FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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June 16, 2022

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of MOSES ORTIZ, Applicant v. MARIO SINACOLA & SONS EXCAVATING, INC. AND ITS SUCCESSORS, Respondent	APPLICATION FOR TEMPORARY REINSTATEMENT Docket No. CENT 2021-0184-DM MSHA Case No. SC-MD-2021-06 DISCRIMINATION PROCEEDING Docket No. CENT 2022-0028-DM MSHA Case No. SC-MD-2021-06 Midlothian Quarry and Plant Mine ID: 41-00071

ORDER GRANTING THE SECRETARY'S MOTION TO ENFORCE ORDER DIRECTING TEMPORARY REINSTATEMENT OF MOSES ORTIZ & ORDER DENYING RESPONDENT'S MOTION FOR DISMISSAL AND SANCTIONS FOR PERJURY

Before: Judge Manning

These matters are before me on an application for temporary reinstatement[1] and a complaint of discrimination filed by the Secretary of Labor ("Secretary") on behalf of Moses Ortiz pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815(c)(2), against Mario Sinacola & Sons Excavating, Inc. and its successors ("Sinacola").

On May 5, 2022, the Secretary filed a Motion to Enforce Order Directing Temporary Reinstatement of Moses Ortiz ("Sec'y Mot.") in which he argued that Sinacola had failed to

[1] On August 24, 2021, this court issued a Decision Approving Settlement Agreement and Order of Temporary Economic Reinstatement ("TR Order"). In lieu of physically reinstating Ortiz to his former position at Sinacola, the TR Order made clear the parties jointly agreed Ortiz would be temporarily economically reinstated. Under the terms of the Settlement Agreement submitted by the parties and approved by the court, Respondent agreed to pay the difference between Ortiz's previous rate of pay at Sinacola and the lesser amount he was earning in a new job held at the time the parties filed the settlement agreement. The TR Order incorporated other terms of the economic reinstatement, as well as rights and responsibilities of the parties, and ordered the parties to comply with such. Notably, the Settlement Agreement explicitly stated it was to "remain in effect until a 'final order' of the Commission is entered regarding Ortiz's underlying discrimination complaint." Because the TR Order was not a final disposition of the application for temporary reinstatement, I retained jurisdiction over the case. 29 C.F.R. § 2700.45(e)(4).

comply with the TR Order. On May 12, Respondent filed a response to the Secretary's motion and its own Requests for Dismissal and Sanctions for Perjury ("Resp. Mot."). Subsequently, on May 24, the Secretary filed a reply to Respondents Request for Dismissal and Sanctions for Perjury. ("Sec'y Reply").[2]

SUMMARY OF THE PARTIES' ARGUMENTS

The Secretary, in his motion, asserts that Respondent "failed to comply with the [TR Order] . . . to temporarily economically reinstate Moses Ortiz by failing to make payments for three (3) pay periods to date." Sec'y Mot. 1. Accordingly, the Secretary moves the court to enforce its own order and require Sinacola to "pay the amount owed for any missed payments and continue to make the agreed payments to Mr. Ortiz until a final order is issued in the merits case." *Id*. at 2.

Respondent, in its response and request, moves the court to dismiss the underlying discrimination case and sanction Ortiz for material perjury and fraud on the Commission. Resp. Mot. 1. According to Respondent, Ortiz confessed during a deposition that his case is based on retaliation for prior criminal convictions and not on retaliation for safety complaints. Further, Ortiz made his only safety complaint to MSHA after he was terminated[3] and he cannot name anyone at Sinacola who has been fired for reporting safety concerns. Finally, Respondent argues that Ortiz failed to disclose three serious felony convictions on his 2010 job application and that Respondent would not have hired Ortiz had it known the truth. Consequently, Respondent, citing the "after-acquired evidence" doctrine and the Supreme Court's decision in *McKennon v. Nashville Banner Publishing Company*, 513 U.S. 352 (1995), argues that Sinacola "cannot be forced to pay wages to an ex-employee who would never have been hired in the first place had he told the truth, nor can Ortiz be economically reinstated as the Motion to Enforce asks."[4] Resp. Mot. 3-4.

The Secretary, in his reply, argues that the "after-acquired evidence" doctrine is not applicable to the temporary reinstatement case. While the doctrine "can limit damages awarded and will generally render reinstatement and front pay inappropriate[,]" the Court in *McKennon* was addressing permanent reinstatement as a remedy after a determination on the merits was

[2] The Secretary's motion was filed in the temporary reinstatement docket, i.e., CENT 2021-0184-DM. Respondent filed its response to the Secretary's motion in the underlying discrimination docket, i.e., CENT 2022-0028-DM. Because Respondent also requests that the discrimination case be dismissed and sanctions be imposed, I accepted the filing in both the temporary reinstatement docket and the discrimination docket. Accordingly, both the temporary reinstatement case and discrimination case are captioned on this order.

[3] Respondent's response focuses on two alleged safety complaints. First, a safety complaint made to MSHA regarding a supervisor allegedly not wearing a seatbelt. Second, a safety complaint made to someone not with MSHA regarding a hernia.

[4] Respondent also argues Ortiz perjured himself during his deposition when he mischaracterized his felony convictions as minor misunderstandings.

made, not temporary reinstatement, as is at issue here.[5] Moreover, the Secretary, citing *McKennon*, asserts that even if after-acquired evidence can be considered, Respondent has failed to put forth sufficient evidence of wrongdoing of such severity that Ortiz in fact would have been terminated on those grounds alone. Sec'y Reply 3. The Fifth Circuit Court of Appeals has held that the pertinent inquiry is whether the employee would have been fired upon discovery of the wrongdoing, not whether the individual would have been hired in the first instance. Here, the only evidence Respondent submitted is an affidavit from its Vice President of Human Resources that Sinacola would not have hired Ortiz.[6]

The Secretary further asserts that Ortiz's discrimination complaint was not frivolously brought and that Ortiz's protected activity need not have occurred in the form of a complaint to MSHA. According to the Secretary, Ortiz made numerous safety complaints to Respondent and, immediately before being terminated, told a member of mine management that "he could have contacted MSHA regarding his concerns 'a long time ago.'" Sec'y Reply. 5. The Commission has long recognized that making a complaint to management and asserting that one may exercise their right to contact MSHA are both protected activities under the Mine Act.[7] Based on the MSHA investigator's findings regarding protected activity, the fact that termination was an adverse action under the Act and, given that some of these events occurred within a single conversation, there clearly was a nexus. When the Secretary finds that a miner's discrimination complaint is not frivolously brought, the Mine Act requires the Commission to order the immediate reinstatement of the miner pending final order on the complaint.

Additionally, the Secretary argues Respondent continues to harass and retaliate against Ortiz. The after-acquired evidence doctrine is well established. Respondent failed to meet its burden under the doctrine but nevertheless attempted to bring the convictions before the court to prejudice Ortiz. Sec'y Reply. 7. Further, Respondent "habitually refused to comply with the . . . [TR Order], having missed payments on at least 10 occasions since the Order was entered." Sec'y Reply 7. Furthermore, despite alleging that Ortiz perpetrated a fraud on the court and perjured himself, Respondent presented no evidence of the type of egregious conduct necessary to establish fraud and failed to present evidence of any testimony under oath that Ortiz contradicted during his deposition. Sec'y Reply 8.

Given the above arguments, the Secretary avers there is no evidence the temporary reinstatement claim was frivolously brought. Accordingly, the Secretary asks the court to

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[5] The Secretary cites the decision of my colleague, Judge Simonton, for the proposition that after-acquired evidence is irrelevant and inadmissible in a temporary reinstatement proceeding. *Sec'y v. Small Mine Dev.*, 2020 WL 8180380, at *2 (December 18, 2020).

[6] The Secretary asserts it is clear Respondent would not have terminated Ortiz based on the convictions or any information omitted from Ortiz's employment application because Respondent had prior knowledge of that information but did not terminate Ortiz until after he lodged a safety complaint and stated he could contact MSHA.

[7] The Secretary acknowledges that the friction between Ortiz and his supervisor likely began when the supervisor became aware of Ortiz's criminal record in 2014 or 2015. However, the Secretary asserts that this history does not form the basis of the suit.

enforce the temporary economic reinstatement order of August 24, 2021, and require Respondent, in an expedited manner, to pay the amount owed for any missed payments and continue making those payments until a final order is issued in the merits case. Finally, the Secretary asks that Respondent's response and request be stricken from the record given that it fails to come close to meeting the burden of proving perjury or fraud on the court, and only serves to further harass and retaliate against Ortiz.

DISCUSSION AND ANALYSIS

Both the temporary reinstatement proceeding, and the discrimination proceeding are captioned in this order. It is critical that the parties recognize the difference between these two proceedings. While the scope of the discrimination proceeding is broad and addresses the merits of the complaint of discrimination, the scope of the temporary reinstatement proceeding was, and is, narrow and limited to a determination whether the discrimination complaint was frivolously brought. *See 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) ("*JWR*"). Moreover, unlike in a discrimination proceeding on the merits, in a temporary reinstatement proceeding a judge "may not resolve credibility disputes or make rulings on credibility." *Sec'y of Labor on behalf of Saldivar v. Grimes Rock, Inc.*, 43 FMSHRC 299, 301 (June 2021) ("*Saldivar*").

Although a hearing was not held on the application for temporary reinstatement,[8] the record supports that Ortiz's complaint was not frivolously brought. The application for

[8] Rather than go to hearing on the application for temporary reinstatement, the parties jointly entered into a settlement agreement in which Ortiz, in lieu of actual reinstatement, was "economically reinstated." The Commission addressed economic reinstatement agreements in *Sec'y of Labor on behalf of Gray v. North Fork Coal Corp*. 33 FMSHRC 589 (Mar. 2011) ("Gray"), and stated as follows:

> [The operator] confuses the legal principles that apply to back pay awards if and when the miner succeeds in his discrimination complaint on the merits, with the legal principles governing the wholly separate temporary reinstatement proceeding.
> . . .
> [T]he purpose of temporary reinstatement is to put the miner back to work as soon as possible so that he or she can resume earning a living while the discrimination case is heard. . . . The temporary reinstatement provisions contemplate that the miner will provide the operator labor in return for wages and benefits. The issue of back pay usually does not arise since the miner is not compensated for the earlier period of time between termination and the judge's order temporarily reinstating him or her. . . . Conversely, if the operator chooses to pay the miner while foregoing the miner's labor, there is no right for the operator to seek reimbursement from the miner should the miner not eventually prevail on his or her discrimination claim.

temporary reinstatement, the special investigator's sworn declaration, and the Secretary's discrimination complaint allege that in February and April of 2021 Ortiz made safety complaints and asserted to mine management his right to contact MSHA with safety concerns.[9] Notably, each of those filings allege Ortiz was terminated immediately after asserting his right to contact MSHA to mine management.[10] The Commission has held that termination eight days after an operator gains knowledge of a protected activity can establish a motivational nexus for purposes of determining whether a complaint of discrimination is frivolously brought. *A&K Earth Movers, Inc.*, 22 FMSHRC 323, 325-326 (Mar. 2000). Here, there is evidence that possibly only seconds or minutes elapsed between the time Ortiz asserted his right to contact MSHA and his termination. Given the temporal proximity of the alleged protected activity and adverse action, a nexus appears to exist that supports a determination that the complaint was not frivolous.[11]

> Consequently, we reject the notion that the considerations which shape back pay award amounts, also apply, as a matter of law, to the economic reinstatement order before us. Unlike back pay awards, Commission judges do not decide the terms of economic reinstatement agreements. The agreement which formed the basis of the judge's order was arrived at after negotiations between the parties. Moreover, we are cognizant of the fact that it was North Fork's decision to offer economic reinstatement in lieu of actual reinstatement that gave rise to the retroactive pay relief that North Fork now seeks to challenge.

Gray at 592-593. (Internal citations omitted).

[9] While Respondent does not explicitly argue that only complaints to MSHA can serve as protected activity, the Secretary's reply directly addresses that argument and correctly states that protected activity can include, among other things, complaints to mine management and assertions by a miner that they may exercise their right to contact MSHA. *See e.g., Saldivar* 43 FMSHRC 299, 307 (Safety complaints made to the operator are protected activity), *Sec'y of Labor on behalf of Coffee v. Txoma Mining, LLC*, 40 FMSHRC 615, 625 (Mar. 2018) (ALJ).

[10] The Secretary correctly points out that Ortiz, as a lay person, need only have a "mere belief" that he has been discriminated against, and need not know what specifically constitutes protected activity in order to trigger the Secretary's investigation into the complaint in order to fully develop the possible claim of discrimination. Sec'y Reply 6 (*quoting Hopkins County Coal, LLC*, 38 FMSHRC 1317 (June 2016). Here, the Secretary's investigation revealed at least two instances of potential protected activity by Ortiz, i.e., reporting the seatbelt issue to mine management and informing management that he could contact MSHA with his concerns.

[11] The "not frivolously brought" 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." *JWR*, 920 F.2d at 748, n.11.

I find Respondent's argument regarding after-acquired evidence unavailing and inapplicable in the context of temporary reinstatement proceedings. Both parties cite the Supreme Court's decision in *McKennon v. Nashville Banner Publishing Company*, 513 U.S. 352 (1995). In *McKennon*, unlike here, the Court was addressing the impact of the after-acquired evidence doctrine on remedies available after a determination on the merits of a discrimination complaint. There the Court found that although certain remedies, such as full reinstatement and front pay, may not be available to a discriminatee based on after-acquired evidence of wrongdoing by the individual, such evidence is not a complete bar to recovery. Here, there has been no hearing on the merits of the discrimination complaint and this court has issued only an order of *temporary* economic reinstatement based upon the parties' jointly submitted Settlement Agreement. Given the unique, limited nature of temporary reinstatement proceedings, the Mine Act's direction that miners be immediately reinstated pending final order on the complaint, 30 U.S.C. § 815(c)(2), and the parties' joint agreement to economically reinstate Ortiz pending final order on the complaint, I agree that any after-acquired evidence of wrongdoing "is irrelevant and inadmissible at this temporary reinstatement stage." *Sec'y of Labor v. Small Mine Dev*., 2020 WL 8180380, at *2.[12] Sinacola has presented insufficient evidence or legal argument to merit overturning the August 24, 2021, Decision Approving Settlement Agreement and Order of Temporary Economic Reinstatement.

With regard to Respondent's motion to dismiss the discrimination proceeding, I find its arguments unavailing. Respondent's motion would require the court to prematurely weigh evidence and make credibility findings. The parties are currently engaged in discovery and preparing for hearing. This order is not the appropriate time or place for the court to weigh evidence on whether Sinacola discriminated against Ortiz. Rather, during and after the August 2 hearing, the court will weigh the evidence, make findings of fact and determine whether Ortiz was discriminated against and, if so, what the appropriate remedy may be.

As stated above, Respondent maintains that Ortiz was discharged when it learned that he had previously been convicted of serious felonies and that Ortiz agreed with this conclusion during his April 8, 2022, deposition. I note that there appears to be a serious dispute of material fact between the parties regarding when Respondent became aware of Ortiz's criminal record. Although Respondent asserts it would not have hired Ortiz had it known of his criminal record, it is unclear when Respondent became aware of that record. The Secretary asserts Respondent had prior knowledge of the criminal record, yet Ortiz was not terminated when management first became aware of the convictions. This dispute of material fact is an issue that must be addressed at the hearing on the merits. If Respondent had prior knowledge of the criminal record but failed to act on that knowledge, one could argue that a later termination allegedly based on that knowledge is pretextual. *See JWR*, 12 FMSHRC 1521, 1534 (Aug. 1990) ("pretext may be

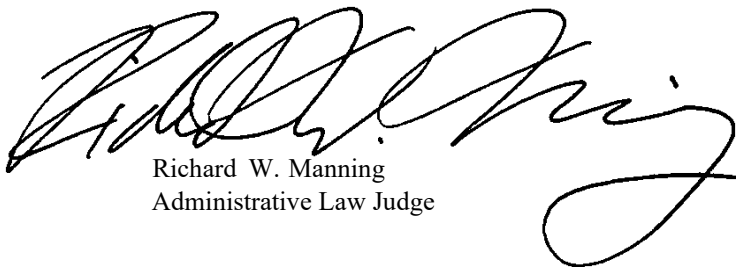
[12] Although Respondent's argument involving the after-acquired evidence doctrine fails in the context of the temporary reinstatement proceeding, Respondent is free to reassert that argument and present evidence at the hearing on the merits after the Secretary has been given an opportunity to establish a prima facie case. I note that the Fifth Circuit has held that "the pertinent inquiry . . . is whether the employee would have been fired upon discovery of the wrongdoing, not whether he would have been hired in the first instance." *Shattuck v. Kinetic Concepts, Inc.*, 49 F.3d 1106, 1108 (5th Cir. 1995).

found … where the asserted justification is weak, implausible, or out of line with the operator's normal business practices."); *see also Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 148 (2000) ("a plaintiff's prima facie case combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.")

Finally, I find that Respondent's arguments regarding perjury and fraud on the court lack merit. I agree with the Secretary's analysis and find that Respondent has failed to point to anything which could meet the high burden of proving a fraud on the court, i.e., an "unconscionable plan or scheme which is designed to improperly influence the court in its decision." *First Nat'l Bank of Louisville*, 96 F.3d 1554, 1573 (5th Cir. 1996). Further, although Respondent may take issue with Ortiz's failure to disclose these convictions on his application for employment, Ortiz appears to have been candid about the existence of his criminal record when asked about it, under oath, at his deposition. In addition, Ortiz claims that Respondent knew of at least one of his convictions for about six years prior to his termination. Based on the record developed in these cases to date, I find that it has not been established that Ortiz perpetrated fraud on the court.

ORDER

The Secretary's Motion to Enforce Order Directing Temporary Reinstatement of Moses Ortiz is **GRANTED**. Respondent is **ORDERED** comply with all terms of parties' settlement agreement in the temporary reinstatement case that was approved by this court by order dated August 24, 2021. Specifically, Respondent is **ORDERED** to pay Ortiz the money owed for payments under the agreement that were missed as set forth by the Secretary. Such payment shall be made as quickly as possible, but by no later than June 24, 2022. Further, Respondent is **ORDERED** to continue making payments under the terms of the settlement agreement as ordered by this court until such time that a final order is issued in the discrimination case on the merits. Respondent's Requests for Dismissal and Sanctions for Perjury is **DENIED**.[13]



Richard W. Manning
Administrative Law Judge

[13] The Secretary, in his reply, requested that Respondent's response be stricken from the record. The Secretary, in making this request, appears concerned that Ortiz will be prejudiced if the convictions are before the court. Given that I sit as the finder of fact in this matter, the risk of prejudice due to the existence of the convictions in the record is minimal at most. Accordingly, I decline to strike the Respondent's response from the record.

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