FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 19, 2018

SECRETARY OF LABOR, U.S. DEPARTMENT OF LABOR on behalf of DANIEL K. MULLINS, Complainant, v. D&H MINING, INC., Respondent.	TEMPORARY REINSTATEMENT Docket No. VA 2018-0068-D MSHA Case No. NORT-CD-2018-04 Mine: D&H No. 3 Mine ID 44-07268

ORDER GRANTING TEMPORARY REINSTATEMENT

Before: Judge Miller

This matter is before me on an application for temporary reinstatement filed by the Secretary of Labor on behalf of Daniel Mullins pursuant to Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2) ("the Act"). The application seeks reinstatement of Complainant to his former position as a roof-bolting machine operator at the D&H No. 3 mine pending final disposition of a discrimination complaint he has filed against Respondent.

The Secretary filed the application for temporary reinstatement with the Commission on February 16, 2018, and served a copy on Respondent by first class mail. On February 28, 2018, Respondent filed a request for a hearing.[1] A hearing was held on March 14, 2018, in Abingdon, Virginia.

For the reasons that follow, the application is granted.

I. SUMMARY OF THE EVIDENCE

The following is based on the allegations contained in the application and the exhibits appended to it, and on the testimony at hearing of Daniel Mullins. Mullins was the only witness for the Secretary and I find that his testimony was not demonstrable false. I have also considered the testimony and arguments provided at hearing by the mine operator, but note that the question before me is whether the complaint of Mullins was frivolously brought. While the operator

1. Commission rules require that a respondent must request a hearing on an application for temporary reinstatement within 10 calendar days following receipt of the application, but allow five additional calendar days when the application is served by mail. 30 C.F.R. §§ 2700.8(b), 2700.45(c).

presented a differing account from that of Mullins, the conflict in testimony will be resolved at a later stage if the Secretary files a complaint of discrimination.

Mullins was employed by D&H Mining as a scoop operator and then as a roof-bolting machine operator at the Lower Mill Blair No. 3 mine. He worked as a full-time employee at the mine from mid-October 2017 until January 10, 2018. Mullins testified that he frequently worked in excessive amounts of dust while operating the roof-bolting machine because he had to work in return air while the continuous miner was operating. He testified that he complained about the dust frequently and believes that the Section Foreman, Gerald Ball, overheard his complaints. He also complained directly to Foreman Ball about the curtains for the continuous miner not being hung correctly. According to Mullins, Ball acknowledged the complaint regarding the curtains and indicated that he would take care of the issue. On one occasion, Mullins believes he overheard Ball telling other miners that the company would do whatever it took to run coal.

Mullins explained that on January 9, 2018, he complained to Foreman Ball about tramming the roof-bolting machine from the section No. 1 entry to the No. 7 entry in dusty conditions. The dust was the result of rock dusting, and Mullins told Ball that the dust was so thick that he could not see well enough to tram the roof-bolting machine. Mullins stated loudly that the dust was so thick, he could not see the T-bar on the roof-bolting machine. Ball became angry and grabbed the curtain, removing it from the T-bar. Mullins returned to the bolting machine after this. He alleges that Ball was angry with him after this incident and did not speak with him for the remainder of the shift. He believes Ball gave him an angry look when he was leaving work that day. Mullins believes that others working in the area observed the scene between him and Ball in the mine and heard Mullins make complaints about the dust. Ball denies that he heard Mullins complain about the dust. He testified that there was no issue with dust in the mine on that day or on any other.

Mullins was fired on January 10, 2018, through a telephone call from a co-worker. He then called Ball and was told that he was being terminated because he had missed too many days of work. Mullins testified that he missed work on January 10 for personal reasons, but that he had received prior permission from Ball to miss work that day. Ball denies that he knew about the absence in advance. Mullins believes he was terminated for complaining about working in excessive dust. Ball testified that Mullins was terminated for missing work.

II. DISCUSSION

Section 105(c) of the Act, 30 U.S.C. § 815(c), prohibits discrimination against miners for exercising any right afforded by the Act. Under Section 105(c)(2) of the Act, "if the Secretary finds that [a discrimination] 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." 30 U.S.C. § 815(c)(2). The Commission has stated that the scope of a temporary reinstatement hearing is therefore "narrow, being limited to a determination by the judge as to whether a miner's discrimination complaint is frivolously brought." *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd*, 920 F.2d 738 (11th Cir. 1990). This standard reflects a Congressional intent

that "employers should bear a proportionately greater burden of the risk of an erroneous decision in a temporary reinstatement proceeding." *Jim Walter Res., Inc. v. FMSHRC*, 920 F.2d 738, 748 (11th Cir. 1990).

The Commission has explained that "it is not the judge's duty ... to resolve [any] conflict in testimony at this preliminary stage of proceedings." *Sec'y of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999); *see also Sec'y of Labor on behalf of Shaffer v. Marion County Coal Co.*, No. WEVA 2018-117-D, 40 FMSHRC __, slip op. at 4, 9 (Feb. 8, 2018). Nevertheless, the Judge "need not accept testimony if it is demonstrably false, patently incredible, or obviously erroneous." *Shaffer*, slip op. at 9 (Althen, Chairman, and Young, Comm'r).

The issues raised in a temporary reinstatement hearing are "conceptually different from those implicated by the underlying merits" of the miner's discrimination claim. *JWR*, 920 F.2d at 744. The temporary reinstatement proceeding addresses "whether the evidence mustered by the miner[] to date establishe[s] that [his] complaint[] [is] nonfrivolous, not whether there is sufficient evidence of discrimination to justify permanent reinstatement." *Id.*

While an applicant for temporary reinstatement need not prove a prima facie case of discrimination, the elements of a discrimination claim are relevant to the analysis of whether the evidence presented satisfies the non-frivolous test. *Sec'y of Labor on behalf of Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085, 1088 (Oct. 2009). In order to establish a prima facie case of discrimination under the Act, a complaining miner must present evidence sufficient to support a conclusion that he engaged in protected activity, that he suffered an adverse employment action, and that the adverse action was motivated at least in part by that activity. *Turner v. Nat'l Cement Co. of Cal.*, 33 FMSHRC 1059, 1064 (May 2011); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981); *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981). The Commission has acknowledged that evidence of motivation is frequently indirect, and has identified several "circumstantial indicia of discriminatory intent: (i) hostility or animus toward the protected activity; (ii) knowledge of the protected activity, and (iii) coincidence in time between the protected activity and adverse action." *Williamson,* 31 FMSHRC at 1089; *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 question for the judge at this stage is whether there is a non-frivolous question as to the elements of the case. *Williamson*, 31 FMSHRC at 1091.

I find that Mullins's application for temporary reinstatement was not frivolously brought. Mullins testified that he made several safety complaints to the section foreman on his shift, including a complaint about working in excessive dust on January 9, 2018. This constitutes protected activity under Section 105(c)(1) of the Act, 30 U.S.C. § 815(c)(1). While Ball testified that he had no knowledge of any complaints by Mullins and denied that there were problems with excessive dust at the mine, at this stage it is inappropriate to weigh the conflicting testimony of the mine's witnesses. *Albu*, 21 FMSHRC at 719. The testimony of Mullins that he was concerned about dusty working conditions and complained of those conditions to management is sufficient to meet the requirement of protected activity.

Mullins testified that his employment was terminated on January 10, 2018. While there is some dispute as to who made the decision to fire Mullins, the mine does not dispute that he was terminated. The action constitutes an adverse action under the Act.

Further, there is a sufficient nexus between the protected activity and the adverse action to support temporary reinstatement. Mullins alleges that he complained about working conditions to his supervisor the day before he was terminated. The coincidence in time between the adverse action and the alleged protected activity is evidence of an illicit motive. *Sec'y on behalf of Stahl v. A&K Earth Movers, Inc.*, 22 FMSHRC 323, 325 (Mar. 2000); *Chacon*, 3 FMSHRC at 2510. Mullins also testified that the person making the termination decision had knowledge of his safety complaints, which is relevant to discriminatory intent under Commission case law. *Chacon*, 3 FMSHRC at 2510. Additionally, Mullins testified that his section supervisor was angry at him for making a safety complaint and told miners the company would do whatever it took to run coal, suggesting hostility towards protected activity. *See id.* While Respondent's witnesses disputed each of these points, it is not necessary to resolve conflicts in testimony at this stage. *Albu*, 21 FMSHRC at 719.

At hearing, Respondent sought to present four additional witnesses that would have testified, as Ball did, that Mullins made no complaints about dust and there were no dusty conditions at the mine. I excluded this testimony on the basis that it would have been needlessly cumulative and would have called for a discussion of credibility, which is more appropriate after discovery and when and if a discrimination petition is ultimately filed. A trial judge has the discretion to "place reasonable limits on the presentation of evidence to prevent undue delay, waste of time, or needless presentation of cumulative evidence." *Johnson v. Ashby*, 808 F.2d 676, 678 (8th Cir. 1987); *see also* Fed. R. Evid. 403; *MCI Commc'ns Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1171 (7th Cir. 1983), *cert. denied*, 464 U.S. 891 (1983). Respondent had the opportunity to question Mullins through cross-examination and to present its defense through the testimony of Ball. The additional testimony offered would not have changed my conclusion that the testimony of Mullins was not demonstrably false. The Commission has explained that resolving conflicts in testimony between the complainant and the operator's witnesses at this stage, "when the parties have not yet completed discovery, would improperly transform the temporary reinstatement hearing into a hearing on the merits." *Sec'y of Labor on behalf of Ward v. Argus Energy WV, LLC*, 34 FMSHRC 1875, 1879 (Aug. 2012).

I find that Complainant has raised a non-frivolous issue as to each element of the prima facie case. I conclude that the discrimination complaint was not frivolously brought and Complainant is entitled to temporary reinstatement.

III. ORDER

The Application for Temporary Reinstatement is hereby **GRANTED**. Respondent is **ORDERED** to, immediately upon receipt of this decision, reinstate Complainant to his former position at the mine, or a comparable position within the same commuting area at the same rate

of pay and benefits he received prior to his discharge, pending a final Commission order on the discrimination complaint.

Margaret A. Miller
Administrative Law Judge

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