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May 18, 2016

MICHAEL WILSON,	:	DISCRIMINATION PROCEEDING
Complainant,	:	
	:	Docket No. KENT 2016-0095-D
	:	MADI-CD 2015-16
v.	:	
	:	
	:	
JIM BROWNING,	:	Parkway Mine
Respondent.	:	Mine ID: 15-19358

DECISION AND ORDER

Before: Judge Miller

This matter is before me on the parties' cross motions for summary decision. After careful consideration of the parties' motions, the attached exhibits, the relevant case law, and the entire record in the case, I deny Complainant's motion for summary decision and grant Respondent's motion for summary decision.

I. BACKGROUND

Michael Wilson is a former employee of the Parkway Mine, an underground coal mine operated by Armstrong Coal Company in Muhlenberg County, Kentucky. Comp. Ex. B (Affidavit of Michael Wilson) at 1. He was employed at the mine as a continuous miner operator and loader operator from August 2009 until he retired on May 6, 2015. *Id*. He also served as a representative of miners beginning in February 2014, and continued in this capacity after his retirement. *Id*. at 1-2. Jim Browning was at all relevant times a miner at the Parkway Mine. Resp. Mot. at 2.

On Saturday, June 13, 2015, Wilson visited the mine in his capacity as a representative of miners. Comp. Ex. B at 2. He sat at a table in the bathhouse to review the mine's examination books. *Id*. Jim Browning was also at the mine to work the day shift. Resp. Ex. A (Affidavit of Jim Browning) at 1. Several other miners were in the bathhouse at the time. Comp. Ex. C (Affidavit of Justin Greenwell) at 1; Comp. Ex. D (Respondent's Answers to Complainant's First Set of Interrogatories) at 1. Wilson alleges that Browning walked up behind him, leaned over him, and asked what he was doing. Comp. Ex. B at 2. Although the two disagree over who was the first to become aggressive, they agree that they became involved in a verbal altercation over Wilson's activities at the mine. *Id.*; Resp. Ex. A at 1-2. Wilson alleges that Browning accused him of looking at the books to find a violation so that inspectors could issue a citation to the company. Comp. Ex. B at 2. According to Wilson, Browning angrily told him to put the book down and leave because Wilson didn't work at the mine anymore and there were other miners'

representatives at the mine. *Id.*; Comp. Ex. C at 1. Wilson also claims Browning told him Wilson was taking money out of his pocket by serving as a miners' representative. Comp. Ex. B at 2-3; Comp. Ex. C. at 1. Wilson says he refused to leave because he had a right to look at the books. Comp. Ex. B at 3. Browning claims he initially spoke with Wilson to see whether there was a safety problem at the mine he needed to be concerned about. Resp. Ex. A at 1. Browning claims he asked Wilson twice what he was doing, to which Wilson replied, "Nothing," shut the book, and turned and stood up in an agitated manner. *Id.* Browning claims he wanted to speak to Wilson about reporting safety violations to mine officials prior to reporting them to inspectors, but that he never got the chance because of Wilson's aggressive response. *Id.* at 2.

The parties agree that the mine superintendent, Danny Thorpe, intervened in the conversation after a few moments, telling Browning to leave and escorting him out of the bathhouse. Comp. Ex. D at 1-2. Thorpe suspended Browning for the rest of the day without pay and told him not to question Michael Wilson in the future. *Id.* at 2.

Wilson continued to work as a miners' representative that day and on future occasions. Comp. Ex. B at 3.

Wilson filed a discrimination complaint regarding the incident with the Mine Safety and Health Administration (MSHA) on June 18, 2015. MSHA notified him on October 21, 2015, that it did not believe there was enough evidence to establish a violation of the Mine Act. On November 17, 2015, Wilson filed the instant complaint of discrimination with the Commission pursuant to Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(3) ("Mine Act").

II. SUMMARY JUDGMENT STANDARD

Commission Rule 67 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 facts; and
> (2) That the moving party is entitled to summary decision as a matter of law.

29 C.F.R. § 2700.67(b).

The Commission has explained that summary decision is an extraordinary procedure. *Energy West Mining Co.*, 16 FMSHRC 1414, 1419 (July 1994). In reviewing the record on summary decision, the judge must consider the record "in the light most favorable to ... the party opposing the motion." *Hanson Aggregates N.Y., Inc.*, 29 FMSHRC 4, 9 (Jan. 2007) (citing *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 473 (1962)). Inferences drawn from the facts in the record must also be viewed in the light most favorable to the party opposing the motion. *Id.* (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

III. DISCUSSION

Wilson claims that Browning violated Section 105(c) of the Mine Act by interfering with Wilson's exercise of his rights as a miners' representative. Section 105(c)(1) provides:

> No person shall discharge or in any manner discriminate against ... or *otherwise interfere with the exercise of the statutory rights* of any miner, representative of miners or applicant for employment in any coal or other mine subject to this chapter because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this chapter, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, ... or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this chapter.

30 U.S.C.§ 815(c)(1) (emphasis added). Section 105(c)(3) permits a miner or his representative, after making an unsuccessful complaint to the Secretary, to file an action before the Commission on his own behalf "charging discrimination or interference in violation of paragraph (1)." 30 U.S.C. § 815(c)(3).

While the framework for evaluating interference claims has not been clearly established by the Commission, a framework proposed by the Secretary of Labor has been adopted by two Commissioners and a number of Commission Administrative Law Judges. *See UMWA on behalf of Franks v. Emerald Coal Res., LP*, 36 FMSHRC 2088, 2108 (Aug. 2014) (Jordan & Nakamura, Comm'rs), *vacated*, 620 Fed. Appx. 127 (3d Cir. 2015); *id.* at 2105-07; *Sec'y of Labor on behalf of Greathouse v. Monongalia Cty. Coal Co.*, 38 FMSHRC __, slip op. at 7, No. WEVA 2015-904-D (May 2, 2016) (ALJ); *Pendley v. Highland Mining Co.*, 37 FMSHRC 301, 311 (Feb. 2015) (ALJ). Under the *Franks* test, an interference violation occurs if:

> (1) a person's action can be reasonably viewed, from the perspective of members of the protected class and under the totality of the circumstances, as tending to interfere with the exercise of protected rights, and
>
> (2) the person fails to justify the action with a legitimate and substantial reason whose importance outweighs the harm caused to the exercise of protected rights.

Franks, 36 FMSHRC at 2108. A claim of interference is "separate from the more usual intentional discrimination claims evaluated under the *Pasula-Robinette* framework," which requires that a complainant prove he engaged in protected activity and suffered an adverse employment action motivated at least in part by the protected activity. *Franks*, 36 FMSHRC at 2103 n.22 (Aug. 2014) (Young & Cohen, Comm'rs); *Turner v. Nat'l Cement Co. of Cal.*, 33

FMSHRC 1059, 1064 (May 2011); *Sec'y of Labor on behalf of Pasula v. Consol. Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds sub nom. Consol. Coal Co. v. Marshall,* 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981).

The Commission has recognized conduct as tending to interfere with the exercise of protected rights on a number of occasions. In *Moses v. Whitley Development Corp.*, the Commission found that interference occurred when a miner's supervisor questioned him about an accident report made to MSHA and repeatedly accused him in front of his coworkers of making the report. 4 FMSHRC 1475, 1477-79 (Aug. 1982), *aff'd*, 770 F.2d 168 (6th Cir. 1985). The Commission noted that "The persistence with which the subject of his supposed reporting of the bulldozer accident was raised and the accusatory manner in which it was done could logically result in a fear of reprisal and a reluctance to exercise the right in the future." *Id.* at 1479. Two Commissioners reached a similar conclusion in *Franks*, which involved two miners who were repeatedly interrogated by a panel of managers, MSHA, and union officials, and ultimately suspended after a safety complaint was made at the mine. *UMWA on behalf of Franks v. Emerald Coal Res., LP*, 36 FMSHRC 2088, 2104 (Aug. 2014) (Jordan & Nakamura, Comm'rs) (emphasizing persistence of the mine's questioning of the miners), *vacated*, 620 Fed. Appx. 127 (3d Cir. 2015). Finally, *Gray v. N. Star Mining* involved potentially threatening statements made by an assistant mine superintendent to a miner after the miner was subpoenaed to testify in a grand jury investigation. *Sec'y of Labor on behalf of Gray v. N. Star Mining, Inc.*, 27 FMSHRC 1, 2-3 (Jan. 2005). The Commission remanded the case for the judge to determine whether the comments were coercive in light of the totality of the circumstances. *Id.* at 10-11. The Commission directed the judge to consider factors including:

> the nature of Brummett's [the speaker's] and Gray's relationship (the two were friends and Brummett helped him secure a job at North Star, and Brummett was a supervisor at North Star); the fact that the statements were made along with inquiries about Gray's and Young's testimony in a confidential grand jury investigation into alleged criminal actions at the mine; and the fact that, on each occasion when Brummett spoke to Gray, he apparently sought to isolate him and talk to him one-on-one.

Id. at 11.

A number of decisions by Commission Administrative Law Judges have also addressed interference complaints based on threatening or harassing conduct towards miners. In *Shemwell v. Armstrong Coal Co.*, the judge found that a miner had pled a valid interference claim where a supervisor encouraged other employees to build a disciplinary record against the miner when he returned to work after a previous discrimination proceeding. 36 FMSHRC 2352, 2357 (Aug. 2014) (ALJ). The supervisor also made comments suggesting that future safety complaints by the miner would not be taken seriously, and the mine's safety director told the miner he should "think about another career," which the judge deemed threatening. *Id.* at 2358. In *Pendley v. Highland Mining Co.*, the judge found that interference occurred where managers took examination books away from Pendley, a miners' representative, when he tried to view them; and a miner with whom Pendley had a long-standing feud approached and shouted at him in a threatening manner on two occasions while he was accompanying inspectors. 37 FMSHRC 301,

303-05, 313-15 (Feb. 2015) (ALJ); *see also Sec'y of Labor on behalf of Clapp v. Cordero Mining*, LLC, 33 FMSHRC 2977 (Dec. 2011) (ALJ) (noting that threatening comments made by a supervisor to an employee after she made a safety complaint were interference, but resolving case under discrimination provision because she was actually discharged), *aff'd*, 699 F.3d 1232 (10th Cir. 2012).

Finally, the Commission has expressed that it is appropriate for Commission judges to refer to cases interpreting the National Labor Relations Act (NLRA) when construing analogous provisions of the Mine Act. *See Franks*, 36 FMSHRC at 2107 n.2; *Gray*, 27 FMSHRC at 9 n.8. The Seventh Circuit has enumerated factors relevant to whether interrogation of an employee constitutes interference under Section 8(a)(1) of the NLRA. *Multi-Ad Servs., Inc. v. NLRB*, 255 F.3d 363, 372 (7th Cir. 2001). While the case at hand does not involve interrogation, the factors are nevertheless instructive:

> Factors that ought to be considered in deciding whether a particular inquiry is coercive include the tone, duration, and purpose of the questioning, whether it is repeated, how many workers are involved, the setting, the authority of the person asking the question, and whether the company otherwise had shown hostility to the union. We also consider whether questions about protected activity are accompanied by assurances against reprisal and whether the interrogated worker feels constrained to lie or give noncommittal answers rather than answering truthfully.

Id. (citation omitted).

Wilson argues that Browning's conduct on June 13, 2015, interfered with his exercise of his rights as a miners' representative under the Act. Comp. of Discrim. at 3. Viewing the facts in the light most favorable to Wilson, on the day in question, Wilson was seated in the bathhouse reviewing the mine's examination books in his capacity as a miners' representative. At least one other miner was present. Browning walked up behind Wilson, leaned over him, and asked what he was doing. Browning accused Wilson of looking at the books to find a violation he could report to MSHA. He angrily said that Wilson was trying to hurt the company and was costing him money, and repeatedly told him to go home. After a few minutes, the mine superintendent entered the bathhouse, observed the scene, and told Browning to leave, escorting him out. The superintendent suspended Browning for the remainder of the day without pay and told him not to question Wilson in the future. Wilson continued to work as a miners' representative that day and on future occasions.

The altercation between Wilson and Browning seems to have arisen out of Browning's concern that Wilson's activities as a miners' representative would cause financial harm to the company and therefore threaten Browning's job. He ultimately expressed that opinion in an agitated manner that Wilson may have perceived as threatening. However, applying the factors from *Multi-Ad* and Commission interference cases, I do not find that the record supports an interference claim against Browning.

First, the Seventh Circuit and the Commission have stated that the position of the person whose conduct is at issue is an important factor in analyzing interference claims. *Multi-Ad Servs.*, 255 F.3d at 372; *Gray*, 27 FMSHRC at 11. In all of the cases discussed above except for *Pendley*, the actions found to constitute interference were done by a supervisor or other management official. In *Gray*, the Commission noted that speech between an employee and his employer has special significance because of "the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." 27 FMSHRC at 10 (quoting *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969)). In an employment relationship, in other words, there is heightened potential for communications to have a coercive effect. In this case, however, the person accused of interference was not a manager, but rather a miner. Wilson was not an employee at the mine, and Browning had no authority over him. Accordingly, Browning's actions should be understood as having less coercive effect than in comparable cases like *Gray* where the actions were done by a supervisor.

The Seventh Circuit and the Commission have also instructed judges to consider the tone and setting of the encounter. *Multi-Ad Servs.*, 255 F.3d at 372; *Gray*, 27 FMSHRC at 11. In several of the Commission cases, the complainant faced intimidating situations such as questioning by a panel of managers, *Franks*, 36 FMSHRC at 2112, or a one-on-one encounter with a supervisor outside of work, *Gray*, 27 FMSHRC at 11. Here, Browning took an aggressive tone with Wilson that could have been interpreted as intimidating. The effect was mitigated slightly by the fact that the encounter took place in the bathhouse in front of several witnesses.

Finally, the Commission and Seventh Circuit have looked at the duration of the conduct and whether the subject was brought up repeatedly. *Multi-Ad Servs.*, 255 F.3d at 372; *Moses*, 4 FMSHRC at 1479. In *Franks*, the Commissioners noted that "The persistence of the managers' questioning, in the face of the miners' repeated refusal to provide the names of the firebosses, also added to the coercive quality of the questioning." 36 FMSHRC at 2114. The Commission in *Moses* similarly emphasized "the persistence with which the subject" of the miner's protected activity was raised. 4 FMSHRC at 1479. In this case, however, the encounter between Wilson and Browning was an isolated incident. Browning was suspended as a result of his conduct, and so was unlikely to disturb Wilson again. Wilson has not alleged that any similar incidents involving Browning have occurred subsequently. Thus, it is unlikely that Wilson views Browning as an ongoing threat that would dissuade him from working as a miners' representative.

In addition to these factors, it is worth noting that the incident does not appear to have had an actual effect on Wilson's exercise of his rights as a miners' representative. Wilson continued working as a representative that day and in the future, and has not alleged that he altered his conduct as a result of the incident. Browning argues that Wilson's failure to plead an adverse action compels dismissal of the case. Resp. Mot. at 7. However, the Commission has not established that a demonstrable adverse impact is a necessary element of an interference claim. *See Gray,* 27 FMSHRC at 9 ("[I]nterference, restraint, and coercion under Section 8(a)(1) of the [NLRA] does not turn on the employer's motive or on whether the coercion succeeded or failed." (second alteration original) (quoting *Am. Freightways Co.*, 124 N.L.R.B. 146, 147

(1959))); *see also Nat'l Steel & Shipbuilding Co. v. NLRB*, 156 F.3d 1268, 1271 (D.C. Cir. 1998) ("An employer violates § 8(a)(1) if its actions have merely a tendency to coerce, regardless of their actual impact in a particular case." (internal quotation omitted)). I therefore decline to dismiss the case on that basis alone. Nevertheless, I find the fact that Wilson continued to serve as a representative to be persuasive evidence that a reasonable miner would not have been dissuaded from exercising his rights in this situation.

Considering all of these factors together, I conclude that Browning's actions did not constitute interference with Wilson's exercise of his rights as a miners' representative. A single altercation between a miner and a representative with no discernible effect on protected activity at the mine does not rise to the level of interference recognized as actionable in past Commission cases. It is simply beyond the scope of Section 105(c). Because I base my decision on this rationale, I do not find it necessary to discuss the First Amendment defense raised by Browning in his motion for summary decision. Finally, I find no basis to award attorney's fees in this case.

IV. ORDER

Based on my review of the record and the applicable law, I find that there is no dispute of material fact and that Respondent is entitled to summary decision as a matter of law. Accordingly, Respondent's motion for summary decision is **GRANTED** and Complainant's cross motion for summary decision is **DENIED**. The complaint of discrimination filed by Michael Wilson is hereby **DISMISSED**.

Margaret A. Miller
Administrative Law Judge

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