FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9900 / FAX: 202-434-9949

February 25, 2019

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) on behalf of JAMES DEE TERRY Complainant v. PROSPECT MINING & DEVELOPMENT CO., LLC, Respondent	TEMPORARY REINSTATEMENT PROCEEDING Docket No. SE 2019-0071-D MSHA Case No. BARB-CD-2019-1 Mine: Carbon Hill Mine Mine ID: 01-03389

ORDER GRANTING TEMPORARY REINSTATEMENT

Before: Judge McCarthy

This matter is before me on the Secretary of Labor's Application for Temporary Reinstatement filed on behalf of miner James Dee Terry pursuant to Section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., as amended ("Mine Act"), and 29 C.F.R. § 2700.45. The Secretary seeks an order temporarily reinstating Terry to his former position with Prospect Mining & Development Co., LLC, pending the investigation and disposition of a Complaint of Discrimination under Section 105(c) of the Act.

I. Statement of the Case

Terry was a miner within the meaning of the Mine Act for Prospect Mining & Development beginning in December 2016 when Prospect Mining acquired Terry's previous employer. Terry was employed as Manager of Special Projects and Safety Compliance from approximately the summer 2017 until September 2018. The Secretary of Labor, on behalf of Terry, alleged that on August 29, 2018, Terry filed a safety complaint with the Mine Safety & Health Administration ("MSHA") regarding conditions at the mine, pursuant to which MSHA conducted an inspection. The Secretary alleges that on September 10, 2018, Terry was reassigned to a position taking inventory of equipment at the Mine and the duties of his previous position were assigned to other employees. The Secretary further alleges that in early November 2018, Terry communicated additional safety concerns to Respondent.

On November 28, 2018, Terry's employment was terminated by the Respondent. Terry filed a discrimination complaint with MSHA on December 3, 2018. On January 23, 2019, after an investigation conducted by MSHA special investigator Freddie N. Fugate, the Secretary filed an application ("Application") for temporary reinstatement with the Commission. The Secretary requested in its Application that the Commission issue an order "directing the Respondent to

reinstate James Dee Terry to the position he held immediately prior to the reduction in his job duties on or about September 10, 2018, or to a similar position at the same rate of pay, with the same benefits, and with the same or equivalent duties assigned to him." Application at 3.

On February 1, 2019, Respondent filed a formal request for a hearing on the temporary reinstatement matter. On February 5, 2019, a conference call was held to set a hearing date for this matter. The hearing was scheduled for February 11, 2019. However, Respondent withdrew its request for a hearing on February 8, 2019. In the same document as the withdrawal of the request for a hearing, Respondent moved for issuance of an order economically reinstating Terry in lieu of physical reinstatement. See Withdrawal of Request for Hearing and Motion for Temporary Economic Reinstatement ("Motion"). In the Motion, the Respondent alleged that Terry's job responsibilities "evolved over time given his inability to work with others and continued, unsatisfactory job performance." Motion at ¶ 5. The Respondent further claimed that "Terry exhibited an abrasive attitude to all individuals with whom he worked, including employees, contractors, and MSHA personnel," and that "[s]ince his discharge, Prospect Mining has received threats made by contract miners towards Terry if he were to return to the mine property." *Id.* Respondent also alleged that Terry refused to return filing cabinets, furniture, and a personal computer that all belonged to Respondent, and that Respondent "has also uncovered some troubling activity Terry was engaged in during his employment related to the administration of certain workers' compensation claims." Motion at ¶ 6. Respondent added in a footnote that it was "ready to support these statements with affidavits if necessary or requested by the Court." Motion at ¶ 6 n.1.

During a February 8, 2019 conference call with the parties to discuss Respondent's Motion, Terry indicated that he objected to Respondent's motion and wished to be temporarily reinstated to his former position at Carbon Hill Mine, pending disposition of his discrimination complaint. Terry also indicated that he would submit his own reply ("Reply") to the allegations contained in Respondent's Motion.

On February 12, 2019, the Secretary, the Respondent, and Terry conferred to discuss a possible settlement agreement to temporarily economically reinstate Terry. The following day, the Secretary represented to the undersigned that the parties had reached an agreement in principle as to economic reinstatement. In the early evening on Thursday, February 14, 2019, however, the Secretary informed the undersigned that "[i]n discussing the terms of the potential agreement today, it has become clear that the parties do not have an agreement." During a conference call on the morning of Friday, February 15, 2019, Respondent confirmed that although the parties had failed to reach agreement on the specific terms of temporary economic reinstatement, Respondent's withdrawal of a hearing request was unconditional.

On February 15, 2019, Terry, on his own behalf, filed his Reply to Respondent's Motion. In his Reply, Terry stated that he did not receive notice about the change to his job title, any dissatisfaction with his job performance, or complaints by others about him or his work. Reply at ¶ 3-5. Terry also asserted that he "did not administer any workers' compensation claims for Prospect Mining," only removed items from the Carbon Hill Mine that belonged to him, and that the only threat Terry received was from Prospect Mining CEO Robert Schneid threatening to break his legs should Terry return to the property. Reply at ¶ 6-10. Terry requested that the undersigned either order temporary physical reinstatement, or in the alternative, order temporary

economic reinstatement with "the unconditional right to obtain other employment." Reply at ¶ 13.

On February 15, 2019, after Terry filed his Reply, Respondent filed a supplemental evidentiary submission ("Supplement") in support of its motion for temporary economic reinstatement. The Supplement included four exhibits. The first, a declaration from CEO Robert Schneid, stated that Terry was removed from his original position due to "his confrontational attitude toward parties working on the project and his inability to get tasks completed on time and on schedule." Supplement Exhibit A, Declaration of Robert Schneid, at ¶ 8. Schneid also asserted that Respondent was unable to provide training records for certain employees to MSHA because Terry, who had previously been in charge of maintaining training records, could not produce them for Respondent. *Id.* at ¶ 15. The second exhibit was a description of the key responsibilities of Terry's prior position as Manager of Special Projects and Safety Compliance. The third exhibit was an e-mail communication sent on August 15, 2018 between GMS Mine Repair and Maintenance ("GMS") in which GMS employees expressed concern regarding Terry's attitude towards GMS. The final exhibit was a communication dated November 7, 2018 between Schneid and Terry regarding Terry's job responsibilities as of September/October 2018.

On February 19, 2019, Terry filed a second reply ("Second Reply") with the Commission disputing the Supplement. Specifically, Terry alleged that he made safety complaints directly to CEO Robert Schneid in August and November. Second Reply at ¶ 1-2. Terry submitted exhibits that he alleges prove that Schneid was aware of safety violations committed by GMS[1] and the Respondent. Second Reply, Exhibits A-B. Terry reproduced an e-mail communication with MSHA from December 12, 2018, after his termination, where he denied withholding training records from Respondent. Second Reply, Exhibit D. Finally, Terry reiterated his request to be temporarily physically reinstated or temporarily economically reinstated with an unconditional right to seek alternative employment.

On February 19, 2019, after Terry submitted his Second Reply, the Secretary submitted his own response. The Secretary declined to take a position on the content of the Operator and Terry's filings while the Secretary's investigation remained pending, but instead the Secretary argued that I lack the authority under the Mine Act and the Commission's Procedural Rules to grant the Respondent's motion for temporary economic reinstatement over Terry's objections.

II. Legal Principles and Analysis

Section 105(c)(2) of the Mine Act provides that, as to claims of discrimination, "if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint." Commission Procedural Rule 45(d) states that "[t]he scope of a hearing for temporary reinstatement is limited to a determination as to whether the miner's complaint was frivolously brought."

[1] Based on the e-mail communications provided in Exhibit C of the Supplement and Exhibit A of Terry's Second Reply, it appears that GMS and Z&J are independent contractors, and not subsidiaries of Prospect Mining and Development Co., LLC.

The elements of a discrimination claim provide a useful framework to assess whether an allegation is frivolous. *Secretary of Labor on behalf of Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085, 1088 (Oct. 2009). To establish a prima facie case of discrimination under section 105(c) of the Act, a complainant must establish (1) that he or she engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (Apr. 1981).

For a temporary reinstatement proceeding, the Secretary need not prove a causal nexus exists between the protected activity and the adverse action; the Secretary need only demonstrate that there is a non-frivolous issue as to the causal nexus. As explained by Judge Manning, a Commission judge should determine the issue of causal nexus was not frivolously brought if "evidence was presented to show that the adverse actions could have been motivated at least in part by the protected activity." *Secretary of Labor on behalf of Bradley v. Climax Molybdenum Co.*, 34 FMSHRC 2808, 2821 (Oct. 2012) (ALJ). The Commission has recognized that direct evidence of motivation is rarely encountered and often, the only available evidence is indirect. *See, e.g., Secretary 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 Commission has identified the following indicia of discriminatory intent to establish a nexus between the protected activity and the alleged discrimination: (1) hostility or animus toward the protected activity, (2) knowledge of the protected activity, and (3) coincidence in time between the protected activity and adverse action. *Id.*

The Secretary has sufficiently demonstrated that the Application was not frivolously brought as to the issue of protected activity. The Secretary's Application states that Terry made safety complaints on two separate occasions. The first was made on or about August 29, 2019. Application at ¶ 6. The second complaint was made in early November 2018 directly to the Respondent. Application at ¶ 9. Making a safety complaint to MSHA or an operator is indisputably protected activity. 30 U.S.C. § 815(c)(1) ("[n]o person shall discharge or in any other manner discriminate against...because such miner...has filed or made a complaint under or relating to this Act, including a complaint notifying the operator or the operator's agent...of an alleged danger or safety or health violation").

The Secretary has sufficiently demonstrated that the Application was not frivolously brought as to the issue of adverse action. The Secretary's Application states that on September 10, 2018, Terry's work responsibilities were reassigned to other individuals and Terry was given another job. Application at ¶ 7. Reassignment to a different position can be considered an adverse action. *Moses v. Whitley Development Corp.*, 4 FMSHRC 1475, 1478 (Aug. 1982). On or about November 16, 2018, Terry was denied continued use of a certain company truck that he had previously used. Application at ¶ 9. An operator's revocation of certain benefits related to the performance of job duties can be considered an adverse action if "materially adverse to a reasonable employee." *Secretary of Labor on behalf of Pendley v. Highland Mining Company*, 34 FMSHRC 1919 (Aug. 2012), *citing Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57 (2006). On November 28, 2018, Terry's employment was terminated. Application

at ¶ 9. It cannot be gainsaid that termination is also an adverse action per the plain meaning of Section 105(c)(1) when motivated by protected activity. *Moses*, 4 FMSHRC at 1479-80.

I further find that the Secretary's Application alleging discriminatory reassignment, loss of benefits, and discharge establishes a sufficient nexus between the protected activity and the adverse action such that it was not frivolously brought. Terry complained directly to Schneid regarding "training violations" at the Carbon Hill Prep Plant owned by Respondent, to which MSHA issued citations to Respondent, GMS, and Z&J. Second Reply at ¶ 2. This, if true, would be sufficient to show Respondent was aware that Terry engaged in protected activity by making a safety complaint. Terry was reassigned to another position less than two weeks after Terry made this safety complaint to MSHA. Application at ¶ 6. After communicating additional safety concerns to Prospect Mining in November 2018, Terry lost the continued use of a company truck, and was terminated less than a month later. Application at ¶ 9. I therefore find that the Secretary has shown that the adverse action could have been motivated at least in part by the protected activity, and therefore the Application is not frivolously brought.

The Respondent elected not to dispute any of the allegations described above at a hearing. As the Respondent has elected not to contest whether the Secretary's application on behalf of Terry was frivolously brought, the only question remaining for me to decide at this stage of the proceedings is the manner of temporary reinstatement. As previously discussed, the Respondent seeks an order granting temporary economic reinstatement, but Terry objects to the terms of Respondent's apparent offer.

My legal authority to order economic reinstatement in lieu of physical reinstatement over the objection of a party is tenuous, absent agreement of the parties. As a default rule, Commission judges have ordered the physical reinstatement of the complainant to his or her former position at the mine, and the parties may subsequently negotiate terms of economic reinstatement in lieu of the complainant's actual return to mine site.[2] Although the Commission has yet to squarely address the question of whether a judge can unilaterally order economic reinstatement, the Commission held in *North Fork Coal Corporation*, 33 FMSHRC 589 (Mar. 2011), *rev'd on other grounds*, 691 F.3d 735 (6th Cir. 2012) that a judge lacks the authority to unilaterally modify the terms of an existing economic reinstatement agreement. Specifically, the Commission noted "[u]nlike back pay awards, Commission judges do not decide the terms of economic reinstatement agreements." *Id.* at 593. Multiple Commission judges have interpreted *North Fork Coal* to severely limit the ability of a judge to order economic reinstatement without a clear agreement between the parties. In *Secretary of Labor on behalf of Riordan v. Knox Creek Coal Corporation*, 36 FMSHRC 1050 (Apr. 2014) (ALJ), Judge Moran rejected a motion by the respondent to order temporary economic reinstatement with a provision offsetting the respondent's payments to the complainant for services rendered elsewhere. He reasoned that "[u]ntil the parties reach an agreement on the terms of any economic reinstatement, the Court's involvement is foreclosed." *Id.* at 1053. Judge Simonton reached a similar conclusion in *Secretary of Labor on behalf of Garcia v. Veris Gold U.S.A.*, 36 FMSHRC 1883 (July 2014) (ALJ) ("*Veris Gold I*"). Judge Gill also rejected the argument that a Commission judge could issue an order granting temporary economic reinstatement without a previous agreement between

[2] *See, e.g., Sec'y of Labor on behalf of York v. BR&D Enterprises, Inc.*, 23 FMSHRC 386 (Apr. 2001).

the parties. *Secretary of Labor on behalf of Wilder v. Private Investigation & Counter Intelligence Services, Inc.*, 33 FMSHRC 2031, 2032 (Apr. 2011) (ALJ) ("the parties have no right to require or impose on each other, nor does the Court have authority to impose, economic reinstatement terms that have not been negotiated and agreed to.") (internal citations omitted).

Commission judges, however, have not entirely foreclosed the possibility of ordering temporary economic reinstatement without an agreement between all parties after particular facts have been established. For example, on reconsideration of his decision in *Veris Gold I*, Judge Simonton opined that an order granting temporary economic reinstatement might be permissible "when presented with a clear showing of extreme circumstances that would render temporary physical reinstatement an objectively meaningless remedy." *Secretary of Labor on behalf of Garcia v. Veris Gold U.S.A.*, 36 FMSHRC 2365, 2368-69 (Aug. 2014) (ALJ) ("*Veris Gold II*"). In reaching this conclusion, Judge Simonton considered Judge Melick's decision in *Secretary of Labor on behalf of Pruitt v. Grand Eagle Mining, Inc.*, 33 FMSHRC 1738 (July 2011) (ALJ). In that case, Judge Melick ordered temporary economic reinstatement over the objection of the complainant where the complainant "represent[ed] a safety hazard to himself and others and present[ed] a potential financial liability to Grand Eagle if he were to be returned to his former job through temporary reinstatement." *Id.* at 1738-39. Judge Melick found particularly persuasive uncontroverted evidence presented at a temporary reinstatement hearing that the complainant damaged a $30,000.00 piece of equipment while on the job just three months prior to his discharge, and violated a mandatory safety standard by working at least 20 feet above ground without fall protection. *Id.*

After careful consideration of the foregoing cases and temporary reinstatement principles, although decisions by other Commission Judges are not binding on me pursuant to Commission Procedural Rule 69(d), I find the reasoning of the Commission in *North Fork Coal* and the reasoning of Judges Moran, Gill, and Simonton to be persuasive on the issue before me. In the absence of an agreement between the Secretary, on behalf of Terry, and the Respondent, my order granting temporary economic reinstatement would by definition impose terms on which the parties could not reach agreement. Respondent's counsel has made it clear that any right to obtain other employment in a temporary economic reinstatement agreement is conditioned on the work "not occur[ing] at Prospect Mining's mine sites or directly relat[ing] to Prospect's mining activities." E-mail from Respondent's attorney to this tribunal (Feb. 19, 2019, 10:09 EST). In his Reply, Terry says that he would accept temporary economic reinstatement only with "the unconditional right to obtain other employment." Reply at ¶ 13. Therefore, the parties do not agree on the terms of economic reinstatement, and I cannot by adjudicative fiat form a complete economic reinstatement agreement for the parties. Doing so would be contrary to the plain meaning of *North Fork Coal*, which by implication contemplates temporary economic reinstatement as an alternative remedy created solely by agreement between the parties.

Respondent argues that the alleged facts submitted in paragraphs five and six of its Motion justify ordering temporary economic reinstatement over Terry's objection. Specifically, the Respondent alleged that Terry "exhibited an abrasive attitude to all individuals with whom he worked, including employees, contractors, and MSHA personnel." Motion at ¶ 5. The Respondent further alleged that Terry removed property, including "filing cabinets, furniture, and a personal computer on which he performed company business" and failed to provide the

Respondent with an inventory of the items he removed. Motion at ¶ 6. Finally, the Respondent alleged that it had uncovered some "troubling activity" involving the administration of certain workers' compensation claims it argues Terry handled. *Id.* All of these allegations, the Respondent concludes, are sufficient to justify ordering temporary economic reinstatement over Terry's objection.

In advancing its arguments, Respondent relies on Judge Melick's decision in *Pruitt*. Given the posture of this case, however, I decline to adopt Judge Melick's approach in *Pruitt* for several reasons. First, I do not read Section 105(c)(2) to grant Commission judges broad authority to craft temporary reinstatement agreements. I conclude that the broad remedies contemplated by Section 105(c)(2) of the Mine Act as cited by Judge Melick apply only to discrimination proceedings. The Mine Act states in relevant part that "if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint." The Mine Act then proceeds to describe the process for adjudicating a discrimination complaint on the merits before reaching the "to take such affirmative action to abate the violation as the Commission deems appropriate" language cited by Judge Melick. From this, I conclude that the plain language of the Mine Act does not empower Commission Judges to issue remedies beyond reinstatement without an agreement between the parties. I agree with Judge Simonton's analysis of Section 105(c)(2) in *Veris Gold II*, where he noted that the language quoted by Judge Melick "applies only after the Commission has provided an 'opportunity for a hearing,' found that a 'person commit[ed] a violation of this subsection' and issued an order 'based upon findings of fact.'" *Veris Gold II*, 36 FMSHRC at 2368. Although the Respondent was provided an opportunity for a hearing on the issue of temporary reinstatement, Respondent withdrew its request unconditionally. I cannot find at this stage of the proceedings that the Respondent has or has not violated Section 105(c), nor can I issue findings of fact with regard to Terry's alleged misconduct. Accordingly, I conclude that my authority to order temporary economic reinstatement is considerably more limited than Judge Melick expressed in *Pruitt*.

Second, unlike the operator in *Pruitt*, the Respondent does not cite any mandatory health or safety standard that Terry violated, or that Respondent would be liable for, should Terry return to work. That there may be hard feelings between Terry and management, or between Terry and other miners, is by itself insufficient to override Terry's statutory right to be reinstated to his position while his claim of discrimination is adjudicated on the merits, particularly where Terry himself wishes to return to work. While it may be true that maintaining a hostile work environment can give rise to a claim of discrimination under Section 105(c) of the Mine Act,[3] the hostile work environment must interfere with the exercise of activities protected by the Mine Act,[4] and any such allegation of a hostile work environment in this case must be weighed against

---

[3] *See, e.g., Sec'y of Labor on behalf of Bowling v. Mountain Top Trucking Co.*, 21 FMSHRC 265 (Mar. 1999), citing *Sec'y of Labor on behalf of Nantz v. Nally & Hamilton Enters., Inc.*, 16 FMSHRC 2208, 2210 (Nov. 1994).

[4] *See, e.g., Delisio v. Mathies Coal Co.*, 12 FMSHRC 2535, 2544 (Dec. 1990) ("the Commission does not sit as a super grievance board to judge the industrial merits, fairness, reasonableness, or

the fact that it was the Respondent who initially sought temporary economic reinstatement, and that it was Terry, through the Secretary, who insisted on physical reinstatement after awareness of Respondent's allegations.

Third, the facts that Judge Melick relied on in *Pruitt* to justify unilaterally ordering temporary economic reinstatement were undisputed by the parties. *Pruitt*, 33 FMSHRC at 1738-39. In this case, Terry disputes all of the allegations that Respondent sets forth in paragraph six of its Motion. Additionally, Terry filed a Second Reply subsequent to Respondent's Supplement in which he reiterated his factual disagreement with Respondent regarding the circumstances of his termination. The undersigned is foreclosed from making credibility determinations in evaluating the Secretary's application for temporary reinstatement.[5] Even if the Respondent could establish an affirmative defense in the underlying discrimination proceeding based on the information provided in the Motion and Supplement,[6] a determination without hearing at this stage of the proceedings that Respondent's allegations are sufficient to justify temporary economic reinstatement over Terry's objections would necessarily require me to credit the Respondent's version of events over Terry's version. Therefore, I find that the facts that Judge Melick relied upon in *Pruitt* are not sufficiently analogous to the mere allegations present in this case to justify imposing temporary economic reinstatement, absent agreement of the parties.

III. Order

For the foregoing reasons, Respondent Prospect Mining & Development Co., LLC is **ORDERED** to immediately reinstate James Dee Terry to the position he held immediately prior to the reduction in his job duties on or about September 10, 2018, or to a substantially equivalent position at the same rate of pay, with the same benefits, and with the same or equivalent duties assigned to him.[7] Should the parties subsequently come to a complete and full agreement on the terms of economic reinstatement, the parties may jointly file a motion to modify this Order to economically reinstate Terry in lieu of actual, physical reinstatement.

---

wisdom of an operator's employment policies except insofar as those policies may conflict with rights granted under section 105(c) of the Mine Act.") (internal citations omitted).

[5] *Williamson*, 31 FMSHRC at 1089.

[6] Commission judges have the authority to make credibility determinations and factual findings in underlying discrimination proceedings that they lack in temporary reinstatement proceedings.

[7] As the change in job responsibilities is one of the non-frivolous adverse actions established by the Secretary's Application, reinstatement to the position previously held by Terry prior to the change in responsibilities is more consistent with the Mine Act's intent to place the miner in as close a position as possible prior to the alleged discrimination while the Secretary completes his investigation. *See, e.g. Bradley*, 34 FMSHRC at 2825.

This Order of Temporary Reinstatement is not open-ended. It will end upon final order on the underlying discrimination complaint as set forth in Section 105(c)(2) of the Act. 30 U.S.C. § 815(c)(2). Therefore, the Secretary must promptly determine whether or not he will file a complaint with the Commission under Section 105(c)(2) of the Act and so advise Terry, the Respondent, and this administrative tribunal.

Thomas P. McCarthy
Administrative Law Judge

Distribution:

Christopher Smith, Office of the Solicitor, U.S. Department of Labor, 618 Church Street, Suite 230, Nashville, TN 37219

John B. Holmes III, Maynard Cooper & Gale, P.C., 1901 Sixth Avenue North, Regions Harbert Plaza Suite 2400, Birmingham, AL 35203

James Dee Terry, 300 Regal Street, Winfield, AL 35594