FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 14, 2016

MARK BAILEY,	:	DISCRIMINATION PROCEEDING
Complainant,	:	
	:	Docket No. WEVA 2016-241-D
	:	PINE CD-2016-03
	:	
v.	:	
	:	
REX OSBORNE, COLIN MILAM,	:	
ROCKWELL MINING, LLC, and	:	
GATEWAY EAGLE COAL CO., LLC,	:	Gateway Eagle Mine
Respondents.	:	Mine ID: 46-06618

ORDER DENYING MOTION TO DISMISS
ORDER DENYING MOTION FOR SUMMARY DECISION

This matter is before me on a Motion to Dismiss due to bankruptcy filing of the original employer and for Summary Judgment on the merits of the case filed by Respondent Rockwell Mining, LLC. Complainant Mark Bailey filed a response to the motion. Bailey initiated this case after being terminated from his employment with Gateway Eagle Coal Co., LLC. He has named Rockwell Mining, LLC ("Rockwell") as a party in his action under a theory of successor liability. In its motion, Rockwell argues that a finding of successor liability against it is precluded by a bankruptcy court order stating that Rockwell's parent company, Blackhawk Mining, LLC, purchased assets including the Gateway Eagle Mine "free and clear of all Liens, Claims and interests." Rockwell further argues that under the Commission's test for successor liability, it is not a successor to Bailey's former employer, Gateway Eagle Coal Co., LLC. Finally, it argues that Bailey's complaint is without merit and that a finding of summary decision in favor of Rockwell is appropriate on the merits. For the reasons that follow, the motions are denied.

I. BACKGROUND

Mark Bailey began working at the Gateway Eagle Mine on February 5, 2014. The mine was operated at that time by Gateway Eagle Coal Co., LLC. Bailey alleges that he began refusing to operate his roof bolting machine in return air in late 2014 because of concerns about inhaling coal and silica dusts while the machine was operating downwind of the continuous miner. He alleges acts of interference with his refusal to work culminating in his suspension with intent to discharge on September 10, 2015. He seeks reinstatement to his former position, back pay, attorneys' fees, and injunctive relief. Respondents argue that Bailey's discharge was not discriminatory, but rather based on excessive absences. Bailey has named Rockwell Mining, LLC, as a respondent in his case, alleging that Rockwell is a successor-in-interest to Gateway Eagle.

Gateway Eagle Coal Co., LLC ("Gateway Eagle") and its parent company, Patriot Coal, filed voluntary petitions for relief under Chapter 11 on May 12, 2015. A bar date for creditors to file proofs of claim was set for June 27, 2015. In early June 2015, Patriot entered into an agreement with Blackhawk Mining and its subsidiary, Rockwell Mining, LLC, for Rockwell to acquire the Gateway Eagle Mine. The plan of acquisition was confirmed by the bankruptcy court on October 9, 2015. *In re Patriot Coal Corp*., Ch. 11 Case No. 15-32450 (Bankr. E.D. Va. Oct. 9, 2015) (order confirming plan of reorganization) ("Confirmation Order"). An Administrative Claims Bar Date was set for November 25, 2015. *In re Patriot Coal Corp*., Ch. 11 Case No. 15-32450 (Bankr. E.D. Va. Oct. 28, 2015) (notice of confirmation, effective date, and bar dates) ("Notice of Admin. Bar Date").

The bankruptcy court's confirmation order approves the sale of assets to Blackhawk "free and clear of all Liens, Claims and interests ... pursuant to the terms and conditions of the Blackhawk APA." Confirmation Order ¶ 114. The order further states in its findings of fact and conclusions of law that:

> Blackhawk is not and shall not be deemed, as a result of any action taken in connection with the Blackhawk Transaction, to: 1) be a successor (or other such similarly situated party) to any of the Debtors . . . .
>
> Blackhawk ... is not, and shall not be, a successor to the Debtors by reason of any theory of law or equity . . . .
>
> [Blackhawk and its affiliates] shall have no successor or vicarious liabilities of any kind or character, including, but not limited to, any theory of antitrust, environmental, successor or transferee liability, labor, employment or benefits law ... whether known or unknown as of the closing of the Blackhawk Transaction, then existing or hereafter arising ... with respect to the Debtors . . . .

Confirmation Order ¶¶ 76, 116, 120.

Bailey's termination occurred after the deadline for filing a proof of claim, but before Rockwell acquired the mine and before the deadline for filing an administrative claim. Bailey filed his complaint of discrimination with MSHA on September 23, 2015. MSHA notified him that it was declining to pursue the complaint on January 21, 2016. Bailey filed his complaint with FMSHRC on February 22, 2016.

II. STANDARD OF REVIEW

A. Motion to Dismiss

Federal Rule of Procedure 12(b)(6) permits a respondent to file a motion to dismiss a claim for failure to state a claim upon which relief can be granted. When ruling on a respondent's motion to dismiss, the judge "must accept as true all of the factual allegations contained in the complaint." *Swierkiewicz v. Sorema N.A*., 534 U.S. 506, 508 n.1 (2002). To survive a motion to dismiss, a complaint must contain sufficient factual matter to allow the court

to draw a reasonable inference that the respondent is liable for the misconduct alleged. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

B. Motion for Summary Decision

Commission Rule 67 provides:

> 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) That there is no genuine issue as to any material facts; and
> (2) That the moving party is entitled to summary decision as a matter of law.

29 C.F.R. § 2700.67(b).

In reviewing the record on summary decision, the judge must consider the record "in the light most favorable to ... the party opposing the motion." *Hanson Aggregates N.Y., Inc.*, 29 FMSHRC 4, 9 (Jan. 2007) (citing *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 473 (1962)). Inferences drawn from the facts in the record must also be viewed in the light most favorable to the party opposing the motion. *Id.* (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

III. DISCUSSION

A. Discharge in Bankruptcy

In its Motion to Dismiss, Rockwell argues that the bankruptcy court's October 9, 2015, order confirming the sale of Patriot Coal's assets to Blackhawk Mining "free and clear of all Liens, Claims and interests" precludes a finding of successor liability against it. As explained below, I find that for due process reasons, it is inappropriate to dismiss the case on these grounds.

i. Free and Clear Sales

Gateway Eagle, through its parent company, Patriot Coal, filed for Chapter 11 bankruptcy protection in May 2015 and sought to sell its assets as a part of the bankruptcy plan. The Bankruptcy Code provides two avenues for the sale of a debtor's assets during the Chapter 11 bankruptcy process. The first is through the Chapter 11 plan of reorganization, which may provide for the "sale of all or any part of the property of the estate either subject to or free of any lien." 11 U.S.C. § 1123(a)(5)(D). Section 1141(c) of the Bankruptcy Code provides that, with some exceptions,[1] "after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors, equity security holders, and of general partners in the debtor." 11 U.S.C. § 1141(c). The second avenue available is § 363(f), which empowers the trustee in bankruptcy to "sell property under subsection (b) or (c) free and clear of any interest in

1. The exceptions are not relevant and so are not addressed here. *See* 11 U.S.C. § 1141(d).

such property of an entity other than the estate." 11 U.S.C. § 363(f). Section 363 may be used before a reorganization plan is approved and involves fewer procedural requirements than the reorganization process. *See* George W. Kuney, *Misinterpreting Bankruptcy Code Section 363(f) and Undermining the Chapter 11 Process*, 76 Am. Bankr. L.J. 235, 236 (2002). The transfer from Gateway Eagle to Blackhawk was accomplished through the plan process, *see* Confirmation Order, but cases involving § 363(f) sales are also relevant to this discussion.

Courts have generally decided that the trustee's power to sell assets "free and clear of any interest in property" under § 363(f) includes the power to sell free and clear of claims for successor liability. *See, e.g., In re Chrysler LLC,* 576 F.3d 108, 126 (2d Cir. 2009); *In re Trans World Airlines*, 322 F.3d 283, 288-90 (3d Cir. 2003) ("*TWA*"); *In re Leckie Smokeless Coal Co.*, 99 F.3d 573, 582 (4th Cir. 1996); *but see Zerand-Bernal Grp., Inc. v. Cox*, 23 F.3d 159, 163 (7th Cir. 1994) (finding that bankruptcy court lacked jurisdiction to enjoin a successor liability suit in state court against a § 363 asset purchaser after the bankruptcy proceeding closed). These courts have explained that while successor liability claims are typically not "interests in property" in the sense of being *in rem*, they nevertheless "arise from the property being sold." *TWA*, 322 F.3d at 290; *but see* Rachel P. Corcoran, L.L.M. Thesis, *Why Successor Liability Claims Are Not "Interests in Property" Under Section 363(f)*, 18 Am. Bankr. Inst. L. Rev. 697 (2010) (arguing that "interests in property" extinguishable under § 363(f) should be limited to *in rem* interests); Kuney, *supra* (similar). For instance, the Third Circuit in *TWA* found that successor liability claims for employment discrimination would not have arisen "[h]ad TWA not invested in airline assets, which required the employment of the EEOC claimants." 322 F.3d at 290; *see also Leckie*, 99 F.3d at 582.

In addition to this textual argument, these courts have observed that "[t]o allow the claimants to assert successor liability claims against [the purchaser] while limiting other creditors' recourse to the proceeds of the asset sale would be inconsistent with the Bankruptcy Code's priority scheme." *Chrysler*, 576 F.3d at 126 (alteration original) (quoting *TWA*, 322 F.3d at 292); *see also New Eng. Fish Co.*, 19 B.R. 323, 329 (Bankr. W.D. Wash. 1982); *but see Chi. Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund v. Tasemkin, Inc.*, 59 F.3d 48, 49 (7th Cir. 1995) ("In fact, once a bankruptcy proceeding is completed and its books closed, the bankrupt has ceased to exist and the priorities by which its creditors have been ordered lose their force."). Section 507 of the Code lists classes of unsecured creditors entitled to priority, and successor liability claimants are not among them. 11 U.S.C. § 507.

Finally, these courts have noted that allowing the bankruptcy trustee to sell assets free and clear of successor liability claims enables it to maximize the sale price of the assets. *See Douglas v. Stamco*, 363 F. App'x 100, 103 (2d Cir. 2010); *TWA*, 322 F.3d at 292-93; *Leckie*, 99 F.3d at 586-87; *In re White Motor Credit Corp.*, 75 B.R. 944, 951 (Bankr. N.D. Ohio 1987); *but see Zerand*, 23 F.3d at 163 (7th Cir. 1994) (suggesting that allowing the bankruptcy court to immunize buyers in asset sales from liability to a greater extent than can be done under ordinary property law creates an improper incentive for companies to enter bankruptcy). In *TWA*, the court found that "a sale of the assets of TWA at the expense of preserving successor liability claims was necessary in order to preserve some 20,000 jobs, including those of ... EEOC claimants still employed by TWA, and to provide funding for employee-related liabilities, including retirement benefits." 322 F.3d at 293.

There is less case law addressing the question of whether an asset sale pursuant to a reorganization plan may extinguish successor liability. However, the textual argument appears to be stronger: whereas § 363(f) provides for a sale of property "free and clear of any interest in such property," § 1141(c) provides that "after confirmation of a plan, the property dealt with by the plan is free and clear of *all claims* and interests of creditors, equity security holders, and of general partners in the debtor." 11 U.S.C. §§ 363(f), 1141(c) (emphasis added); *see also Chrysler*, 576 F.3d at 125 (deciding to "harmonize the application of § 1141(c) and § 363(f)" by interpreting the latter to permit sales free and clear of successor liability). If a successor liability claim can be considered an "interest in property," it almost certainly can be considered a "claim" of a creditor.[2] Additionally, the arguments for maximizing sale prices and preserving Code priorities apply equally in the context of § 1141(c).

While the dominant trend is towards permitting bankruptcy courts to extinguish claims for successor liability, the National Labor Relations Board ("NLRB") reached a contrary result in *International Technical Products Corp.*, 249 N.L.R.B. 1301 (1980) ("*ITP*"). The Board determined that a bankruptcy court's free and clear sale order did not extinguish a successor's liability for back pay under an NLRB order against the debtor.[3] 249 N.L.R.B. 1301, 1303 (1980) ("*ITP*"). The Board emphasized that a Board order is not focused on the property of the employer, suggesting that bankruptcy law was therefore inapplicable. The Board stated that

> [W]hile a bankruptcy court may have the authority to assign a certain priority to the Board's claim for backpay, the authority to modify or set aside the order upon which the claim is based rests exclusively with the Board and the appropriate reviewing Federal courts, and not the bankruptcy courts.

ITP, 249 N.L.R.B. at 1303.

In a recent FMSHRC discrimination case, Judge Moran cited *ITP* in an order suggesting that a bankruptcy court's § 363(f) sale order did not preclude a finding of successor liability under the Mine Act. *Varady v. Veris Gold USA, Inc.*, 38 FMSHRC __, slip op. at 14, No. WEST 2014-307-DM (Mar. 4, 2016) (ALJ). Judge Moran concluded that "There is nothing in the Mine Act that relegates it to a status as an appendage of bankruptcy law and therefore there is nothing which prohibits this Court ... from making the legal determination of whether [the asset purchaser] is a successor entity under the Mine Act." *Id.* at 16.

However, the status of *ITP* as good law is uncertain. While the Board has stated that *ITP* is "current Board law," *Leiferman Enters., LLC*, 354 N.L.R.B. 872, 872 n.3 (2009), *aff'd*, 649

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2. A "creditor" is defined in the Bankruptcy Code as an "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor." 11 U.S.C. § 101(10).
3. The case was decided under the previous version of the Bankruptcy Act, but was based primarily on policy concerns rather than textual interpretation and so remains relevant. 249 N.L.R.B. at 1303-04.

F.3d 873 (8th Cir. 2011), its reasoning has never been reexamined by the Board. *See* N.L.R.B., Office of General Counsel, Opinion Letter re: *In the Matter of RFS Ecusta, Inc.*, 2005 WL 936629 (Mar. 21, 2005). The Board's reasoning has also been questioned in later decisions. *See Herbert N. Zimmerman, Inc.*, 314 N.L.R.B. 107, 112 (1994) ("Whatever the final balance between the two acts may be, totally ignoring regular bankruptcy proceedings is not it."); *New Eng. Fish Co.,* 19 B.R. at 327 (stating that *ITP* was "based on specious reasoning"); *see also In re Pan Am. Hosp. Corp.,* 364 B.R. 832, 837 (Bankr. S.D. Fla. 2007) ("The NLRB does not, however, have a right to assert successor liability to a *bona fide* § 363 purchaser for reinstatement and back pay incurred prior to the sale.")

Reviewing the law as it stands, the most plausible interpretation of the Bankruptcy Code is that it enables a bankruptcy court to extinguish claims for successor liability through either a § 363(f) sale or a reorganization plan.

ii. Due Process

While most courts agree that the Bankruptcy Code permits a bankruptcy court to extinguish claims for successor liability, they have found that this power is limited by the requirements of due process. Courts have recognized that permitting a bankruptcy court to extinguish claims where the injury occurs after the conclusion of the bankruptcy proceeding ("future claims") presents significant due process problems. *See, e.g., Chrysler*, 576 F.3d at 127 (declining to decide whether order extinguishing claims applied to future claims); *Zerand*, 23 F.3d at 163; *In re Chateaugay Corp*., 944 F.2d 997, 1003 (2d Cir. 1991). The Supreme Court has explained that for a proceeding to satisfy due process there must be "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co*., 339 U.S. 306, 314 (1950).

The Fifth Circuit addressed the issue of future claims in *Lemelle*, a wrongful death action against an alleged successor corporation involving a mobile home fire. *Lemelle v. Universal Mfg. Corp*., 18 F.3d 1268 (5th Cir. 1994). The assets of the mobile home manufacturer had been sold to a third party in bankruptcy, and the alleged successor corporation merged with the reorganized company after the bankruptcy. *Id.* at 1271. The mobile home had been manufactured prior to the bankruptcy, but the fire occurred after the conclusion of the bankruptcy. *Id.* at 1271. The alleged successor argued that the wrongful death claim had been discharged in the predecessor's bankruptcy. *Id.* at 1271. The court determined that the wrongful death suit was not a "claim" that the bankruptcy court could have discharged because the claimants were completely unknown at the time of the petition and could not have been given notice of the proceeding. *Id.* at 1277.

Several federal district courts have also addressed the issue of future claims in the context of § 363(f) asset sales. *In re Grumman Olson Industries, Inc*., and *Schwinn Cycling & Fitness, Inc. v. Benonis* involved products liability actions where the product was manufactured and sold prior to the bankruptcy, but the injury occurred after the bankruptcy concluded. *In re Grumman Olson Indus., Inc*., 467 B.R. 694, 698 (S.D.N.Y. 2012); *Schwinn Cycling & Fitness, Inc. v. Benonis*, 217 B.R. 790, 793 (N.D. Ill. 1997). In both cases, the plaintiff named the purchaser of assets in a § 363 sale as a defendant under a theory of successor liability. 467 B.R. at 699; 217

B.R. at 792-94. The bankruptcy court's order confirming the sale in each case had declared that the sale was "free and clear of all claims" and that the purchaser would not be liable under a successorship theory for claims against the debtor. 467 B.R. at 699; 217 B.R. at 792-93. Both courts concluded that a bankruptcy court's order could not be enforced to extinguish a claim "where no injury occurred to the claimant until after the bankruptcy closed, such that the claimant was not provided with notice of, or an opportunity to participate in, the bankruptcy proceedings that gave rise to that order." *Grumman Olson,* 467 B.R. at 702; *see also Schwinn,* 217 B.R. at 797.

The court in *Grumman Olson* acknowledged that, on its face, the sale order would have extinguished the theory of successor liability pled by the plaintiff. 467 B.R. at 708. But it found that "Enforcing the Sale Order against the [plaintiffs] to take away their right to seek redress under a state law theory of successor liability when they did not have notice or an opportunity to participate in the proceedings that resulted in that order would deprive them of due process." *Id.*

The claim at issue differs from the claims in *Grumman Olson* and *Schwinn* in that the injury occurred prior to the discharge in bankruptcy rather than after it. The Eighth Circuit addressed the issue of due process in a situation similar to the one at hand. *Sanchez v. Nw. Airlines, Inc.*, 659 F.3d 671 (8th Cir. 2011). In *Sanchez*, the plaintiff brought suit against his employer for discrimination against him on the basis of his disability in violation of the Americans with Disabilities Act. *Id.* at 672. The employer argued that the claim had been discharged in its Chapter 11 bankruptcy. *Id.* at 673. The plaintiff's claim accrued after the company had filed for bankruptcy, prior to confirmation of its Chapter 11 plan, but after the deadline for regular creditors to submit proofs of claim. *Id.* at 673-74. The court found that although the plaintiff received notice of the bankruptcy, the notice did not afford him an opportunity to make an appearance, since his claim accrued after the bar date. *Id.* at 675-76. Thus, due process prevented the bankruptcy court from discharging his claim. *Id.*; *see also In re Savage Indus., Inc.*, 43 F.3d 714, 720-21 (1st Cir. 1994) (holding that claims arising during Chapter 11 proceeding survived because claimants did not receive notice).

In this case, Bailey's claim accrued on the date of his suspension with intent to discharge, September 10, 2015. This was prior to the plan confirmation date of October 9, 2015, but well after the bar date of June 27, 2015. Confirmation Order. The parties have not addressed whether Bailey received notice of the bar date. Nevertheless, any notice he may have received would not have "afford[ed] a reasonable time for [him] to make [his] appearance," *Mullane*, 339 U.S. at 314, since the deadline for submitting claims had already passed.

Rockwell argues that even though Bailey's claim arose after the regular claims bar date, Bailey could still have filed an administrative claim. Resp. Mot. for Sum. Dec. at 3 n.7. The deadline for filing an administrative claim was November 25, 2015, two months after Bailey's suspension with intent to discharge.[4] Bailey disputes that his claim qualified as an administrative claim. The Bankruptcy Code provides that

4. Bailey did not receive MSHA's determination on his case until January 21, 2016. He thus argues that his claim accrued after the Administrative Claims Bar Date, since he could not have filed a claim with FMSHRC prior to receiving the determination from MSHA. 30 U.S.C. §

> After notice and a hearing, there shall be allowed administrative expenses … including the *actual, necessary costs and expenses of preserving the estate including … wages and benefits awarded pursuant to a judicial proceeding* or a proceeding of the National Labor Relations Board *as back pay* attributable to any period of time occurring after commencement of the case under this title, as a result of a violation of Federal or State law by the debtor, without regard to the time of the occurrence of unlawful conduct on which such award is based or to whether any services were rendered, if the court determines that payment of wages and benefits by reason of the operation of this clause will not substantially increase the probability of layoff or termination of current employees, or of nonpayment of domestic support obligations, during the case under this title.

11 U.S.C. § 503(b) (emphasis added). While Bailey is seeking back wages, he has not yet received an "award" of back pay. Further, the Code refers only to wages and benefits awarded "pursuant to a judicial proceeding or a proceeding of the National Labor Relations Board." *Id.* The term "judicial proceeding" is not defined in the Code, but Congress's separate reference to the NLRB suggests that the term does not encompass administrative proceedings such as those before the NLRB. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." (internal quotations omitted)). Thus, I find that Bailey could not have brought his discrimination claim as an administrative claim in the bankruptcy proceeding.

Because Bailey could not have brought his claim in the bankruptcy proceeding as either an administrative or an ordinary claim, he had no "opportunity to be heard" as required by due process. Accordingly, I find that Bailey's claim was not discharged by the bankruptcy proceeding and that he is not bound by the bankruptcy court's determination that Blackhawk is not a successor to Patriot Coal.

B. Successor Liability

Rockwell argues that even if the Court decides to apply the Commission's test for successor liability, it should find that Rockwell is not a successor to Bailey's former employer, Gateway Eagle.

815(c)(3). However, courts to address the issue have held that in the analogous case of a Title VII suit, a right-to-sue letter is "merely a jurisdictional prerequisite, and does not create a claim." *McSherry v. Trans World Airlines*, 81 F.3d 739, 741 (8th Cir.1996). Rather, the claim "arises, for purposes of discharge in bankruptcy, at the time of the events giving rise to the claim, not at the time plaintiff is first able to file suit on the claim." *O'Loghlin v. Cty. of Orange*, 229 F.3d 871, 874 (9th Cir. 2000).

The Commission has held that a corporate successor may be held liable for its predecessor's violations of the Mine Act. *Sec'y of Labor on behalf of Corbin v. Sugartree Corp.*, 9 FMSHRC 394, 397 (Mar. 1987), *aff'd sub nom. Terco, Inc. v. Fed. Coal Mine Safety & Health Review Comm'n*, 839 F.2d 236 (6th Cir. 1987); *see also Munsey v. Smitty Baker Coal Co.*, 2 FMSHRC 3463, 3465 (Dec. 1980) (applying successorship doctrine in a Coal Act case). In analyzing whether it is appropriate to impose liability on a successor, the Commission applies a nine-factor test derived from Title VII case law. *Corbin*, 9 FMSHRC at 397-98; *Munsey*, 2 FMSHRC at 3465-66. The relevant factors are:

> 1) [W]hether the successor company had notice of the charge, 2) the ability of the predecessor to provide relief, 3) whether there has been a substantial continuity of business operations, 4) whether the new employer uses the same plant, 5) whether he uses the same or substantially the same work force, 6) whether he uses the same or substantially the same supervisory personnel, 7) whether the same jobs exist under substantially the same working conditions, 8) whether he uses the same machinery, equipment and methods of production and 9) whether he produces the same product.

Munsey, 2 FMSHRC at 3465-66 (alteration in original) (quoting *EEOC v. MacMillan Bloedel Containers, Inc.*, 503 F.2d 1086, 1094 (6th Cir. 1974)).

Rockwell argues that it had no notice of Bailey's charge and that it therefore should not be held liable as a successor. Resp. Mot. for Sum. Dec. at 15-18. A number of courts have agreed that the issue of notice is dispositive with regard to the imposition of successor liability. *See, e.g., Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 616 (6th Cir. 1986), *overruled on other grounds by Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993) (finding that where "the successor had no notice of contingent charges of discrimination at or before the time of acquisition, the case was removed from the rationale of *MacMillan* and successor liability would not attach"); *Scott v. Sopris Imports Ltd.*, 962 F. Supp. 1356, 1360 (D. Colo. 1997). Rockwell notes that Bailey did not file his discrimination complaint with MSHA until November 23, 2015. Rockwell first received notice of the MSHA complaint in a letter from MSHA on November 24, 2015, over a month after confirmation of the Patriot sale. Resp. Mot. for Sum. Dec. at 17. Bailey argues, however, that the notice requirement was satisfied when he filed a UMWA grievance opposing his termination. Comp. Resp. in Opp. at 7. The grievance was resolved on September 15, 2015, prior to the bankruptcy confirmation. Resp. Mot. for Sum. Dec., Ex. O.

The purpose of the notice requirement is to "ensure fairness by guaranteeing that a successor had an opportunity to protect against liability by negotiating a lower price or indemnity clause." *Steinbach v. Hubbard*, 51 F.3d 843, 847 (9th Cir. 1995) (citing *Golden State Bottling Co., Inc. v. NLRB*, 414 U.S. 168, 185 (1973)); *see also Musikiwamba v. ESSI, Inc.*, 760 F.2d 740, 750 (7th Cir. 1985). Accordingly, the relevant time period for notice is before the transfer of the business. In many cases, courts have looked to the filing of a lawsuit to show notice. *See, e.g., EEOC v. N. Star Hosp., Inc.*, 777 F.3d 898, 902 (7th Cir. 2015); *Brzozowki v. Corr. Physician Servs., Inc.*, 360 F.3d 173, 178 (3rd Cir. 2004); *Musikiwamba*, 760 F.2d at 751-52; *EEOC v. Nichols Gas & Oil, Inc.*, 688 F. Supp. 2d 193, 196 (W.D.N.Y. 2010). However, some courts have held that a successor may have notice of a claim even though no formal claim has yet been

filed. *See, e.g., Battino v. Cornelia Fifth Ave., LLC*, 861 F. Supp. 2d 392, 405-06 (S.D.N.Y. 2012) (finding that individual defendant had notice of claim for unpaid wages based on conversation providing him with knowledge of predecessor's unlawful action); *Walker v. Faith Tech., Inc.*, 344 F. Supp. 2d 1261, 1268 (D. Kan. 2004) (finding that successor had notice of claim because plaintiff complained about discrimination to his project manager, who told official in both old and new companies about the complaints); *cf. Scott v. Sopris Imps. Ltd.*, 962 F. Supp. 1356, 1359-60 (D. Colo. 1997) (evaluating whether successor had "constructive notice of an imminent, or even possible claim"). In *Golden State Bottling*, the Supreme Court upheld a finding that the notice prong had been satisfied where a managerial employee of the predecessor company had knowledge of the potential liability, participated in the sale negotiations, and took a similar management position with the successor. 414 U.S. at 173. The Court noted that those facts "support[ed] an inference that [the manager] informed his prospective employer of the litigation before completion of the sale." *Id.*

I find that here, Bailey has raised a genuine issue of material fact as to whether Rockwell had notice of his discrimination charge. Bailey asserts that Rockwell had notice of his claim based on his grievance of his discharge. Comp. Resp. in Opp. at 7. While the record includes a copy of the denial of his grievance, it is unclear whether Rockwell knew of the grievance and whether the grievance provided notice of Bailey's allegations of discriminatory discharge. Resp. Mot. for Sum. Dec., Ex. O. Nevertheless, I find that Bailey has raised a question of fact with regard to this issue. Further, I am unpersuaded by Rockwell's argument that the bankruptcy court's "free and clear" order prevented it from having notice of any claim. *See* Resp. Mot. for Sum. Dec. at 15-17. Such a rule would defeat any successor liability claim after a free and clear sale, and as discussed above, a successor liability claim can in some cases survive a bankruptcy proceeding.

Addressing the second element of the *Munsey* test, Rockwell admits that the predecessor, Gateway Eagle, would have been unable to provide relief to Bailey. Resp. Mot. for Sum. Dec. at 21. Gateway Eagle's parent company, Patriot Coal, lacked sufficient funds to meet its obligations, and Gateway Eagle no longer has any employees, making reinstatement impossible. *Id.* In *Munsey*, the Commission implied that the inability of the predecessor to provide relief counseled in favor of imposing liability on the successor corporation. *See Munsey*, 2 FMSHRC at 3466. However, Rockwell argues that Gateway Eagle's inability to provide relief should weigh *against* a finding of successor liability, because ordering the successor to provide relief would "work a damaging windfall in the plaintiff's favor by the mere serendipity of working for a company that failed and was sold." Resp. Mot. for Sum. Dec. at 19.

Rockwell's approach finds support in the case *Musikiwamba v. ESSI, Inc.*, in which the Seventh Circuit states that "Unless extraordinary circumstances exist, an injured employee should not be made worse off by a change in the business. But neither should an injured employee be made better off." 760 F.2d at 750. However, most courts do not take this approach, instead holding that a predecessor's inability to pay weighs in favor of imposing successor liability. *See, e.g., Thompson v. Real Estate Mortg. Network*, 748 F.3d 142, 153 (3d Cir. 2014); *Prince v. Kids Ark Learning Ctr., LLC*, 622 F.3d 992, 995 (8th Cir. 2010); *Terco, Inc. v. Fed. Coal Mine Safety & Health Review Comm'n*, 839 F.2d 236, 239 (6th Cir. 1987). Commission case law is consistent and follows the reasoning that the inability of a predecessor

to provide relief weighs in favor of successor liability. *See Corbin*, 9 FMSHRC at 398. Accordingly, I take that approach here.

The remaining seven factors of the *Munsey* test "provide a framework for analyzing the crucial question of whether there was a continuity of business operations and work force between the successor and its predecessor." *Corbin*, 9 FMSHRC at 398. Rockwell concedes that its operation of the mine involves the same plant, equipment, and method of production as its predecessor, as well as much of the same workforce. Resp. Mot. for Sum. Dec. at 22. It argues that despite this, there has not been a "substantial continuity of business operations" at the mine because Blackhawk has implemented a new business model under which the former Gateway mine is operated in conjunction with another mining complex. *Id.* at 23. I note, however, that the record has not been developed on this point. At present the record concerning successorship is limited to the affidavits of two employees at the mine, which contain little detail regarding the management structure, workforce, and production methods at the mine. I thus find that there are issues of material fact remaining, and that I cannot decide this question on summary decision.

Rockwell also suggests that Gateway Eagle's bankruptcy compels as a matter of law a finding that Rockwell has not continued the business of Gateway Eagle, because it was that business that led to the bankruptcy. *Id.* at 22. Rockwell has offered no case law in support of that argument, however, and I am not persuaded by it. Because there remain questions of fact on the issue of successor liability, I cannot find that Rockwell was or was not a successor in this case and leave the matter for further development and decision.

C. 105(c)(3) Claim

Finally, Rockwell argues that Bailey's claim of discrimination is without merit and that it is entitled to summary decision on the merits.

Section 105(c)(1) of the Mine Act provides that a miner cannot be discharged, discriminated against, or otherwise interfered with in the exercise of his statutory rights because he "has filed or made a complaint under or related to this Act, including a complaint notifying the operator ... of an alleged danger or safety or health violation" or "because of the exercise by such miner ... of any statutory right afforded by this Act." 30 U.S.C. § 815(c)(1).

In order to establish a prima facie case of discrimination under Section 105(c)(1), a complaining miner must produce evidence sufficient to support a conclusion that (1) he engaged in protected activity, (2) he suffered an adverse action, and (3) the adverse action was motivated at least partially by that activity. *Driessen v. Nev. Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *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. Consol. Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds sub nom. Consol. Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981). The burden of proof for a prima facie case is "lower than the ultimate burden of persuasion, which the complainant must sustain as to the overall question of whether section 105(c)(1) has been violated." *Turner v. Nat'l Cement Co. of Cal.*, 33 FMSHRC 1059, 1065 (May 2011).

The complainant is not required to produce direct evidence of the operator's motive. *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981). More often, the complainant proves motive using circumstantial evidence. *Id.* Facts that may be relevant to establishing motive include the operator's knowledge of the protected activity; the operator's hostility or animus towards the protected activity; the timing of the adverse action in relation to the protected activity; and disparate treatment. *Id.* at 2510-13.

The 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. *Driessen*, 20 FMSHRC at 328-29 (citing *Robinette*, 3 FMSHRC at 818 n.20). The operator may also defend affirmatively by proving that the adverse action was in part motivated by unprotected activity of the miner, and that it would have taken the adverse action based on the unprotected activity alone. *Id.* (citing *Robinette*, 3 FMSHRC at 817; *Pasula*, 2 FMSHRC at 2799-2800). The operator bears the burden of persuasion for the affirmative defense. *Pasula*, 2 FMSHRC at 2800.

i. Protected Activity

Bailey alleges that he engaged in protected activity when he informed his supervisor of a dangerous condition in the mine and refused to work in that condition. He alleges that sometime in 2014, he raised concerns with Rex Osborne about operating thin-vein bolting machines in sections of the mine in which the roof was higher than the height intended for such machines. Compl. of Discrim. at 2. Later that year, he became concerned about his exposure to dusty conditions while operating his roof bolt machine in return air while the continuous miner machine was cutting coal. *Id.* He began refusing to operate the roof bolt machine in return air. *Id.* The Commission has determined that among the statutory rights protected by Section 105(c) is the right to refuse to work in dangerous conditions. *Pasula*, 2 FMSHRC at 2790-93.

Rockwell does not address Bailey's allegations of protected activity in its motion for summary decision. Construing the record in the light most favorable to Bailey, I will thus assume for purposes of summary decision that he engaged in protected activity.

ii. Adverse Action

The parties agree that Gateway Eagle suspended Bailey with intent to discharge him on September 10, 2015, and that he was ultimately discharged. *See* Resp. Mot. for Sum. Dec., Ex. K. Discharge is an adverse action specifically mentioned in Section 105(c).

iii. Discriminatory Motive

The parties dispute whether Gateway Eagle had a discriminatory motive in discharging Bailey. Bailey argues that he was discharged for refusing to operate the roof bolting machine in return air, while Rockwell argues that he was discharged for poor attendance.

The record includes ample evidence of Bailey's poor attendance record. According to a termination notice from Bailey's previous employer, he was discharged from a former position for missing work. *See* Resp. Mot. for Sum. Dec., Ex. D. At Gateway Eagle, Bailey received a

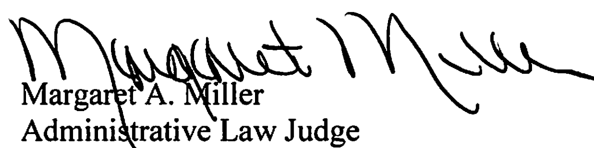
warning letter in June 2014 for having three unexcused absences in 180 days. Resp. Mot. for Sum. Dec., Ex. E. He also received a counseling letter regarding attendance issues in August 2014. Resp. Mot. for Sum. Dec., Ex. F. Under the mine's collective bargaining agreement, a miner who accumulates three unexcused absences in 180 days should receive counseling on attendance. Resp. Mot. for Sum. Dec., Ex. P. If subsequent to counseling he again incurs three absences in 180 days, there is just cause for discharge. *Id.* Bailey received another warning in April 2015 that he had incurred three more unexcused absences in 180 days. Resp. Mot. for Sum. Dec., Ex. G. The letter notified him that he was suspended with intent to discharge. *Id.* Gateway Eagle resolved the suspension the same month by having Bailey sign a "Last Chance Agreement," in which he promised to maintain an absentee rate at or below the mine average and not to incur another unexcused absence within the next year. Resp. Mot. for Sum. Dec., Ex. H. Bailey received another warning in May 2015 for two instances of unexcused tardiness or leaving early. Resp. Mot. for Sum. Dec., Ex. I. On September 4, 2015, he incurred another absence, which the mine asserts was unexcused. Resp. Mot. for Sum. Dec., Ex. K. On September 10, 2015, he received a notice of suspension with intent to discharge based on the unexcused absence and having an absentee rate below the mine average. *Id.*

Bailey disputes much of Rockwell's account of his termination. First, he testified at his deposition that he was not terminated for attendance reasons from his previous job, but rather resigned due to an undesirable shift change. Comp. Resp. in Opp. at 4. Second, he claims that one of the absences cited as the basis for the Last Chance Agreement had previously been resolved to the satisfaction of Gateway Eagle management. *Id.* Bailey claims that he only entered into the agreement based on the promise by Gateway Eagle management that the agreement would be unenforceable so long as he provided documentation to explain the absence. *Id.* Further, he argues that the September 4 absence that was the alleged basis for his discharge was an excused absence for which he should not have been penalized. *Id.* at 5.

I find that issues of material fact remain regarding Gateway Eagle's motive in discharging Bailey. Accordingly, I find that summary decision is inappropriate.

IV. ORDER

Based on my review of the record and the applicable law, I find that there are disputes of material fact remaining with regard to the merits of Bailey's claim and the issue of successor liability, and that Rockwell is not entitled to summary decision as a matter of law. Accordingly, Rockwell's motion for summary decision is **DENIED**. Further, I find that Bailey's discrimination claim was not discharged by the Patriot Coal bankruptcy proceeding. Therefore, Rockwell's motion to dismiss is also **DENIED**.



Margaret A. Miller
Administrative Law Judge

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