FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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September 4, 2018

SHAWN HIRT,	:	DISCRIMINATION PROCEEDING
Complainant,	:	
	:	Docket No. CENT 2018-0065-DM
	:	RM-MD-2016-19
v.	:	
	:	
	:	
GARY SERVAES ENTERPRISES,	:	Mine: Atchison Quarry
Respondent.	:	Mine ID: 14-01710

DECISION AND ORDER

This case is before me on a complaint of discrimination brought by Shawn Hirt against Gary Servaes Enterprises ("GSE") 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) ("Mine Act"). In a conference call with the judge, the parties agreed that there was no dispute of fact and the case could be decided on the written record without the need for an in-person hearing. Conf. Call 11, Aug. 1, 2018. GSE submitted a motion for summary decision. Hirt provided his argument orally during the conference call and submitted case law in support of his legal arguments. I have carefully considered the parties' motions, the attached exhibits, and the relevant case law. Because Hirt is unrepresented in this case, I have also considered the parties' statements during conference calls. Based on this record, I deny GSE's Motion for Summary Judgement and grant summary decision in favor of Hirt.

I. PROCEDURAL BACKGROUND

Hirt filed the instant Complaint of Discrimination with the Commission on December 8, 2017, after the conclusion of an investigation by the Mine Safety and Health Administration (MSHA). The Chief Administrative Law Judge acknowledged receipt of the complaint and notified Hirt of the requirement to provide proof of service within 30 days. Hirt submitted an envelope addressed to Gary Servaes Enterprises and an unsigned certified mail receipt on January 3, 2018. Respondent did not file an answer to the complaint. The Chief Judge then issued an Order to Show Cause on February 7, 2018, ordering GSE to file an answer to the complaint within 30 days or face a default judgment in favor of Hirt. The order was sent by certified mail to the address of record for GSE, but was returned to the Commission as unclaimed.[1]

[1] Counsel for GSE stated in a conference call that the address used by Hirt and the Commission was the home address of the business owner, Gary Servaes. If GSE is unable to accept service at that address, it will need to change its address of record with MSHA.

The case was assigned to me on March 13, 2018, and a Prehearing Order and Notice of Hearing were issued on March 22, 2018. Through phone conversations and emails with the parties, it became apparent that GSE had not received the complaint. The parties disagree about the circumstances involving the failed service of the complaint: Hirt believes that GSE refused to accept the certified mail containing the complaint, while GSE states that the complaint was sent to the home address of the business owner, Gary Servaes, who was not home to sign for it when it arrived. In either case, GSE was not served, and therefore the Order to Show Cause was erroneously issued.

As the complainant, Hirt bore the burden of establishing the validity of the service of process of his complaint. *See Fed. Deposit Ins. Corp. v. Oaklawn Apartments*, 959 F.2d 170, 174 (10th Cir.1992). It was within the authority of the Court to dismiss the case once it became clear that the respondent had not been served with the complaint. However, because of his pro se status, Hirt was given the opportunity to cure the defect in service. By Order on April 5, 2018, Hirt was directed to attempt service again. He provided proof of service on April 10, 2018. GSE filed an answer on April 16, 2018, and the case was set for hearing.

In several communications with the Court, Hirt has continued to argue that he is entitled to a default judgment based on the Chief Judge's February 7 Order to Respondent to Show Cause. Conf. Call Tr. 3, June 26, 2018. Hirt misunderstands the law on this issue. The Due Process Clause prevents a court from entering a default judgment without notice or service to the defendant. *Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 80, 108 S. Ct. 896, 896 (1988); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657 (1950). A default judgment may not be issued in this case based on the failed service of Hirt's complaint to GSE, and therefore the case will be decided on the merits.

The parties have agreed that there is no dispute of fact and this case may be decided on the written record without the need for an in-person hearing. Conf. Call 11, Aug. 1, 2018. My findings of fact are based on the entire record in this case, including the Motion for Summary Decision submitted by Respondent, the attached exhibits, the submissions of Complainant, and the representations of the parties in recorded conference calls with the judge.

II. FINDINGS OF FACT

Hirt was employed as a blaster assistant at GSE's Atchison Quarry from November 2014 through April 9, 2015, when he was terminated from his employment. Resp. Ex. 3. Hirt filed a discrimination complaint with MSHA regarding his termination, and MSHA conducted an investigation. Following the investigation, Hirt filed a Section 105(c)(3) action against GSE before the Commission. A hearing was held on July 6, 2016, and a decision was entered in Hirt's favor. The present matter involves communications made between the parties during settlement negotiations in that case.

Prior to hearing in the 2015 discrimination case, the parties were directed to engage in settlement negotiations with the assistance of a Commission settlement attorney, Thomas Stock. GSE was represented by attorney Allen Ternent. In June 2016, Ternent sent an email to Stock with a copy to Hirt. The email stated in part:

> I would note that my client is unwilling at this time to support any outcome other than dismissal of the Complaint. He might be willing to agree to refrain from seeking the filing of criminal charges against Mr. Hirt (for the making of false documents) in return for a withdrawal of his Complaint, but that's about the best I expect.

Resp. Ex. 1. The email was sent in response to an email from Stock regarding scheduling a conference call. *Id.* Hirt alleges that the email constituted an unlawful threat. Compl.

An affidavit of Ternent submitted as an exhibit by GSE describes the context of the email at issue from the point of view of GSE. Resp. Ex. 6.[2] According to Ternent, Gary Servaes was frustrated with Hirt for filing the 2015 discrimination complaint because Hirt's allegations were false, and Servaes had in fact made an effort to keep Hirt employed at the mine for as long as possible. Resp. Ex. 6 ¶ 23. Servaes and Ternent believed that Hirt had made factual misrepresentations in his discrimination complaint and in an addendum to the complaint. Resp. Ex. 6 ¶¶ 15-18. They discussed what could be done to ensure that Hirt faced consequences for his misrepresentations. Resp. Ex. 6 ¶ 23. Ternent, a former prosecutor, advised Servaes that Hirt's actions likely violated Kansas law, and that once the discrimination matter was resolved, they could seek the filing of criminal charges against Hirt. Resp. Ex. 6 ¶ 23. Servaes indicated that he would like to do so. *Id.*

Sometime after this discussion, the parties were directed to work with a settlement attorney in an attempt to settle the case. FMSHRC Settlement Counsel Thomas Stock contacted Ternent to begin the mediation process. Resp. Ex. 6 ¶ 24. In a phone call between Ternent and Stock's office, Ternent explained that Servaes had indicated that he was not interested in participating in mediation. Resp. Ex. 6 ¶ 25. Ternent reiterated this point in a later call with Stock, and explained his opinion that Hirt had committed criminal wrongdoing. Resp. Ex. 6 ¶ 27. Stock asked Ternent to send his position regarding mediation in an email so that Stock could explain to the judge why the parties were abandoning settlement negotiations. Resp. Ex. 6 ¶ 28. After confirming with Servaes that he wished to proceed directly to hearing, Ternent sent the email above. Resp. Ex. 6 ¶ 29.

Ternent states that he did not intend to send the email to Hirt, but rather did so inadvertently because Hirt's email address was included in the email chain initiated by Stock. Resp. Ex. 6 ¶ 30. Ternent states that he included the reference to seeking criminal charges against Hirt in the email in order to accurately reflect his conversation with Stock. Resp. Ex. 6 ¶ 31. He also believed that Hirt was probably unaware that "making false information" was a crime in Kansas, and felt it would be unfair for Hirt to participate in the mediation or hearing

[2] Ternent also represented GSE in the instant case. He was advised that because he was a witness in this case, he should seek outside counsel prior to hearing. After a number of discussions, Ternent was granted permission to proceed in a limited capacity, because he had a difficult time finding an attorney and there were no disputes of fact or credibility issues to be decided.

without being aware that a criminal investigation and prosecution could follow. Resp. Ex. 6 ¶ 31. In sending the email, he wished to leave that issue in the hands of the settlement counsel. Resp. Ex. 6 ¶ 31.

The representations made by Hirt that Ternent and Servaes believed to be false involved the dates and hours Hirt worked at the mine and the date of the filing of his complaint. Resp. Ex. 6 ¶¶ 15-18 (Ternent Affidavit). Hirt's discrimination complaint was filed with MSHA on July 6, 2015, but he signed the complaint with a date of April 2, 2015. Resp. Ex. 3 (Discrimination Complaint). Hirt also filed an addendum to his complaint on July 9, 2015, addressing the late filing of his complaint. Resp. Ex. 3 (Addendum to Discrimination Complaint). The addendum states that Hirt's last day of work was April 2, 2015. *Id.* However, the mine's payroll records indicate that Hirt's last day of work was April 9, 2015. Resp. Ex. 3 (Payroll Records). Hirt also stated in his discrimination complaint that he regularly worked 40 regular hours and eight overtime hours per week. Resp. Ex. 3 (Discrimination Complaint). The mine's payroll records indicate that he in fact worked an average of 28.67 regular hours per week and worked overtime only occasionally. Resp. Ex. 3 (Payroll Records); Resp. Ex. 6 ¶ 18 (Ternent Affidavit). Hirt denies making any false statements. Conf. Call 15, Aug. 1, 2018.

III. 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).

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). 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)).

IV. DISCUSSION

Section 105(c) of the Mine Act provides in pertinent part that

> No person shall discharge or in any manner discriminate against . . . or otherwise interfere with the exercise of the statutory rights of any miner . . . because such miner . . . has filed or made a complaint under or related to this chapter, . . . or because such

> miner . . . has instituted or caused to be instituted any proceeding under or related to this chapter . . . or because of the exercise by such miner . . . of any statutory right afforded by this chapter.

30 U.S.C. § 815(c)(1). The Senate Committee Report indicates that Section 105(c) was intended to "protect miners against not only the common forms of discrimination, such as discharge, suspension, demotion . . . or changes in pay and hours of work, 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 (1977). Accordingly, the Commission has recognized that "the Mine Act establishes a cause of action for unjustified interference with the exercise of protected rights which is separate from the more usual intentional discrimination claims evaluated under the *Pasula-Robinette* framework." *UMWA on behalf of Franks v. Emerald Coal Res., LP*, 36 FMSHRC 2088, 2103 n.22 (Aug. 2014) (Comm'rs Cohen & Young, separate op.), *vacated*, 620 Fed. Appx. 127 (3d Cir. 2015); *id.* at 2105-07 (Chairman Jordan & Comm'r Nakamura, separate op.); *see also Sec'y on behalf of Gray v. N. Star Mining, Inc.*, 27 FMSHRC 1, 7-8 (Jan. 2005) (implicitly recognizing cause of action for interference).

The Commission has split on the issue of the correct test for interference claims, however. Commissioners Cohen and Jordan have determined that an interference claim is established when:

> (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.

Sec'y of Labor on behalf of Greathouse v. Monongalia Cty. Coal Co., 40 FMSHRC__, slip op. at 6 (June 2018) (Comm'rs Cohen & Jordan, separate op.) (quoting *Franks*, 36 FMSHRC at 2108 (Chairman Jordan & Comm'r Nakamura, separate op.)). The Commission has stated that this test is "consonant with Commission precedent." *Sec'y on behalf of McGary v. Marshall Cty. Coal Co.*, 38 FMSHRC 2006, 2012 (Aug. 2016). Commissioners Althen and Young would also require proof that the person's action was motivated at least in part by the miner's protected activity. *Greathouse,* slip op. at 25 (Acting Chairman Althen & Comm'r Young, separate op.).

Interference with Protected Activity

In interference cases, and in particular, in cases that involve a threat to an employee, the Commission has instructed its judges to "analyze[] the totality of the circumstances . . . to determine whether [the alleged statements or actions] were coercive and violative of section 105(c) of the Mine Act." *Sec'y of Labor on behalf of Gray v. N. Star Mining, Inc.*, 27 FMSHRC 1, 10 (Jan. 2005); *see also McGary*, 38 FMSHRC at 2015-18. The essence of the inquiry is whether the conduct or statements "could logically result in a fear of reprisal and a reluctance to exercise the right in the future." *Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475, 1479 (Aug. 1982), *aff'd*, 770 F.2d 168 (6th Cir. 1985). Relevant factors include the setting of the interaction,

the relationship between the parties to the interaction, whether the subject was raised repeatedly, the tone of the interaction, and who was present. *See Wilson v. Fed. Mine Safety & Health Review Comm'n*, 863 F.3d 876, 881-82 (D.C. Cir. 2017); *Multi-Ad Servs., Inc. v. NLRB*, 255 F.3d 363, 372 (7th Cir. 2001); *Gray*, 27 FMSHRC at 11. The standard is objective, and thus whether interference occurred "does not turn on the employer's motive or on whether the coercion succeeded or failed." *Gray*, 27 FMSHRC at 9 (quoting *American Freightways Co.*, 124 NLRB 146, 147 (1959)).

At issue in this case is an emailed statement from the operator's attorney Ternent to the Commission settlement counsel and Hirt.[3] Ternent states in the email that Gary Servaes "might be willing to agree to refrain from seeking the filing of criminal charges against Mr. Hirt (for the making of false documents) in return for a withdrawal of his Complaint, but that's about the best I expect." Resp. Ex. 1. The filing of a discrimination complaint is a protected right under the plain language of Section 105(c)(1). 30 U.S.C. § 815(c)(1) (prohibiting discrimination or interference because a miner has "instituted or caused to be instituted any proceeding under or related to this chapter").

Ternent's email threatens that Servaes will seek criminal charges against Hirt if he continues to pursue his complaint. GSE argues that Ternent's statement was not intended as a threat, but rather was simply speculation about GSE's position in mediation. Resp. Mot. at 11-12. GSE states that it "did not act with the intent to intimidate or interfere with claimant's rights to make a complaint or institute proceedings under the Act." Resp. Mot. at 11. However, Commission precedent is clear that in interference cases, statements are evaluated under an objective standard rather than according to the speaker's intent. *Gray*, 27 FMSHRC at 9; *see also Franks*, 36 FMSHRC at 2112 (Chairman Jordan and Comm'r Nakamura, separate op.).

In addition to the text of the email, the context of the interaction would lead a reasonable miner to interpret the statement as a threat. The Commission has determined that the nature of the relationship between the parties is a relevant factor in determining whether a statement was coercive. *Gray*, 27 FMSHRC at 10-11; *see also Wilson*, 863 F.3d at 882. Here, Hirt was an unrepresented party in a legal dispute, while Ternent was an attorney. Although Ternent had no direct authority over Hirt, Hirt's unfamiliarity with the legal process would have contributed to the intimidating nature of the email. GSE argues that the involvement of the neutral Commission settlement counsel in the interaction lessened the potential for it to be coercive. However, there was no evidence presented that Hirt was somehow reassured that he could continue to pursue his complaint without fear that doing so would lead to criminal charges being brought against him. *Cf. Franks*, 36 FMSHRC at 2113 (finding that the presence of a union representative during the interrogation of miners did not mitigate interference because he was representing the interests of different miners).

Even if the settlement counsel's presence did to some extent mitigate the coercive nature of the interaction, I see no basis for concluding that it completely neutralized Ternent's statement. The coercive effect of the statement is clear on its face, and there is nothing in the

[3] While GSE notes that the email address for Hirt actually belonged to his mother, it is clear from the record that Hirt received the email.

context of the conversation to suggest it should be interpreted differently. There is little doubt that a threat of this sort "could logically result in a fear of reprisal and a reluctance to exercise the right in the future." *Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475, 1479 (Aug. 1982), *aff'd*, 770 F.2d 168 (6th Cir.1985). Any reasonable miner would wish to avoid facing criminal charges, and thus could reasonably be dissuaded from pursuing his complaint with the Commission by such a comment. I find that no relevant facts are in dispute regarding this issue, and that as a matter of law, the email constituted interference with Hirt's protected right to file a discrimination complaint and participate in the ensuing litigation.

Discriminatory Motive

The Commission has split on the issue of whether discriminatory motive is a necessary element of an interference claim. Because there is no genuine dispute on the issue in this case, however, I find it unnecessary to decide whether proof is required.

The requirement of proving discriminatory motive in interference cases derives from the phrase "*because of* the exercise by such miner . . . of any statutory right afforded by this chapter." 30 U.S.C. § 815(c)(1) (emphasis added). In regular discrimination cases under Section 105(c), the Commission requires a showing that "the adverse action was motivated in any part by the protected activity." *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981). Commissioners Althen and Young have determined that the same requirement should apply in interference cases. *Greathouse,* 40 FMSHRC __, slip op. at 25 (separate op.).

Here, there is no dispute that Ternent's email was sent in relation to a discrimination complaint filed by Hirt. Even if GSE believed that some statements made in the discrimination complaint were not accurate, it was a complaint nonetheless. The filing of the complaint was a protected activity under Section 105(c)(1). Thus, the email was sent at least in part because of Hirt's protected activity.

Legitimate and Substantial Reason

In some cases, conduct that interferes with the protected rights of miners may be justified by an operator's "legitimate and substantial reason." *Franks*, 36 FMSHRC at 2116 (Chairman Jordan & Comm'r Nakamura, separate op.). For the operator to prevail on this defense, its actions must be narrowly tailored to promote the purported justification, and the justification must "outweigh[] the harm caused to the exercise of protected rights." *McGary*, 38 FMSHRC at 2019 (quoting *Franks*, 36 FMSHRC at 2108); *see also Moses,* 4 FMSHRC at 1479 n.8 (noting that in some cases a comment on protected rights could be necessary to address a safety or health problem).

Ternent offers two justifications for sending the email to Hirt. First, he states that he sent the email as a summary of a phone conversation between him and Stock. Resp. Ex. 6 ¶ 27 (Ternent Affidavit). During that conversation, Ternent informed Stock that he believed Hirt had committed criminal wrongdoing by making false statements in his filings with the Commission. *Id.* Ternent also conveyed GSE's position that it did not wish to attempt mediation. *Id.* At the

end of the conversation, Stock requested that Ternent send him something in writing to explain to the judge why they were abandoning mediation. Resp. Ex. 6 ¶ 28. Ternent included the sentence about Hirt's criminal wrongdoing in the email because it had been part of his conversation with Stock. Resp. Ex 6 ¶¶ 29, 31.

Accepting these facts as true, the justification appears to be the need to make an accurate reflection of the conversation between Stock and Ternent, as well as the need to provide a reason to the judge for abandoning mediation. GSE has offered no explanation for why those reasons are important, and the information could have been provided by Ternent without resort to a threat. In contrast, the impact on the rights of the miner is substantial. A reasonable miner would be strongly dissuaded from pursuing his complaint with the Commission when faced with the threat of criminal charges. I do not find that the reasons offered by GSE outweigh that impact.

Ternent also states that he was motivated to include the reference to criminal charges in the email because he "felt it would be fundamentally unfair to Mr. Hirt to participate in mediation or a hearing without being aware that a criminal investigation and prosecution could follow." Resp. Ex. 6 ¶ 31. It is true that Hirt was unrepresented and may have needed the warning about criminal liability, although it is worth noting that this argument is inconsistent with Ternent's claim that the email was not intended for Hirt. However, Ternent presented the information about potential criminal charges as a threat conditioned on Hirt's continuing to pursue his complaint. The Act requires that an action that interferes with the protected rights of miners be narrowly tailored to the justification for the action. *Greathouse*, 40 FMSHRC __, slip op. at 17 (Comm'rs Cohen & Jordan, separate op.). Ternent's warning could easily have been conveyed in a way that did not interfere with Hirt's right to pursue his complaint. The choice to phrase the warning as a threat increased rather than minimized the impact on Hirt's protected activity.

I find that neither of GSE's proffered justifications outweighs the harm to protected rights in this case. There is no dispute of material fact, and Hirt is entitled to summary decision as a matter of law.

V. REMEDY

The authority of Commission judges to fashion relief for victims of discrimination is broad. *Sec'y of Labor on behalf of Rieke v. Akzo Nobel Salt Inc.*, 19 FMSHRC 1254, 1257 (July 1997). Section 105(c)(3) of the Act states that when a complainant's charges of discrimination are sustained, the Commission shall "issue an order . . . granting such relief as it deems appropriate, including, but not limited to, an order requiring the rehiring or reinstatement of the miner of his former position with back pay and interest or such remedy as may be appropriate." 30 U.S.C. § 815(c)(3). The goal of a Commission judge in fashioning a remedy is "to restore discriminatees, as nearly as we can, to the enjoyment of the wages and benefits they lost as a result of their illegal terminations." *Sec'y of Labor on behalf of Dunmire v. N. Coal Co.*, 4 FMSHRC 126, 143 (Feb. 1982).

Hirt claims in his original complaint that he is entitled to $50,000.00 "for the hardship I have had to face for the last three years."[4] Compl. Hirt was given the opportunity to present further evidence regarding his damages but declined to do so. Conf. Call 5-7, Aug. 1, 2018. In the absence of any evidence of actual harm suffered by Hirt as a result of GSE's interference, I am unable to award him any damages in this case.

Hirt also argues that he is entitled to attorney's fees because he represented himself in this matter. Conf. Call 6, Aug. 1, 2018. Section 105(c)(3) provides that

> Whenever an order is issued sustaining the complainant's charges under this subsection, a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as determined by the Commission to have been reasonably incurred by the miner . . . shall be assessed against the person committing such violation.

30 U.S.C. § 815(c)(3). An award of attorney's fees is "a matter that lies within the sound discretion of the trial judge." *Sec'y on behalf of Ribel v. E. Assoc. Coal Corp.*, 7 FMSHRC 2015, 2027 (Dec. 1985).

Hirt is not an "attorney" and did not retain an attorney to represent him in this matter. The Supreme Court considered the question of whether a pro se litigant could be awarded attorney's fees in an action under a different federal statute in *Kay v. Ehrler*, 499 U.S. 432, 111 S. Ct. 1435 (1991). The Court found that the primary purpose of the fee provision at issue was "ensuring the effective prosecution of meritorious claims." 499 U.S. at 437. The Court explained that

> A rule that authorizes awards of counsel fees to pro se litigants . . . would create a disincentive to employ counsel whenever such a plaintiff considered himself competent to litigate on his own behalf. The statutory policy of furthering the successful prosecution of meritorious claims is better served by a rule that creates an incentive to retain counsel in every such case.

Id. at 438. Discrimination complainants who are not represented by counsel frequently have difficulty navigating the procedural requirements of the Commission and presenting a successful case. Thus, it would be unwise to adopt an approach that encouraged complainants to proceed without counsel. Accordingly, I decline to award attorney's fees in this case.

[4] Hirt also asks for a copy of his W-2, but that is not an issue for a FMSHRC proceeding and must be addressed between the parties in another setting.

VI. PENALTY

Because Hirt's discrimination complaint is sustained, the Secretary shall be notified of this decision and shall file a petition for assessment of civil penalty with the Commission within 45 days of receipt of the decision. *See* 29 C.F.R. § 2700.44(b).

Hirt has on several occasions raised the argument that because he is pursuing his complaint without the assistance of the Secretary, any penalty assessed should be paid to him rather than to the Secretary. Conf. Call Tr. 2-4, Aug. 1, 2018; Conf. Call Tr. 3-4, June 26, 2018. In support of this argument, he cites the case *Secretary of Labor on behalf of Bailey v. Arkansas-Carbona Co.*, 5 FMSHRC 2042 (Dec. 1983). *Bailey* states that in discrimination cases, the Commission should grant "all relief that is necessary to make the complaining party whole." 5 FMSHRC at 2049 (quoting S. Rep. No. 95-181, at 37 (1977)). The "make whole" principle is intended to "restore the [victim of illegal discrimination] to the situation he would have occupied but for the discrimination." *Bailey*, 5 FMSHRC at 2049 (quoting *Dunmire*, 4 FMSHRC at 142).

I am not persuaded by Hirt's argument. A penalty awarded to Hirt would not make him "whole," but rather would put him in a better position than he would have held but for the discrimination. This would exceed the remedial authority granted to the Commission by the Act.

VII. ORDER

Respondent's Motion for Summary Decision is hereby **DENIED** and Complainant's cross-motion is **GRANTED**. Gary Servaes Enterprises is hereby **ORDERED** to stop any action that threatens or tends to interfere with the rights of miners to file discrimination complaints as provided in the Mine Act, and to post a notice at the mine, in a conspicuous location, setting forth the rights of miners pursuant to Section 105(c) of the Act, along with a copy of this decision. This decision is referred to the Secretary of Labor for proposal of a civil penalty.

Margaret A. Miller
Administrative Law Judge

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