FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9950 / FAX: 202-434-9949

July 11, 2019

SECRETARY OF LABOR, U.S. DEPARTMENT OF LABOR on behalf of TYLER HERRERA, Complainant, v. FIELD LINING SYSTEMS, INC., Respondent.	DISCRIMININATION PROCEEDING Docket No. WEST 2019-0364-DM MSHA Case No.: RM-MD-2019-11 Mine: Freeport-McMoRan Safford Inc Mine ID: 02-03131

DECISION AND ORDER

Before: Judge Rae

The captioned matter is before me based on an Application for Temporary Reinstatement (the "Application") filed by the Secretary of Labor (the "Secretary") on behalf of Tyler Herrera against Field Lining Systems, Inc. ("Respondent"), pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (the "Act"), 30 U.S.C. § 815(c)(2). Under section 105(c)(2), "upon the application of the Secretary" the Commission "shall order the immediate reinstatement of the miner pending final order on the complaint" if the complaint "was not frivolously brought." 30 U.S.C. § 815(c)(2). The Secretary determined that Herrera's complaint was not frivolously brought and accordingly filed the Application with the Commission on June 14, 2019. Following a conference call held on June 17, 2019, Respondent indicated that they were not requesting a hearing and asked the parties be allowed to submit briefs in support of or against the Application. The parties' briefs were submitted on July 8, 2019.

For the reasons discussed below, I grant the Application and order Complainant's temporary reinstatement.

I. LEGAL PRINCIPLES

Section 105(c) of the Act prohibits mine operators from discriminating against miners for engaging in any right protected under the Act. 30 U.S.C. § 815(c). "[I]f the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint." 30 U.S.C. § 815(c)(2). A temporary reinstatement proceeding differs from a hearing on the merits of a discrimination claim in that addressing an application for temporary reinstatement is limited narrowly to the question of whether the miner's

discrimination complaint "was not frivolously brought" by Rule 45(d).[1] 29 C.F.R. § 2700.45(d); Sec'y *of Labor on behalf of Deck v. FTS Int'l Proppants, LLC*, 34 FMSHRC 2388, 2390 (Sept. 2012) ("*FTS Int'l Proppants*"); *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd sub nom. Jim Walter Res., Inc. v. FMSHRC*, 920 F.2d 738 (11th Cir. 1990) ("*Jim Walter Res.*"). A discrimination complaint satisfies the "not frivolously brought" standard of section 105(c)(2) of the Act when there is "reasonable cause to believe" that the "complaint appears to have merit." *Jim Walter Res.*, 920 F.2d at747 (citing S. Rep. No. 95-181 at 36).

In view of the narrow scope of temporary reinstatement proceedings, "the Commission has recognized, '[i]t [is] not the judge's duty, nor is it the Commission's, to resolve the conflict in testimony at this preliminary state of the proceedings.'" *FTS Int'l Proppants*, 34 FMSHRC at 2390 (quoting *Sec'y of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999)). Although the Secretary need not present a prima facie case of discrimination to prevail at this stage of the proceeding, reviewing the elements of a discrimination claim aides in determining whether the submitted evidence satisfies the "not frivolously brought" standard. To demonstrate a prima facie case of discrimination under section 105(c) of the Mine Act, the Secretary must establish that the complainant engaged in an activity protected by the Mine Act, that the complainant was subjected to an adverse action, and that the adverse action was motivated, at least in part, by the complainant's protected activity. *See Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-800 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation 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) (citations omitted).

II. BACKGROUND AND APPLICATION

Since March 20, 2019, Herrera worked for Respondent as a laborer. Application at 2; Sec'y's Memo at 2; Herrera Decl. at 1. During the night shift on or about April 19, 2019, Herrera allegedly observed a fork lift operator moving a light plant with a forklift. Application, Ex. A at 2; Sec'y's Memo at 2; Herrera Decl. at 1. Herrera allegedly heard a crash and saw that

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[1] Specifically, Rule 45(d) provides:

> The scope of a hearing on an application for temporary reinstatement is limited to a determination as to whether the miner's complaint was frivolously brought. The burden of proof shall be upon the Secretary to establish that the complaint was not frivolously brought. In support of his application for temporary reinstatement, the Secretary may limit his presentation to the testimony of the complainant. The respondent shall have an opportunity to cross-examine any witnesses called by the Secretary and may present testimony and documentary evidence in support of its position that the complaint was frivolously brought.

29 C.F.R. § 2700.45(d)

the light plant had fallen off the forklift, damaging the light plant's outriggers and bending one of the wheels. Application, Ex. A at 1-2; Sec'y's Memo at 2; Herrera Decl. at 1. Herrera then allegedly saw a supervisor place the light plant against a berm. Application, Ex. A, 1-2; Sec'y Memo at 2. Herrera believed this was done to give the appearance the light plant was still functioning properly. Application, Ex. A, 1-2; Sec'y Memo at 2. Herrera alleges the supervisor placed the damaged light plant close to portable restrooms. Application, Ex. A, 1-2. Herrera allegedly felt the damaged light was unsafe due to its instability and potential for collapse. *Id.*

Herrera allegedly shared his concerns with his coworkers and urged them to reach out to MSHA. Sec'y Memo at 2. On April 20, 2019, Herrera called the MSHA hotline and reported the damaged light plant. Sec'y Memo at 2; Herrera Decl. at 5. Two days later, on April 22, 2019, Josh Johnson, the Safety Manager for Respondent, had allegedly called Herrera and asked if he had made a complaint to MSHA. Sec'y Memo at 2. Herrera conceded that he did call MSHA with a safety concern. Sec'y Memo at 2. Two days after the conversation with Josh Johnson, Herrera was terminated on April 24, 2019. Application, Ex. A at 1-2; Sec'y Memo at 2; Herrera Decl. at 8.

Following his termination, Herrera filed his 105(c) discrimination complaint on May 13, 2019. Application at 2; Sec'y Memo at 2. MSHA Special Investigator Merle Nash then investigated the complaint and determined that Herrera had engaged in two episodes of protected activity. Application, Ex. B at 2. Nash determined that the first protected activity was Herrera's alerting the mine operator of his safety concern regarding the damaged light plant on April 20, 2019. *Id.* Nash determined that the second protected activity was Herrera's calling MSHA to report a hazard complaint that same day. *Id.* Based on the information available to Nash as a result of the investigation, he concluded that Herrera's April 24, 2019, termination (the adverse action) was motivated, at least in part, because of the protected activity discussed above. Application at 2. Accordingly, Nash determined that Herrera's discrimination complaint was not frivolously brought. *Id.*

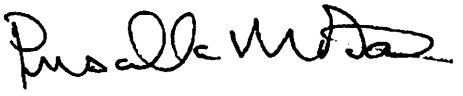
In opposition to the Application, Respondent asserts that Herrera's termination was not unique, and Herrera was terminated solely for violating the company's attendance policy. While Respondent's assertion regarding Herrera's non-compliance with the company attendance policy may constitute an affirmative defense to the underlying discrimination complaint, such a defense is not properly before me during a temporary reinstatement proceeding.

Therefore, given Herrera's alleged engagement in protected activities and the close nexus in time to his termination, I agree at this preliminary stage of the proceeding that his complaint is not frivolously brought.

III. ORDER

For the reasons set forth above, Field Lining Systems, Inc., is **ORDERED** to immediately reinstate Tyler Herrera to the position he held on April 20, 2019, with restoration of pay, allowances, and benefits retroactive to the date of discharge.[2]

Mr. Herrera's reinstatement is not open-ended. It will end upon a final order on the underlying discrimination complaint. 30 U.S.C. § 815(c)(2). Therefore, the Secretary must promptly determine whether or not he will file a complaint with the Commission under section 105(c)(2) of the Act and so advise the Respondent. Otherwise, I shall entertain a motion to terminate this Order.[3]



Priscilla Rae
Administrative Law Judge

Distribution:

Veronica Melendez, Esq., U.S. Department of Labor, Office of the Solicitor, 90 Seventh Street, Suite 3-700, San Francisco, CA 94103

Kristy Lagumas, Field Lining Systems, Inc., 439 S. 3rd Ave., Avondale, AZ 85323

Tyler Herrera, 900 East Hollywood Lot #213, Safford, AZ 85546

[2] Herrera's regular pay is $910.00 per week as calculated at a rate of $14.00 per hour for 50 hours and overtime pay rate of $21.00 for 10 hours each week. Application, Ex. A at 1.

[3] The Court does not have the authority to, sua sponte, grant economic reinstatement. *See e.g., Sec'y of Labor on behalf of Terry v. Prospect Mining & Development Co., LLC*, 41 FMSHRC 142 (Feb. 2019) (ALJ). However, should the parties agree to such, a motion should be submitted forthwith.