FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
721 19th STREET, SUITE 443
DENVER, COLORADO 80202-2536
TELEPHONE: 303-844-5266 / FAX: 303-844-5268

November 18, 2014

MONA KERLOCK, Complainant, v. ASARCO, LLC, Respondent	DISCRIMINATION PROCEEDING Docket No. WEST 2014-851-DM RM-MD 14-10 Ray Mine Mine ID: 02-00150

ORDER DENYING RESPONDENT'S MOTION FOR RECONSIDERATION & ORDER DENYING MOTION TO CERTIFY FOR INTERLOCUTORY RULING

Before: Judge Miller

This case is before me on a Complaint of Discrimination brought by Mona Kerlock, on her own behalf, pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c) (the "Mine Act" or "Act"). On October 22, 2014 Respondent, Asarco, LLC, filed a Motion for Reconsideration of Respondent's Motion to Dismiss, or in the alternative, Motion to Certify for Interlocutory Review. On November 3, 2014 Complainant filed a statement in opposition to both of Respondent's motions. For reasons that follow, I **DENY** both of Respondent's motions.

Asarco argues first that the court should reconsider Respondent's August 12, 2014 motion to dismiss given that Complainant is no longer a pro se litigant and new information has come to light which indicates that Complainant is unable to return to work. In the alternative, the court should certify for interlocutory review its decision denying Respondent's motion to dismiss. Conversely, Complainant argues that her pleadings met the burden to survive a motion to dismiss for failure to state a claim, and the change in her status from a pro se litigant to a represented party is not a basis for reconsideration. Further, the parties are actively engaged in discovery, dismissal at this time would be inappropriate, and the court should deny Respondent's request to certify this matter for interlocutory review because there is no basis for immediate review.

On March 31, 2014 Complainant, Mona Kerlock, filed a discrimination complaint with the Secretary of Labor, Mine Safety and Health Administration. MSHA investigated the complaint and, based upon its review of the information gathered, determined that there was not sufficient evidence to establish that a violation of section 105(c) occurred. Subsequently, on June 17, 2014, Complainant sent to the Commission a letter stylized as a "Request for Appeal" in which she sought to proceed pursuant to section 105(c)(3) of the Act. On August 12, 2014 Respondent filed a motion to dismiss for failure to state a claim. Complainant, who was a pro se litigant at the time, did not file a response. On August 27, 2014 this court issued an order denying Respondent's motion to dismiss. *Kerlock v. Asarco, LLC*, 36 FMSHRC 2404 (Aug. 2014) (ALJ). There, in treating Respondent's motion to dismiss as a motion for summary

decision, I found that Complainant had properly alleged that she engaged in a protected activity and suffered an adverse action, and that material facts were in dispute. *Id.* at 2405-2406. Specifically, I noted that Complainant alleged that she, along with others at the mine, had complained about dust in the area of the 2 Shovel and 5A Dump, and that, subsequently, Complainant had been placed on medical leave, without full pay, and sent home despite her contention that she could have worked in other areas at the mine. *Id.* at 2406. I also found that the original complaint and subsequent Request for Appeal satisfied the minimal burden for pleadings in 105(c) proceedings. Finally, I found that the Complainant's status as a pro se litigant afforded her certain protections from Asarco's challenge to the adequacy of her pleadings. *Id.*

Asarco first asserts that, because Complainant is now represented by counsel, her pleadings should no longer be held to the lower standard that the court applied in its order denying the motion to dismiss. As a result, Respondent contends that the court should review its conclusion that Complainant alleged a protected activity since Complainant only reported personal health problems, and "complaints regarding a personal illness are not protected activity[.]" Asarco Mot. at 3-4. Further, Respondent argues that the court should review its conclusion that Complainant alleged an adverse action given that she admitted during her workers compensation deposition that she is unable to work, and communications with physicians show that Complainant is unable to return to work. *Id.* at 6-9. Therefore, Respondent asserts that the facts demonstrate that there was no adverse action, and placing Complainant on short term disability was a legitimate business decision.

The fact that Complainant is no longer a pro se litigant does not change the court's finding that Complainant satisfied the Commission's requirements for pleadings in a 105(c) proceeding. First, a dismissal is a drastic remedy not favored by the Courts. Next, although Asarco argues that there is new evidence to show the pleadings are insufficient, I disagree. Not only is there minimal change from the first motion to dismiss, there is nothing to show that the pleadings are inadequate. In addition, material facts remain in dispute, and, therefore, summary dismissal of this proceeding is inappropriate at this time.

Complainant's pleadings satisfy the Commission's minimal burden for pleadings in a 105(c) proceeding. The Commission's procedural rules require that a discrimination complaint need only "include a short and plain statement of the facts, setting forth the alleged . . . discrimination or interference, and a statement of the relief requested." 29 C.F.R. § 2700.42. This court, in the original order denying the motion to dismiss, found that Complainant had satisfied the burden for pleadings in a 105(c) proceeding. *Kerlock v. Asarco, LLC*, 36 FMSHRC 2404, 2406 (Aug. 2014) (ALJ). Specifically, the court found that the pleadings appropriately alleged that Complainant engaged in protected activity and suffered an adverse action, and requested relief. The finding was based on a review of the pleadings, and was not dependent on Complainant's status as a pro se litigant at the time. The original order denying the motion to dismiss is clear that the denial is based not just on the pro se status, but the sufficiency of the pleadings themselves. In fact, the decision makes reference to the Complainant's status as a pro se litigant as it relates to the sufficiency of the pleadings only after the discussion finding that the Commission's procedural rules had been satisfied. While Complainant's status certainly bolstered the argument for finding that the pleadings were sufficient, that finding was not

dependent upon Complainant's pro se status. Rather, the court would have reached the same conclusion if Complainant had been represented by counsel at the time. Accordingly, I reiterate my earlier finding that Complainant's pleadings satisfy the Commission's procedural rules.

Complainant has alleged material facts which contradict those offered by Respondent and, therefore, a dispute of material fact exists and summary dismissal is inappropriate. In order to establish a prima facie case of discrimination a complaining miner must show that they engaged in protected activity and suffered an adverse action that was motivated at least partially by the protected activity. *Id.* at 2405. This court, in the original order denying the motion to dismiss, found that Complainant alleged "that she, along with others at the mine, complained about dust in the area of 2 Shovel and 5A Dump, and that, subsequently, she was placed on medical leave, without full pay, and sent home despite her contention that she could have worked in other areas at the mine." *Id.* 2405-2406. While Respondent again asserts that no protected activity occurred, I again find that Complainant, in alleging that she filed a safety complaint regarding dust at the mine, has alleged a protected activity.[1] *See Perry v. Phelps Dodge Morenci Inc.*, 18 FMSHRC 1918, 1921 (Nov. 1996) (Complainant properly alleged protected activity when he pled that he complained to the mine that, due to medical problems, his operation of a truck posed a safety hazard to both himself and others).

While Respondent asserts that new information contained in doctor's notes and Complainant's deposition testimony in a workers compensation proceeding necessitate reconsideration of the court's finding that an adverse action was alleged, I disagree. [1] Although Respondent asserts that Complainant, in her deposition testimony for her workers compensation proceeding, admitted that she is unable to work, I find that this conclusion cannot be clearly drawn from the testimony. As noted above, and in the original order denying the motion to dismiss, Complainant alleged that she was placed on medical leave, without full pay. This certainly is an allegation of an adverse action. Respondent has the ability at hearing to raise the defense that the adverse action was a justified business decision, but there is nothing in its motion that would lead me to believe that Kerlock failed to allege an adverse action. While Respondent asserts that the action was motivated by legitimate business reasons, Complainant alleges that it was motivated by the complaint she made. Asarco's motion seeks to have this matter dismissed for Complainant's failure to *prove* her case based on her pleadings. However, Complainant is not required to do so, and, rather, is simply obligated to meet the Commission's minimal pleading requirements, which she has done. At this point, a dispute of material fact remains regarding both the complaint made by Kerlock, and the circumstances surrounding the adverse action. Accordingly, I reiterate my earlier finding that material facts are in dispute and that summary dismissal of this proceeding is inappropriate at this time.

Finally, Asarco argues that, in the event the Court denies its motion for reconsideration, it should certify the issue of the adequacy of Complainant's pleadings for interlocutory review.

---

[1] Respondent asserts that the court, in denying the original motion to dismiss, relied on a statement that was not contained in the motion. To the extent that the language in the order denying the motion to dismiss was not clear, the court clarifies here that it intended to draw attention to the fact that Respondent has acknowledged that a truck driver who suffers a reaction due to exposure to something in the mine atmosphere could be a hazard to not only themselves, but also to others at the mine.

Asarco argues that a controlling question of law exists on the issue of whether its motion to dismiss should be granted, and particularly that Complainant did not adequately plead a protected activity and adverse action. Asarco asserts that the motion to dismiss would have been granted had the court been aware of the most recent communications from Complainant's physicians and Complainant's deposition testimony, and Complainant had not been a pro se litigant at the time the motion was filed. *Id.* Respondent avers that immediate review of this matter will materially advance the case since a favorable finding would bring the case to a close, and the parties would be able to avoid further negotiation, discovery, trial preparation and expense. *Id.* at 11. In addition, review could help to expedite the discovery process and any settlement. *Id.* I find no merit to Asarco's assertion that interlocutory review is appropriate in this case.

The Commission's Procedural Rules state that "[i]nterlocutory review by the Commission shall not be a matter of right but of the sound discretion of the Commission." 29 C.F.R. § 2700.76(a). Interlocutory review "cannot be granted unless . . . [t]he Judge has certified, upon . . the motion of a party, that [her] interlocutory ruling involves a controlling question of law and that in [her] opinion immediate review will materially advance the final disposition of the proceeding." *Id.* at § 2700.76(a)(1)(i).

I find that this matter does not involve a controlling question of law. The question in this matter involves the sufficiency of the Complainant's pleadings. This issue is not novel nor does it involve an unresolved question of law as relevant to case. As discussed above, in the original order denying the motion to dismiss, and in Commission case law, there is a minimal burden for pleadings in 105(c) matters. *Perry v. Phelps Dodge Morenci Inc.*, 18 FMSHRC 1918, 1921 (Nov. 1996). Here, the pleadings were sufficient when Complainant was pro se, would have been sufficient had Complainant been represented by counsel at that time, and remain sufficient at present. Accordingly, I find that there is no controlling question of law at issue.

I find that immediate review will not materially advance the final disposition of this matter. Respondent has not exhibited any sense of urgency which would accompany the need for immediate review. The court issued the original order denying Respondent's motion to dismiss on August 27, 2014. Rather than properly seek interlocutory review of that order as required by the Commission rules, Respondent filed a petition for discretionary with the Commission on September 26, 2014. While the petition was timely filed exactly 30 days after the issuance of my order, the Commission's October 2, 2014 order denied Respondent's petition because a final decision ending my jurisdiction over this matter had not been issued. *Kerlock v. Asarco, LLC*, 36 FMSHRC __, slip op. (Docket No. WEST 2014-851-DM) (Oct. 2, 2014). Rather than immediately file a motion for certification of interlocutory review, Respondent waited until October 22, 2014 to file the instant motions. Based on the timing of Respondent's filings, I am not convinced that there is an urgent need to have this motion put before the Commission.

While Respondent asserts that a favorable ruling by the Commission on interlocutory review would avoid further need for negotiation, discovery and trial preparation, the same could be said of most every case in which a judge has denied a party's motion to dismiss. There is nothing unique about this case that warrants the need for immediate review of my interlocutory

ruling on the pleadings. As Complainant points out, the parties are actively engaged in discovery, with both sides awaiting additional disclosures. It would be a disservice to both parties for the court to halt this matter so that the Commission can review a motion for summary dismissal in a case where discovery is still in its infancy, the record is far from being complete, and the court believes it unlikely that Respondent will succeed in its attempt to have the case dismissed. This case is presently set for hearing on January 21, 2015, just over two months from now. I find that certification of this matter for interlocutory review is more likely to delay the final disposition of this matter than materially advance it.

Accordingly, based on my above findings, Respondent's Motion for Reconsideration of Respondent's Motion to Dismiss is **DENIED**. Further, Respondent's Motion to Certify for Interlocutory Review is also **DENIED**. This case remains set for hearing on January 21, 2015. The court encourages the parties to continue to engage in necessary discovery and settlement discussions.

Margaret A. Miller
Administrative Law Judge

Distribution:

Tyler Allen, Shannon Peters, Tyler Allen Law Firm, 4291 North 24th Street, Suite 150 Phoenix, AZ 80516

Donna Pryor, Mark Savit, Jackson Lewis, 950 17th Street, Suite 2600, Denver, CO 80202