is taken to be true. Thus, the Court is left "only with the question of whether, as a matter of law, Complainant has alleged a cognizable claim of discrimination under section 105(c) of the Mine Act." *Id.* at 4.

The analysis of any section 105(c)(3) complaint of discrimination must begin by taking into account both the Commission's long-established grounds for establishing a *prima facie* case in such matters, per its decisions in *Pasula* and *Robinette*,[10] and also by the measure of what issues may be considered in evaluating such complaints, per the Commission's decision in *Hatfield*.[11]

Given that this is a section 105(c)(3) matter, it makes sense to begin with the complaint itself and apply *Hatfield* before applying *Pasula* and *Robinette*. The full text of the complaint has already been reproduced, above. To refresh the reader's recollection, reduced to its core, Complainant, a non-employee representative of miners at Armstrong Coal's Parkway Mine, has

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[10] *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (Apr. 1981).

[11] Complainant contends that the Court's statement that Wilson is limited to the grounds he brought before MSHA when he made his complaint is "baffling," asserting that it "is totally immaterial to this case, particularly in light of the fact that the Court and Wilson have no idea at this point what any witness (other than Wilson and Brandon Shemwell) told MSHA during its investigation." Resp. 14. As noted, the Court has already determined that Wilson, by virtue of his presence at the mine as a miners' representative, was engaged in protected activity. However, the Court does not buy into the claim that there was any adverse action flowing from the miners' entirely legitimate inquiry.

asserted that while he was traveling underground with an MSHA inspector, three miners, later determined to be employed as ram car drivers at the mine, approached an MSHA inspector and asked the inspector how they could get rid of him as a miners' representative and keep him off of mine property. Wilson contends that, by the words of those miners, asking the MSHA inspector how to remove him as a miners' rep, they violated section 105(c) of the Mine Act.

In *Hatfield*, which also involved a section 105(c)(3) complaint of discrimination, the Commission clearly set the bounds for such actions:

> The statutory scheme devised by Congress for addressing a miner's complaint of discrimination provides, pursuant to section 105(c)(2) of the Mine Act, that upon receipt of such a complaint the Secretary "shall cause such investigation to be made as he deems appropriate," and that "[i]f upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission. . . . " 30 U.S.C. § 815(c)(2). Section 105(c)(3) of the Mine Act provides that, if the Secretary determines that no discriminatory violation has occurred, "the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of [section 105(c)(1)]." 30 U.S.C. § 815(c)(3). Thus, the statutory scheme provides to miners a full administrative investigation and evaluation of an allegation of discrimination, as well as the right to private action in the event that the administrative evaluation results in a determination that no discrimination has occurred. *See Gilbert v. Sandy Fork Mining Co., Inc.*, 9 FMSHRC 1327 (August 1987), *rev'd on other grounds*, *Gilbert v. FMSHRC*, 866 F.2d 1433 (D.C. Cir. 1989).
>
> The written discrimination complaint filed by Hatfield with MSHA is general in nature and alleges no specific protected activities. The present record contains no indication that the matters alleged in the amended complaint were part of the case reported to and investigated by MSHA. Nor is there evidence in the record that the Secretary's determination that the Act had not been violated was based on matters contained in the amended complaint. If the Secretary's determination was based upon an investigation that did not include consideration of the matters contained in the amended complaint, the statutory prerequisites for a complaint pursuant to § 105(c)(3) have not been met.
>
> Accordingly, we vacate the judge's Order of December 18, 1990, and remand this matter to the judge for a determination of this issue. The complainant should be afforded an opportunity to demonstrate that the protected activities alleged in the amended complaint were part of the matter that was investigated by the Secretary in connection with Hatfield's initial discrimination complaint to MSHA.

Hatfield, 13 FMSHRC at 545-46.

While that decision was clear enough, *Secretary of Labor on behalf of Gray v. North Fork Coal Corp.*, 33 FMSHRC 27 (Jan. 2011), left no doubt about attempts to reach beyond the claims of discrimination made when a complaint is first filed before MSHA, as the Commission there observed that:

> [t]he reference to "complainant" is an acknowledgment that the proceeding under section 105(c)(3) involves *the same alleged discriminatory conduct that prompted the miner's complaint to the Secretary under section 105(c)(2)*. The statute does not direct the miner to file a complaint under section 105(c)(3) because the miner has already filed a complaint.

Gray, 33 FMSHRC at 37 (emphasis added).

Armed with the understanding of the clear limitations for consideration in a section 105(c)(3) action, the Court moves to the application of the criteria applied to establish a *prima facie* case in all discrimination complaints.

A miner alleging discrimination under the Mine Act establishes a *prima facie* case of prohibited discrimination by presenting evidence sufficient to support a conclusion that he engaged in protected activity and suffered adverse action motivated in any part by that activity. *Pasula*, 2 FMSHRC at 2797-800; *Robinette*, 3 FMSHRC at 817-18; *Driessen v. Nev. Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998). The mine operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Pasula*, 2 FMSHRC at 2799-800. If the mine operator cannot rebut the *prima facie* case in this manner, it nevertheless may defend by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Pasula* at 2800; *Robinette*, 3 FMSHRC at 817-18; *see also E. Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

Thus, whether in the context of establishing a *prima facie* case, as well as in rebutting such a case, showing adverse action is a *sine qua non* for all discrimination claims. As explained above, Complainant has not established any adverse action.

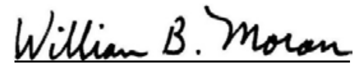
Drastically, Complainant's stance is that *not even an inquiry* about how such a process could be initiated would be barred and sanctions must be applied.[12] The Court would also note that virtually every elected and appointed position in the United States, at the local, state, and federal levels, allows for the removal of anyone occupying such a position. If Complainant had his way, his position, as a miners' representative, would be unique, exempt even from inquiry.

[12] The complaint lodged against the three miners makes one thinks of George Orwell's novel *1984*, with the ram car drivers here guilty of a "thoughtcrime" and with the remedy sought here akin to the "re-education" room in the book's "Ministry of Love."

As noted, if the Court were to allow discovery, in addition to being unwarranted, it would effectively allow Complainant to conduct his own private special investigation. Having failed to establish any adverse action, it would be entirely inappropriate to saddle Respondents with the expense and time attendant to such discovery in Complainant's attempt to see if he can manufacture a claim, when the four corners of Wilson's complaint utterly fall short.

Accordingly, Respondents' Motion for Summary Decision is hereby GRANTED and Wilson's section 105(c)(3) Complaint is DISMISSED.

SO ORDERED.



William B. Moran
Administrative Law Judge

Distribution:

Brandon W. Marshall, Esq., Patrick F. Nash, Esq., Nash Marshall, PLLC, 129 West Short Street, Lexington, KY 40507

Wes Addington, Esq., Appalachian Citizens Law Center, 317 Main Street, Whitesburg, KY 41858

Tony Oppegard, Esq., P.O. Box 22446, Lexington, KY 40522