FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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January 18, 2019

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF DELBERT LEIMBACH, Applicant	DISCRIMINATION PROCEEDING Docket No. LAKE 2019-0106-DM No. NC-MD-19-01
v.	
HUBER CARBONATES, LLC Respondent	Mine: Quincy Plant Mine ID: 11-02627

ORDER DENYING RESPONDENT'S MOTION TO DISMISS OR IN THE ALTERNATIVE MOTION TO STAY, RECUSE, AND REINVESTIGATE

Before: Judge William B. Moran

Before the Court is Respondent Huber Carbonates, LLC's Motion to Dismiss or in the Alternative Motion to Stay, Recuse, and Reinvestigate. ("Motion"). The Secretary filed an Opposition to the Motion ("Opposition"). For the reasons which follow, the Court denies the Motion to Dismiss and also denies the Alternative Motion because the Court does not have the authority to order a stay, recusal or reinvestigation in connection with an Application for Temporary Reinstatement.

Huber's Motion seeks an order "dismissing the Secretary's Application for Temporary Reinstatement or, in the alternative, an Order staying the Secretary's Application for Temporary Reinstatement until such time as the Mine Safety and Health Administration ("MSHA") has recused the individuals involved in investigating Delbert Leimbach's ("Leimbach") Section 105(c) discrimination complaint and completing a new investigation into the merits of Leimbach's allegations by MSHA representatives who have not seen the email correspondence described in this motion."[1] Motion at 1.

[1] On December 26, 2018, following a hearing held on December 19, 2018, the Court issued an Order, granting the Secretary's Application for the Temporary Reinstatement of Delbert Leimbach, finding that the Application was not frivolously brought. Subsequently, on January 8, 2019, the parties filed a joint motion seeking to amend that Order granting temporary reinstatement to economically reinstate Leimbach as of December 26, 2018. The Court GRANTED the joint motion on January 11, 2019.

Background

The heart of the controversy precipitating the Motion may be concisely stated. On August 8, 2018, outside counsel for Huber sent what it contends was an attorney-client privileged and confidential email to Huber. The email was addressed to Huber's in-house counsel and members of management. According to Huber's Counsel, the email contained legal advice about a separate temporary reinstatement proceeding (Docket Number LAKE 2018-0343), before a different administrative law judge, and involving a different employee, although it also included legal advice regarding Leimbach. Motion at 2. Subsequently, according to the Motion, a Huber management member sent the email to another Huber employee, an EH&S [Environmental Health and Safety] Coordinator. That EH&S employee then forwarded the email to Leimbach, an act Huber characterizes as inappropriate and without authorization. *Id.* at 3. Leimbach then, again according to the Motion, forwarded the email to an MSHA special investigator and Leimbach filed a section 105(c) discrimination complaint under the Mine Act. The text of Leimbach's complaint asserted that his firing was based on forwarding the email to MSHA.

Huber's Counsel endeavored to have the email returned and asserted that an attorney for the Secretary acknowledged in September 2018 "that the email 'contained exchanges between management and counsel that meet the requirements of attorney-client communications.'" *Id.* at 4. Huber also asserts that the email also contains attorney work product, and as such, that is also privileged. *Id.* Later in September Huber fired Leimbach, asserting that the action was taken for violating company policies including sharing the email created by Huber's Counsel. Subsequently, the Secretary's Counsel and Huber's Counsel attempted to reach an accord about the disposition of the email but they were unable to come to an agreement.

The impact of the email was not limited to the Leimbach complaint. As noted, it was also connected with another discrimination complaint brought by a different individual, whose complaint was investigated by a different special investigator for MSHA and which case was before a different administrative law judge, in Docket No. LAKE 2018-0387-DM. In that separate discrimination proceeding, Huber's Counsel filed a motion similar in intent to the Motion currently before this Court. The administrative law judge assigned to that case dealt with the attorney-client privilege assertion by referring the question to another administrative law judge. That "referral judge" concluded that the email was subject to the attorney-client privilege being claimed. Motion at 5, Exhibit 2.

The Motion then turns to the Application for Leimbach's temporary reinstatement. Respondent observes that the four corners of Leimbach's complaint speak only to his actions regarding sharing the email with MSHA. As the Court noted in its Order of temporary reinstatement, the basis of a discrimination complaint is not limited to words in the complaint but includes MSHA's interview of the individual making the complaint. Order Granting Temporary Reinstatement at 4, *citing Hatfield v. Colquest Energy*, 13 FMSHRC 544 (Apr. 1991). The reason for this inclusion is plain – a person filing a discrimination complaint is not necessarily savvy about expressing all the possible bases for the complaint and therefore the MSHA interview and investigation are deemed to be part of the charging document.

Respondent's Contentions/Arguments

Huber begins its argument by noting that the requirements for a complaint include "a short and plain statement of the facts, setting forth the alleged discharge, discrimination or interference, and a statement of the relief requested." Motion at 6, *citing* 29 C.F.R. § 2700.42. Huber also contends that "the doctrine of collateral estoppel applies to 'preclude the relitigation in a subsequent suit of any issues actually litigated and determined in the prior suit.'" *Id.* (internal citations omitted). Focusing on the latter point, Huber asserts that Leimbach's Application for Temporary Reinstatement must be dismissed, because it is based on the email claimed to be within the attorney-client privilege, which Leimbach was not entitled to possess, and because the administrative law judge in that other discrimination case, which matter did not involve Leimbach, determined that the email was within the attorney-client privilege. *Id.*

From this, Huber contends that any use of the email is unwarranted and, since it cannot form the basis of any discrimination complaint filed by Leimbach, his Application and Complaint should be dismissed. Huber then stakes out its alternative requested relief if the Application is not dismissed. The alternative is that the Application be stayed until MSHA both recuses the individuals involved in investigating Leimbach's Section 105(c) discrimination complaint and undertakes and completes a new investigation into the merits of Leimbach's allegations, performed by new MSHA representatives, with those individuals being untainted by knowledge of the information in the Huber email. *Id.* at 7.

The Secretary's Opposition to Huber's Motion

At the outset the Secretary, in his Opposition, contends that Huber's Motion fails "to provide any reason to delay any temporary reinstatement hearing." Opposition at 1. As the temporary reinstatement hearing occurred before the Court had an opportunity to review the Secretary's Opposition and the Court, as noted above, granted the application, reinstating Leimbach, that aspect is now moot and the Court treats the Motion as a motion to reconsider whether the application was frivolously brought. Since the Court's determination of frivolity was not based on the email issue at all, but rather on separate and independent grounds of discrimination, the determination of reinstatement stands.

The Secretary also contends that "[t]his Court should also deny Huber's motion because the Court is not bound by Judge Rae's decision,[2] and because collateral estoppel does not apply in this case." *Id.* Instead, the Secretary asserts that Huber's filing is simply a *motion in limine* seeking to exclude potential evidence. Granting such a motion, excluding the email, "would be manifestly unfair to [the] Complainant." *Id.*

[2] The Secretary notes, and it is not disputed, that there are two separate discrimination cases involving different complainants and that those matters are before different administrative law judges. What the cases have in common is the question of the August 8, 2018 email between Huber and its legal counsel. They are: *Secretary on behalf of Justin Hickman v. Huber Carbonates, LLC*, Docket No. LAKE 2018-0387, which is before Judge Rae and *Secretary on behalf of Delbert Leimbach v. Huber Carbonates, LLC*, Docket No. LAKE 2019-0106, before this Court.

The Secretary acknowledges that Leimbach's temporary reinstatement application was based, *in part*, on information he learned through an August 8, 2018 email "between respondent, respondent's counsel, and a non-management level employee." *Id.* at 3. However, the Court takes note that the temporary reinstatement application was not based solely upon the August 8, 2018 email. In fact, at the temporary reinstatement proceeding, the Court's subsequent determination that the application was not frivolously brought was based entirely on information *apart* from that email. *See*, this Court's Order Granting Temporary Reinstatement, December 26, 2018, at 3 n.1.

Importantly, the Secretary announced that his decision to proceed with evidence apart from the August 8, 2018 email at the temporary reinstatement proceeding, did not constitute a concession that the email is not relevant nor that it would be improper to consider the email in a discrimination case on the merits. Opposition at 3.

In the argument section of the Secretary's Opposition, the Secretary asserts that Huber "seeks to dismiss the entire Leimbach TR Application because it disagrees with *one* of the Secretary's theories of the case." *Id.* at 4. (emphasis in original). In this regard the Opposition notes that the Secretary's Leimbach TR Application, [ ] was accompanied by an affidavit from Special Investigator David Schwab, [and that it] sets forth multiple instances of protected activities, including Mr. Leimbach's communications with MSHA and his safety-related complaints made directly to Huber." *Id.* at 5. The Secretary also challenges Huber's reliance on 29 C.F.R. § 2700.42, and Administrative Law Judge Miller's decision in *Secretary o/b/o Eric Greathouse et al v. Monongalia County Coal Co. et al*., 37 FMSHRC 2892 (Dec. 2015) (ALJ)("*Greathouse*"), because "[t]he pleading and evidentiary standards are different for temporary reinstatement proceedings than they are for merits proceedings."[3] Opposition at 5-6. The Court agrees. *Greathouse* was not a temporary reinstatement proceeding.

The Secretary also addresses whether the Court is bound by the decision of Judge Rae regarding the August 8, 2018 email and whether collateral estoppel applies, arguing that neither so limits this Court. Noting that the determination of an administrative law judge is not binding on another judge, the Secretary points to 29 C.F.R. part 2700.69(d) and *Big Ridge, Inc. v. FMSHRC*, 715 F.3d 631, 640 (7th Cir. 2013), which expressly address the subject of precedence. As to the collateral estoppel assertion, the Secretary argues that the email issue cannot be described as having been "determined," because Judge Rae's decision is not final and

[3] The Secretary similarly dismisses Huber's contentions that Leimbach inappropriately retained the August 8, 2018 email, that he admitted sharing the email with others, and that he was fired for violating several company policies and breaching his confidentiality agreement, because those contentions are not evidence, but rather arguments by Huber's Counsel. Further, at the temporary reinstatement stage, the Secretary argues that it is outside the judge's duty to resolve conflicts in testimony or to entertain the operator's rebuttal or affirmative defenses. Such proceeding is only to determine whether the application has been frivolously brought. Opposition at 6-7.

there is no established identity of issue. [4] Beyond those issues, in the temporary application case before her, as Judge Rae temporarily reinstated Mr. Hickman *a month before Huber's motion for declaratory judgment*, the email determination could not be deemed as necessary to her temporary reinstatement decision. Opposition at 8-9.

Last, the Secretary contends that "Huber's demand for this Court to 'stay, recuse, and reinvestigate' this matter must be rejected because the requested remedies are outside the scope of Commission authority to grant." *Id.* at 9. In this regard, the Secretary asserts that the Commission is without authority to issue "a declaratory order granting such relief."[5] *Id.*

Discussion

After receiving the Motion and the Opposition, the Court held a conference call with the parties, *procedurally* addressing the logistics of addressing the Motion and whether its order on the Motion could include a ruling on whether the email is within the attorney-client privilege claim and, if so, whether it was waived in any event. The Court was initially inclined to address those issues in this Order, but as a result of the conference call, it reconsidered that approach and directs that those issues now be addressed by a separate motion.[6]

Nevertheless, speaking to the Motion at hand in a limited fashion, Huber asserts that the emails in issue constitute attorney-client privileged communications and they also contain attorney work product, which is also privileged. It is true that, in a distinct Mine Act discrimination case, involving a different miner, and before a different administrative law judge, the same Huber emails were determined to be within the attorney-client privilege. Huber's Counsel seeks the same outcome regarding those emails in this case.

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[4] There are problems with collateral estoppel claim in that it may be questioned whether the two cases involve the same parties, but perhaps more significantly, whether there has been a final adjudication on the merits. The latter seems not to have occurred. Further, the issue of waiver of the attorney-client claim has clearly not been determined in that other matter. *Compare with Sec. v. Southwest Quarry and Materials*, 2003 WL 145588 at *2-3 (Jan. 2003) (ALJ).

[5] On the issue of declaratory orders, among other authority cited, the Secretary states that "declaratory orders are 'noncoercive declarations of rights rather than orders imposing penalties or liabilities' … [and that] [t]he only difference between declaratory orders or judgments and other orders and judgments is presence or absence of the element of coercion." Opposition at 10, *citing Administrative Declaratory Orders*, 13 Stan. L. Rev. 307, 307 (1961); Kenneth Culp Davis, *Administrative Law Treatise* § 4.10 at 268 (1958). The Secretary comments that "this constraint is appropriate to ensure the agency is limited to adjudicating only the specific types of claims it is authorized to hear, rather than functioning more like a court of general jurisdiction." *Id.*

[6] Thus the Secretary and Huber will have a separate opportunity to *flesh out* the email issues. "To flesh out something is to give it substance, or to make it fuller or more nearly complete. …To *flush out* something is to cause it to leave a hiding place." *Flesh Out*, Merriam-Webster's Collegiate Dictionary (11th ed. 2003).

As described above, Huber asserts that, as it prevailed in the distinct discrimination matter before a different judge, collateral estoppel controls the attorney-client contention in this case as well. From that premise, it contends that since Leimbach's complaint rests on that privileged material and it may not be considered, his complaint and consequently the application must fail.

Huber's Motion must fail because the Secretary's Application for Leimbach did not in fact rest solely upon the email, nor did the Court's December 26, 2019 Order Granting Temporary Reinstatement rely at all upon the email material. In addition, the Court agrees with the arguments advanced by the Secretary of Labor that collateral estoppel is not applicable to this matter. Accordingly, Huber's Motion to Dismiss is **DENIED**.

As to Huber's alternative motion to stay, recuse and reinvestigate Leimbach's discrimination complaint anew, with no part of such reinvestigation involving the Huber emails and that it be performed by individuals who have not been exposed to those emails, that is also **DENIED**. Motion at 7-8. In making this argument, Huber simply repeats the points it made in seeking its Motion to Dismiss. Key in the Court's denial of Huber's alternative motion is no prior decision by the Commission is cited to show that the Court has the authority to order reinvestigation by the Secretary. When presented with an Application for Temporary Reinstatement, the Court is faced with a single issue – whether the Application was frivolously brought. In its December 26, 2018 Order granting the temporary reinstatement application for Delbert Leimbach, the Court, relying only on testimony and exhibits apart from the challenged emails, found that the application was not frivolous. [7]

The Court, now in possession of the Huber email, which was provided by Respondent's Counsel, at the Court's direction, for its *in camera* review, awaits further arguments on the issues of whether the email is within the attorney-client privilege claim and, if so, whether it was waived in any event. The parties are advised that the Court is receptive to a conference call, if there are questions regarding how to proceed on those issues.

William B. Moran

William B. Moran
Administrative Law Judge

[7] Huber's Motion refers to its motion seeking declaratory relief in the *Hickman* matter before Judge Rae, but the Motion here does not seek such relief. Although declaratory relief may be available before the Commission in some instances, Huber has neither asserted, nor articulated, the basis for such relief here. *See, e.g.*, *North American Drillers, LLC*, 34 FMSHRC 352, 356 (Feb. 2012).

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