FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
Office of Administrative Law Judges
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004

December 2, 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of JEFFREY PAPPAS, Complainant,	:	DISCRIMINATION PROCEEDING Docket No. WEST 2016-264-DM WE MD 16-02
v.	:	
CALPORTLAND COMPANY, and RIVERSIDE CEMENT COMPANY, Respondents.	:	Mine ID 04-00011 Mine: Oro Grande Quarry

ORDER DENYING RESPONDENTS' MOTIONS FOR SUMMARY DECISION

This case is before me upon a complaint of discrimination filed by the Secretary of Labor ("Secretary"), on behalf of Jeffrey Pappas against CalPortland Company ("CalPortland") and Riverside Cement Company ("Riverside"), pursuant to section 105(c)(2) of the Federal Mine Safety and Health Review Act of 1977 ("Mine Act"), 30 U.S.C. § 815(c)(2).

I. STATEMENT OF THE CASE

In October 2015, Pappas filed a complaint alleging discrimination under section 105(c) of the Mine Act against CalPortland. After an investigation, the Secretary chose to pursue the case on behalf of Pappas and filed an application for temporary reinstatement pursuant to section 105(c)(2) of the Mine Act against CalPortland. I held a hearing on the temporary reinstatement on January 5, 2016, and granted the Secretary's application. Upon review, the Federal Mine Safety and Health Review Commission ("Commission") upheld Pappas' temporary reinstatement. CalPortland subsequently filed a petition for review to the U.S. Court of Appeals for the D.C. Circuit, which granted CalPortland's petition and vacated the Commission's decision and order for temporary reinstatement on October 20, 2016.[1]

On February 12, 2016, the Secretary filed a discrimination complaint on behalf of Pappas to the Commission. Chief Administrative Law Judge Robert J. Lesnick assigned the matter to me on March 11, 2016. On March 11, 2016, the Secretary filed an amended complaint adding Riverside as a respondent to the proceeding. CalPortland and Riverside each filed an answer to

[1] The D.C. Circuit held Pappas was an "applicant for employment" under section 105(c)(2) who was not eligible for temporary reinstatement. *CalPortland Co. v. FMSHRC*, No. 16-1094, slip op. at 2 (D.C. Cir. Oct. 20, 2016). The court maintained, however, that CalPortland may still be held liable for discrimination under the section 105(c)(2). *Id.* at 17 ("[i]n a final decision, CalPortland, as the successor operator of the Oro Grande plant, could perhaps be ordered to instate Pappas if it was found to have violated the Mine Act when it failed to hire him. . . .") (internal citations omitted).

the amended complaint on April 8, 2016. I issued a Notice of Hearing on April 14, 2016, and set this matter for hearing on December 6–9, 2016, in San Bernardino, California.

II. ISSUES

On November 10, 2016, Respondents Riverside and CalPortland each filed a motion for summary decision. On November 28, 2016, the Secretary timely filed a response to each of Respondents' motions after filing an unopposed motion to extend the submission deadline, which I granted.

The issues before me are as follows: (1) whether Riverside is entitled to summary decision because there are no material facts in dispute; and (2) whether CalPortland is entitled to summary decision because there are no material facts in dispute. For the reasons that follow, Riverside's motion for summary decision is **DENIED**, and CalPortland's motion for summary decision is **DENIED**.

III. FACTUAL BACKGROUND

Riverside owned and operated the Oro Grande Quarry from July 2014 to September 30, 2015. (Am. Compl. at 2; Riverside Answer at 1.) Pappas worked at the Oro Grande Quarry as a dust collector and laborer. (*Id.*; Riverside Mot. at 2.) Early in 2014, Pappas grew concerned about a potentially dangerous situation at the mine and filed a hazard complaint with MSHA. (Am. Compl. at 2; Riverside Mot. at 2.) On April 15, 2014, Pappas filed a discrimination complaint with MSHA against his employer. (Am. Compl. at 3; Riverside Mot. at 3.) The complaint resulted in a settlement agreement with Riverside, whereby Pappas was reinstated at the Oro Grande Quarry on January 5, 2015. (Am. Compl. at 3; Riverside Answer at 3; Riverside Mot. at 3.) (*Id.*)

On June 30, 2015, CalPortland entered into an agreement with Martin Marietta Materials, Inc. ("Martin Marietta"), Riverside's parent company, to purchase assets that included the Oro Grande Quarry. (Am. Compl. at 4; Riverside Answer. at 3; CalPortland Answer at 8.) In August 2015, CalPortland began visiting Oro Grande's facilities. (Am. Compl. at 4; Riverside Answer at 3; CalPortland Answer at 2.) In September 2015, CalPortland invited Riverside's employees to apply for positions with CalPortland and interviewed those who submitted applications. (Am. Compl. 4; CalPortland Answer at 3.)

At that time, Jamie Ambrose served as Riverside's human resources manager. (Am. Compl. at 4; Riverside Answer at 3.) Ambrose was later offered the position of human resources manager at the mine with CalPortland. (Am. Compl. at 4; Riverside Answer at 3; CalPortland Answer at 2.) On September 3, 2015, Steve Antonoff, Vice President of Human Resources for CalPortland, met with Ambrose and discussed Ambrose's recommendations for hire. (Am. Compl. at 4; Riverside Answer at 3; CalPortland Mot. at 8; Ambrose Decl. at 4.) Ambrose did not positively recommend Pappas for hire. (*Id.*)

Pappas subsequently did not receive an offer of employment from CalPortland. (Am. Compl. at 4–5; CalPortland Mot. at 13.) Pappas was laid off by Riverside and received a severance package. (Am. Compl. at 4; Riverside Mot. at 3.)

IV. PRINCIPLES OF LAW

A. Summary Decision

Commission Rule 67(b) provides that 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) [t]hat there is no genuine issue of material fact; and (2) [t]hat the moving party is entitled to summary decision as a matter of law." 20 C.F.R. § 2700.67(b). A "material fact" for the purposes of defeating summary decision can also be an inference, drawn from evidence on record, as to a factual element of a claim. *KenAmerican Res.*, 38 FMSHRC __, slip op. at 4, No. KENT 2013-211 (Aug. 25, 2016).

The Commission has consistently held that summary decision is an "extraordinary procedure" and analogizes it to Rule 56 of the Federal Rules of Civil Procedure.[2] *Lakeview Rock Prods., Inc.*, 33 FMSHRC 2985, 2987 (Dec. 2011) (citations omitted). The Supreme Court, as the Commission observes, has determined that summary judgment is only appropriate "upon proper showings of the lack of a genuine, triable issue of material fact." *Id.* (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)). The Supreme Court has also held that both the record and "inferences drawn from the underlying facts" are viewed in the light most favorable to the party opposing the motion. *Id.* at 2988 (quoting *Poller v. Columbia Broadcasting Sys.*, 368 U.S. 464, 473 (1962); *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

The Commission has also recently noted that a party moving for summary judgment bears the initial burden of showing that there is no genuine dispute as to material facts. *KenAmerican Res.*, 38 FMSHRC __, slip op. at 4 (citing *Celotex Corp.*, 477 U.S. at 323; *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970)). If the moving party carries its burden, then the burden shifts to the non-movant to establish a genuine dispute as to material fact. *Id.* However, in determining whether facts are disputed, Commission Judges should not solely rely on the parties' claims, but should conduct an independent review of the record. *Id.*

B. Discrimination Under the Mine Act

Section 105(c)(1) of the Mine Act provides:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the statutory rights of any miner . . . because such miner . . . has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent . . . of an alleged danger or safety or health violation in a coal or other mine, or because such miner . . . has instituted or caused to be instituted any proceeding under or related to this chapter or has

[2] Federal Rule of Civil Procedure 56(a) provides for the filing of motions for summary judgment and states that: "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

testified or is about to testify in any such proceeding, 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).

Under Commission law, a complainant establishes a *prima facie* case of a violation of section 105(c) if the preponderance of the evidence proves (1) that the complainant engaged in a protected activity, (2) that there was adverse action, and (3) that the adverse action was motivated in any part by the protected activity. *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds, sub nom. Consolidation Coal Co. v. Marshall,* 663 F.2d 1211 (3d Cir. 1981).

In evaluating whether a complainant has proven a causal connection between protected activities and adverse action, the following factors are to be considered: (1) knowledge of the protected activity; (2) hostility or animus toward protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment. *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds*, 709 F. 2d 86 (D.C. Cir. 1983).

The mine operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 818 n.20 (Apr. 1981). If the mine operator cannot rebut the *prima facie* case, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activities and would have taken the adverse action in any event based on unprotected activities alone. *Driessen*, 20 FMSHRC at 328-29; *Pasula*, 2 FMSHRC at 2800.

V. ANALYSIS AND CONCLUSIONS OF LAW

A. Riverside's Motion for Summary Decision

Riverside asserts that it is entitled to summary decision because the Secretary cannot prove by a preponderance of evidence that Pappas' termination from Riverside was motivated in any part by protected activity and therefore cannot establish a *prima facie* case of discrimination. (Riverside Mot. at 1–2.) Riverside specifically notes that it laid off its entire workforce following CalPortland's asset purchase of the Oro Grande facility, and thus its decision to lay off Pappas was based solely on the asset sale. (*Id.* at 2.)

In response, the Secretary asserts that his claim against Riverside is not based on Pappas' lay off, but rather on Riverside failing to address Pappas' harassment complaint and declining to recommend Pappas for continued employment at CalPortland. (Opp. to Riverside at 2.) The Secretary therefore argues that Riverside is not entitled to summary decision because Riverside has not identified uncontroverted facts that are relevant to the Secretary's allegations and has failed to establish that no genuine issues of material fact exist. (*Id.* at 5.)

To succeed in his claim, the Secretary must establish a *prima facie* case for discrimination and demonstrate (1) Pappas engaged in a protected activity, (2) that there was adverse action, and (3) that the adverse action was motivated in any part by the protected activity. *Driessen, Inc.*, 20 FMSHRC at 328; *Pasula*, 2 FMSHRC at 2799-2800. Riverside concedes Pappas engaged in protected activity when he filed a discrimination complaint in April 2014, establishing the first element of discrimination. (Riverside Mot. at 6.)

In regard to the second element, the Commission has recognized harassment as a form of adverse action. *See Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475, 1478–79 (Aug. 1982), *aff'd* 770 F.2d 168 (6th Cir. 1985) (concluding that coercive interrogation and harassment over the exercise of protected rights is prohibited by section 105(c)(1) of the Mine Act). The Commission has also held that "an adverse action is an act of commission or omission by the operator subjecting the miner to discipline or a detriment in his employment relationship. *Sec'y of Labor on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842, 1847–48 & n.2 (Aug. 1984) (recognizing discrimination may manifest itself in subtle or indirect forms of adverse action). Thus, the Secretary's claim that Riverside management allowed co-workers to harass Pappas about his safety complaint could constitute adverse action. (Am. Compl. at 3) Riverside, however, denies Pappas was subject to such harassment. (Riverside Answer at 3.)

Additionally, Ambrose, Riverside's human resources manager at the time, did not recommend Pappas for employment at CalPortland. (Am. Compl. at 4; Riverside Answer at 3; CalPortland Mot. at 8; Ambrose Decl. at 4.) In other discrimination contexts, a negative reference from a former job employer for engaging in protected activity has constituted adverse action. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997) (holding an employer could be liable for retaliation under Title VII by providing a negative job reference against an employee after the employee's discharge). Ambrose denies giving Pappas a "negative" recommendation, but states she simply passed on giving a positive recommendation. (Ambrose Decl. at 4.) Her characterization, however, is subjective. In fact, the Secretary has disputed Ambrose's characterization of her meetings with CalPortland and the truthfulness of her statements.[3] The Commission has recognized that credibility determinations are not appropriate for summary decision. *KenAmerican Res.*, 38 FMSHRC __, slip op. at 10 & n.11 (". . . a hearing, with the opportunity to observe a witness' demeanor, is the proper venue to determine intent and credibility, not a summary decision motion"). As such, whether Ambrose's representations regarding her hiring recommendations are credible cannot be determined at this stage.

With respect to the third element, the Secretary must present evidence demonstrating that the adverse action was motivated in any part by Pappas' protected activity. Discriminatory intent can be established with evidence of: (1) knowledge of the protected activity; (2) hostility

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[3] In her response to CalPortland's motion for summary decision, counsel for the Secretary characterizes Ambrose's lack of recommendation as "blacklisting." (Opp. to CalPortland at 12.) Additionally, the Secretary appears to question Ambrose's credibility. (Opp. to CalPortland at 5–6.) Specifically, the Secretary notes Ambrose previously told MSHA Special Investigator Jackson that she did not talk to CalPortland about Riverside employees. (*Id.* at 5.) However, the record establishes that Ambrose did discuss her recommendations for hire with CalPortland. (Am. Compl. at 4; Riverside Answer at 3; CalPortland Mot. at 8; Ambrose Decl. at 4.)

or animus toward protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment. *Chacon*, 3 FMSHRC at 2510 (Nov. 1981). Riverside admits the Secretary will be able to prove the first element regarding knowledge. (Riverside Mot. at 8.)

In regard to the second element, Riverside asserts there is no evidence of animus and that Pappas was treated identically to all Riverside employees. (*Id.*) Animus may be shown by evidence suggesting supervisors were indifferent to or angered by a miner's protected activity. *See Turner v. Nat'l Cement Co. of California*, 33 FMSHRC 1059, 1069 (May 2011) (discussing supervisors' negative reactions to miner's safety complaints); *Sec'y of Labor on behalf of Williamson v. CAM Mining, LLC*, 31 FMSHRC at 1085, 1089–90 (Oct. 2009). The Secretary disputes Riverside's claim by asserting Riverside's management failed to respond to Pappas' harassment claim and labeled Pappas a "problem" to the company. (Resp. to Riverside at 4; Riverside Mot. Ex. 5 at 8–10.)

In terms of coincidence in time, Riverside asserts that a significant length of time elapsed between Pappas' original discrimination complaint in December 2014 and his current complaint filed on September 20, 2015. (Riverside Mot. at 8.) However, the Secretary disputes and asserts Pappas' harassment grievances had not been resolved up until late August 2015. (Opp. to Riverside at 4; Riverside Mot. Ex. 5 at 8–10.)

Regarding disparate treatment, Riverside states Pappas was treated identically to all Riverside employees during the asset sale as all employees were laid off. (Riverside Mot. at 8.) The record reflects, however, that Riverside did not recommend all its employees for hire. (Am. Compl. at 4; Riverside Answer at 3; CalPortland Mot. at 8; Ambrose Decl. at 4.) Riverside has not addressed nor established that there are no genuine factual disputes as to the reasons behind Pappas' lack of recommendation.

After review of the record, I find that significant genuine issues of material fact remain as to the Secretary's *prima facie* case for discrimination, specifically related to Ambrose's intent and involvement in CalPortland's hiring process. I conclude that, when viewing the record in the light most favorable to the Secretary, Riverside has not established its right to summary decision as a matter of law.

B. CalPortland's Motion for Summary Decision

1. CalPortland's Knowledge of Protected Activity

CalPortland contends that it had no knowledge of any protected activity by Pappas and therefore could not have engaged in discrimination. (CalPortland Mot. at 1–2.) Specifically, CalPortland argues that Ambrose provided no information regarding Pappas' past work history and protected activity in her meeting with Antonoff. (*Id.* at 10.) Further, CalPortland claims that because Ambrose did not work for CalPortland during the hiring process, Ambrose's knowledge of Pappas' protected activity cannot be imputed to CalPortland. (*Id.* at 17.) Thus, CalPortland claims it is entitled to summary decision because there are no genuine issues of material fact in regard to it lacking knowledge of Pappas' protected activity. (*Id.* at 2, 19–20.)

In response, the Secretary disputes that CalPortland had no knowledge of Pappas' protected activity. (Opp. to CalPortland at 3.) Specifically, the Secretary suggests CalPortland learned about Pappas' history through conversations with several of Pappas' supervisors. (*Id.*) The Secretary also asserts that Ambrose's knowledge may be imputed to CalPortland as a matter of law. (*Id.* at 10.)

The Secretary notes that CalPortland had numerous occasions to learn about Pappas' protected activity. (Opp. to CalPortland at 3.) For example, the Secretary asserts CalPortland's plant manager Rich Walters met with and hired one of Pappas' supervisors, David Salzborn. (Opp. to CalPortland at 3–4.) The Secretary claims Salzborn was also in a position to influence CalPortland's hiring decision. (*Id.* at 4.) According to the Secretary, Salzborn referred to Pappas as a "poor performer" and "not a good employee" in a discussion with Walters. (*Id.*)

Additionally, the Secretary points to multiple conversations between Riverside's human resources manager, Ambrose, and CalPortland's Vice President of Human Resources, Antonoff. (*Id.*) Although CalPortland denies that Antonoff and Ambrose discussed Pappas' protected activity, the Secretary appears to question the credibility of their denials. (CalPortland Mot. at 8–9; Opp. to CalPortland at 5–6.) Specifically, the Secretary notes that Ambrose previously told MSHA Special Investigator Jackson that she did not talk to CalPortland about Riverside employees. (*Id.* at 5.) However, Ambrose has since admitted she met with Antonoff to discuss her recommendations for hire. (Am. Compl. at 4; Riverside Answer at 3; CalPortland Mot. at 8; Ambrose Decl. at 4.)

As noted above, credibility determinations are not appropriate for summary decision. *KenAmerican Res.*, 38 FMSHRC __, slip op. at 10 & n.11. Based on the record, I find that genuine issues of material fact remain in dispute as to CalPortland's actual knowledge of Pappas' protected activity.[4]

2. Successorship

Further, CalPortland asserts that because the Secretary has not pled successorship for its action against CalPortland, the Secretary is precluded from claiming CalPortland is liable as a successor for any acts of discrimination made by Riverside at this stage of the proceeding. (*Id.* at 20–21.) CalPortland also argues that the successorship argument fails as a matter of law because CalPortland had no notice of Pappas' prior MSHA activity. (*Id.*)

In response, the Secretary contends its complaint may be amended to include a successorship theory up to the time of trial. (*Id.* at 13–16.) In this regard, the Secretary again notes that it disputes whether CalPortland had notice of Pappas' protected activity and argues

[4] Because I have determine that material factual disputes exist over CalPortland's actual knowledge of Pappas' protected activity, I need not determine whether Ambrose's knowledge may be imputed to CalPortland for purposes of summary decision. I reserve my determinations on that issue for after hearing. I note, however, that the Commission has recognized that knowledge and animus may be imputed to an employer notwithstanding the actual decision-maker's ignorance of the protected activities. *Colorado Lava, Inc.*, 24 FMSHRC 350, 358 (Apr. 2002) (concurring opinion).

that CalPortland was placed on notice that the Secretary seeks to hold it liable for its predecessor's discrimination during the hearing on temporary reinstatement. (*Id.* at 14–15.)

It is the well-established practice of Commission Judges for "administrative pleadings [to be] liberally construed and easily amended, as long as adequate notice is provided and there is no prejudice to the opposing party." *CDK Contracting Co.*, 23 FMSHRC 783, 784 (July 2001) (ALJ); *Empire Iron Mining*, 29 FMSHRC 317, 326 (Apr. 2007) (ALJ); *New NGC, Inc.*, 35 FMSHRC 3225, 3226 (Sept. 2016) (ALJ). The Secretary may therefore raise the issue at hearing and amend the complaint. Moreover, the Secretary's discrimination complaint alleges Respondents Riverside and CalPortland were closely involved with each other in the decision for Pappas to not be retained at CalPortland. (Am. Compl. at 4–5.) The Secretary's complaint details facts regarding CalPortland's purchase of the Oro Grande mine from Martin Marietta. (Am. Compl. at 4.) This transaction and the relationship involving the two companies, one of which succeeds the other in taking over the mine, imply issues related to successorship.

Further, the Secretary pled the claim that CalPortland is a successor to Martin Marietta, Riverside's owner, in its initial application for temporary reinstatement filed on December 8, 2015. (App. Temp. Restatement at 2.) The issue and factors required to determine a successor-in-interest were discussed in my Decision and Order on Temporary Reinstatement. *Sec'y on behalf of Pappas v. CalPortland Co.*, 38 FMSHRC 53, 60–61 (Jan. 2016) (ALJ). I therefore determine that CalPortland has been provided adequate notice thereof and would not be prejudiced, especially given that CalPortland appears to have already anticipated the issue in its motion for summary decision and prepared its counter-arguments.

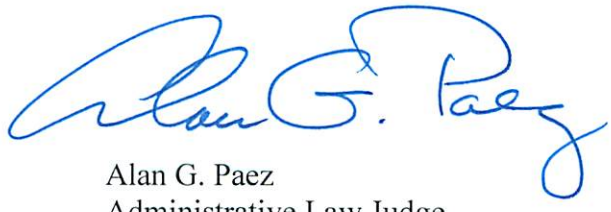
In regard to CalPortland's claim that any successorship argument fails as a matter of law, I have already determined above that material issues of fact exist over whether CalPortland had notice of Pappas' protected activity.

In conclusion, when viewing the record in the light most favorable to the Secretary, I determine that CalPortland has not established its right to summary decision as a matter of law.

VI. ORDER

For the reasons stated above, Riverside's motion for summary decision is hereby **DENIED**. Additionally, CalPortland's motion for summary decision is hereby **DENIED**.

These matters will proceed to hearing in San Bernardino, California, as scheduled on December 6–9, 2016.



Alan G. Paez
Administrative Law Judge

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