

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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December 17, 2014

SECRETARY OF LABOR, MSHA,
on behalf of **JUSTIN GREENWELL**,
Complainant,

v.

ARMSTRONG COAL COMPANY,
Respondent.

DISCRIMINATION PROCEEDING

Docket No. KENT 2014-791-D
MADI-CD 2014-11
MADI-CD 2014-12

Mine: Parkway Mine
Mine ID:15-19358

**ORDER DENYING COMPLAINANT'S MOTION TO JOIN &
ORDER DIRECTING COMPLAINANT TO FILE 105(C)(3) CASE**

This case is before me on a complaint of discrimination filed pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977. On November 25, 2014, Complainant, Justin Greenwell, through his attorney, filed a motion to join Chris Oglesby as a respondent in this docket. On December 10, 2014, the Secretary, filed a response to Complainant's motion. For reasons that follow, Complainant's motion is **DENIED** and, pursuant to section 105(c)(3) of the Act, he is directed to file an action on his own behalf with the Commission.

Complainant alleges that on March 19, 2014 he was threatened by Chris Oglesby, an hourly employee of mine, for notifying MSHA about issues with the mine's respirable dust sampling. Two days later, on March 21st, Complainant filed a discrimination complaint with MSHA in which he named Oglesby, individually, as the person responsible for discriminatory action. The complaint did not name Armstrong Coal Company. The same day, MSHA contacted counsel for Complainant to advise him that, while Oglesby would continue to be listed on the complaint as the individual responsible for the discriminatory action, MSHA was changing the complaint to indicate that Armstrong was the entity against whom the complaint was filed. Counsel for Complainant objected to the change and, subsequently, MSHA advised Complainant's counsel that there had been a misunderstanding, the complaint had not been changed, and a notification letter had been sent to Oglesby informing him that a complaint had been filed against him.

On September 12, 2014 the Secretary, pursuant to section 105(c)(2), filed a complaint with the Commission against Armstrong alleging that the mine interfered with the exercise of protected activity by informing coworkers that Complainant had complained to MSHA, and soliciting coworkers to ostracize and harass Complainant due to his protected activity. Oglesby was not named as a respondent. On September 17, 2014, MSHA notified Complainant that it believed a violation of section 105(c) of the Act had occurred, and the Secretary had filed a complaint on behalf of Greenwell with the Commission. A copy of the letter was sent to Armstrong, but not to Oglesby. Thereafter, on November 25, 2014, Complainant, through his own counsel, filed the instant motion to join Chris Oglesby as a respondent.

Complainant argues that section 105(c) allows for the filing of discrimination complaints against individuals and, since the filing of his original complaint, he has sought to hold Oglesby individually accountable for violating the Act. Complainant asserts that the Secretary's case rests on the difficult to prove theory that the mine, in violation of the Act, encouraged Oglesby and others to harass Complainant as a result of his protected activities. Complainant, on the other hand, seeks to hold Oglesby personally liable for violating the Act. Complainant alleges that he "cannot obtain complete relief . . . unless Oglesby, the alleged perpetrator, is joined as a party herein." Mot. 6. Specifically, Complainant asserts that, conceivably, liability could be found against Oglesby under Complainant's theory, while no liability is found against Armstrong under the Secretary's theory. As a result, Complainant asserts that Oglesby is required to be joined as an indispensable party under Federal Rule of Civil Procedure 19. In the alternative, Complainant argues that Oglesby should be permissively joined as a respondent under Federal Rule of Civil Procedure 20 given that Complainant's right to relief arises out of the same occurrence raised by the Secretary under his theory of liability for Armstrong, and there are questions of law and fact common to both Armstrong and Oglesby.

The Secretary, in response, asserts that he is afforded wide discretion in his handling of 105(c)(2) complaints and, based on his investigation of the alleged incident, has determined that Armstrong created a work environment that interfered with Complainant's exercise of his rights under the Act. Further, Oglesby's reaction "flowed from the environment . . . created by Armstrong" and, as a result, the Secretary, in exercising his prosecutorial discretion, named Armstrong as the only respondent in this matter. Nevertheless, the Secretary acknowledges that Complainant is a party to this matter, that Oglesby is a "person" under the Act, and that the court may join Oglesby as a party.

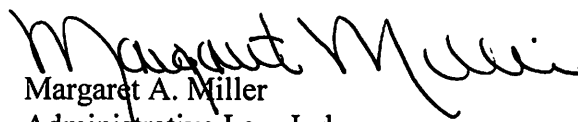
Section 105(c) of the Act states that "[n]o person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner . . . because such miner . . . has filed or made a complaint under or related to this Act, . . . or because of the exercise by such miner . . . of any statutory right afforded by this Act." 30 U.S.C. § 815(c)(1) (emphasis added). The Act defines "person" to include "any individual." 30 U.S.C. § 802(f). Following a miner's filing of a discrimination complaint with the Secretary and subsequent investigation into the complaint, the Secretary is afforded wide discretion in determining whether to pursue a 105(c)(2) case by filing a complaint with the Commission. *Robert K. Rowland v. Sec'y of Labor*, 7 FMSHRC 630 (May 1985).

The Act permits Complainant to bring an action against Oglesby individually as Oglesby is an "individual" and therefore falls within the Act's definition of "person." Given that section 105(c) prevents any "person" from violating its provisions, it certainly applies to Oglesby, as well as to Armstrong in this case. While I find that Complainant may properly bring an action against Oglesby, joining him in the instant proceeding, brought by the Secretary pursuant to section 105(c)(2), is not the best mechanism to do so.

It is clear that Complainant's theory of liability differs from the Secretary's. While Complainant seeks to impose liability only individually against Oglesby, the Secretary's response makes clear that he intends to pursue his case against Armstrong as an entity, and not

against Oglesby as an individual. The Secretary's prosecutorial discretion affords him the ability to pursue a 105(c)(2) case in the way he sees fit, and the court cannot order him to pursue a particular case theory. Generally, the Secretary, upon completion of the investigation, sends a letter to Complainant stating whether a violation of section 105(c) has occurred. Here, following the investigation, the Secretary determined that the provisions of 105(c) had been violated and, pursuant to section 105(c)(2), filed a complaint with the Commission in which he named only Armstrong as a respondent. In declining to name Oglesby as a respondent, the Secretary effectively determined that, while the investigation revealed a violation of 105(c) under the Secretary's theory, Complainant's theory of individual liability did not amount to a violation. While the Secretary agrees that the court may join Oglesby in this matter, the court concludes that a better alternative would be for Complainant to pursue his claim of individual liability under section 105(c)(3) of the Act, which grants a miner the right to file an action on his own behalf following a determination by the Secretary that the provisions of 105(c) have not been violated. 30 U.S.C. § 815(c)(3). The Secretary's refusal to pursue Complainant's theory of individual liability, combined with the information contained in his response to the instant motion, are essentially a determination that no violation of 105(c) occurred in the manner alleged by Complainant. An action filed under section 105(c)(3) will allow Complainant to advance his own theory of the case, without the apparent interference of the Secretary, and pursue the complete relief he desires. Once the 105(c)(3) complaint is filed against Oglesby then it may be consolidated for purposes of hearing with this action against Armstrong.

Accordingly, Complainant's motion to join Chris Oglesby as a respondent in this proceeding is **DENIED**. I accept the Secretary's response in this case as a denial of the discrimination complaint filed against Oglesby individually, and I advise Complainant to file a separate action against Oglesby, within 30 days of this order, pursuant to section 105(c)(3) of the Act. Complainant should attach a copy, or make reference to, this order so that the Commission's docket office is made aware of the somewhat unusual circumstances of the action. Following the assignment of a docket number to that action, Complainant should notify the court so that it can take steps to have that matter consolidated for hearing with the above captioned docket.


Margaret A. Miller
Administrative Law Judge

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