

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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July 16, 2018

SECRETARY OF LABOR  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA), on behalf  
of KELLY RAWLEY,  
Complainant

v.

J.L. SHERMAN EXCAVATION CO. and  
PAMELA AND JEFFREY SHERMAN,  
Respondents

DISCRIMINATION PROCEEDING

Docket No. WEST 2018-0034-DM

Mine: J.L. Sherman Excavation Co.  
Mine ID: 45-03100

**ORDER OF DISMISSAL**  
**DECISION APPROVING SETTLEMENT**  
**ORDER TO PAY**

Before: Judge McCarthy

This case is before me upon a discrimination complaint filed by the Secretary of Labor on behalf of Kelly Rawley under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). This is the fourth Commission proceeding involving Rawley and Respondent, J.L. Sherman Excavation Company. The prior proceedings were settled, as outlined below. This matter is set for hearing on July 17-18, 2018 in Spokane, Washington. On July 12, 2018, the Secretary filed an Unopposed Motion for Approval of First Amended Settlement Agreement.

Complainant Kelly Rawley was employed at Respondent J.L. Sherman Excavation Company's mine. On October 5, 2015, Rawley complained to Respondent's owner, Jeffrey Sherman, about brakes on an endloader that made it unsafe to operate. On October 6, 2015, Jeffrey Sherman told Rawley not to speak with an MSHA inspector. Jeffrey Sherman also terminated Rawley's employment with J.L. Sherman.

On November 12, 2015, Rawley filed a Discrimination Complaint with MSHA, alleging that Respondent interfered with his statutory rights and discriminated against him by instructing him not to speak with the MSHA inspector and by discharging him because of protected activity in violation of Section 105(c) of the Mine Act. Rawley withdrew his November complaint after a representative of Respondent informed him that he had been laid off for the winter, not terminated, and would be able to return to work in April of 2016.

In the spring of 2016, Respondent reopened the mine but did not recall Rawley. On April 2, 2016, Rawley filed a new 105(c) complaint with MSHA alleging that he had been terminated and not rehired by Respondent. MSHA conducted an investigation. On May 12, 2016, the Secretary of Labor filed an Application for Temporary Reinstatement in Docket No. WEST 2016-0467-DM. On May 23, 2016, the parties filed a Settlement Agreement and Joint Motion for Temporary Economic Reinstatement. On May 26, 2016, Administrative Law Judge Barbour ordered that Rawley be economically reinstated.

On June 16, 2016, after completion of MSHA's investigation, the Secretary filed a Complaint of Discrimination alleging that Respondent interfered with Rawley's statutory rights by instructing him not to speak with MSHA, and discriminated against him through discharge or refusal to rehire. That Complaint was assigned Docket No. WEST 2016-0545-DM.

On April 19, 2017, the Secretary filed an Unopposed Motion to Approve Settlement Agreement in WEST 2016-0545-DM. The Settlement Agreement provided that Respondent had interfered with Rawley's rights under section 105(c) of the Act when Jeffrey Sherman instructed Rawley not to speak with MSHA on October 6, 2015. The Settlement Agreement further provided, *inter alia*, that Respondent would reinstate Rawley to his previous position as leadman, with specified backpay and benefits, and that Rawley would not be discharged for three years, except for good cause with advance written notice to Rawley and the Secretary. Rawley and Respondent's owners, Jeffrey and Pamela Sherman, also agreed to engage in at least one session of personal, workplace conflict resolution at Respondent's expense, no later than June 1, 2017. Respondent also agreed to provide annual, comprehensive, workplace training on miners' rights and responsibilities under the Mine Act.

By Order of Dismissal dated April 27, 2017, the undersigned granted the Secretary's Unopposed Motion and approved the Settlement Agreement. Thereafter, Rawley returned to work for Respondent in late April 2017.

On May 2, 2017, MSHA issued Citation No. 7958951 against Respondent for failing to pay back wages due Rawley under the terms of the Settlement Agreement. *See App.* for Temporary Reinstatement, Docket No. WEST 2017-0598, at 4 (July 25, 2017). Shortly after receiving Citation No. 7958951, Pamela Sherman allegedly "accused Rawley of calling MSHA and complained that he was costing her money because of the citation." *Id.*

On May 31, 2017, Rawley and Respondent participated in a workplace conflict resolution session pursuant to the Settlement Agreement in WEST 2016-0545-DM. *Id.* As part of that session, Rawley signed an agreement that he would "provide written notification to [Respondents] of any safety or maintenance concern before any complaint is filed with MSHA or any agency." *Id.* at 5 (herein referred to as the "prior notification policy").

On June 28, 2017, Respondent terminated Rawley's employment allegedly for violating company policy prohibiting the possession of alcohol on company premises. *Id.* Contrary to the terms of the settlement agreement approved in WEST 2016-0545-DM, which provided that Rawley would not be discharged for three years, except for good cause with advance written

notice to Rawley and the Secretary, the June 28, 2017 termination was “effective immediately.” On July 3, 2017, Rawley filed a new discrimination complaint with MSHA. *Id.*

On July 25, 2017, the Secretary filed a new Application for Temporary Reinstatement against J.L. Sherman Excavation Company and Jeffrey and Pamela Sherman. The Secretary alleged that the prior notification policy that was agreed to during the workplace conflict resolution agreement was contrary to public policy and interfered with Rawley’s statutory right under section 103(g) to make an anonymous complaint to MSHA about safety or health issues before complaining to Respondent(s). The Secretary further alleged that Rawley’s June 28, 2017 termination constituted discriminatory retaliation for prior protected activity under section 105(c) of the Mine Act. The Secretary’s Application was assigned Docket No. WEST 2017-0598-DM.

On July 31, 2017, Respondent agreed to reinstate Rawley, pending the outcome of the Secretary’s investigation. On August 1, 2017, the Secretary filed a Motion to Withdraw Application for Temporary Reinstatement. On August 8, 2017, the undersigned granted the motion and dismissed the temporary reinstatement proceeding.

As noted above, the instant case arises out of the same circumstances as the three previous proceedings involving Rawley and J.L. Sherman Excavation Company.

The Complaint in the instant proceeding was filed after the Secretary’s investigation of Rawley’s July 3, 2017 discrimination complaint to MSHA. The Secretary alleges that Respondents J.L. Sherman, Jeffrey Sherman, and Pamela Sherman engaged in unlawful discrimination by retaliatory discharge of Rawley because of prior protected activity, and interfered with Rawley’s exercise of statutory rights under the Act though the prior notification policy and Pamela Sherman’s alleged coercive statement. First Amended Compl. at 5. The Secretary seeks to impose a \$25,000 civil penalty against all three Respondents. *Id.* at 5.

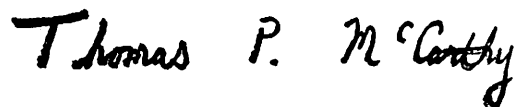
The Secretary has filed an Unopposed Motion for Approval of First Amended Settlement Agreement to resolve the proceedings in Docket No. WEST 2018-0034. The First Amended Settlement Agreement proposes a reduction in civil penalties from \$25,000 to \$6,500. First Amended Agreement at 3. Regarding the events of May 2, 2017 and Citation No. 7958591, the Settlement Agreement represents that the parties would have presented conflicting testimony at trial as to whether Pamela Sherman made certain alleged coercive remarks to Rawley about contacting MSHA and costing her money. *Id.* at 2. In the unopposed motion, the Secretary factually explains why he has agreed to withdraw this interference allegation. Unopposed Mot. at 3. Regarding the events of May 31 and the Voluntary Settlement Agreement, the First Amended Settlement Agreement represents that the Shermans “were unaware [that] the prior notification provision violated section 105(c) of the Mine Act, even though they should have been aware [that] the prior notification provision violated section 105(c) of the Mine Act.” First Amended Agreement at 3. Respondents agree to expunge from Rawley’s personnel file any records relating to the events of June 27, 2017 through August 4, 2017, including the termination of Rawley’s employment and his reinstatement following the temporary reinstatement proceedings in Docket No. WEST 2017-0598. *Id.* at 4. Respondents also agree to pay Rawley

\$4,000 in economic damages.<sup>1</sup> The First Amended Settlement Agreement represents that Respondents have retired, are not now engaging in mining and will not again engage in mining in the future. As a consequence, the First Amended Settlement Agreement does not require Respondent to post notification of miners' rights at their worksite. Respondents have instead agrees that they shall mail a copy of MSHA's Miners' Rights Poster to all miners employed at J.L. Excavation Company between at least June 1, 2017, and November 20, 2017. *Id.* at 4. Finally, the First Amended Settlement Agreement states that, aside from the terms outlined above, "the making of the Agreement is not intended to and shall not constitute an admission by Respondent as to the merits of the allegations made in the Complaint, or as to any violation of the Federal Mine Safety and Health Act of 1977 (Mine Act), except in future proceedings brought under the Mine Act." *Id.* at 4.

By email dated July 13, 2018, Rawley's counsel confirmed that Rawley has found other employment and waives any right to reinstatement with Respondents.

I have reviewed the settlement motion, as well as the parties' Settlement Agreement, and I conclude that the proposed settlement is appropriate under the criteria set forth in section 110(i) of the Mine Act, is fair, reasonable, and appropriate under the facts, and protects the public interest because it will further the intent and purpose of the Federal Mine Safety and Health Act, as amended.

Accordingly, the Secretary's Unopposed Motion for Approval of First Amended Settlement Agreement is **GRANTED**, and the parties are **ORDERED** to comply with the terms and conditions in the settlement agreement within 30 days of the date of this order.<sup>1</sup> Upon completion of the terms and conditions of the Settlement Agreement, the captioned proceeding is **DISMISSED**.



Thomas P. McCarthy  
Administrative Law Judge

Distribution:

Katherine Kasameyer, Office of the Solicitor, U.S. Department of Labor, 300 Fifth Avenue, Suite 1120, Seattle, WA 98104

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<sup>1</sup> Exhibit A attached to the First Amended Settlement Agreement indicates that both the \$4,000 in economic damages to Rawley and the \$6,500 in MSHA civil penalties are being paid by J.L. Sherman, rather than by Jeffrey and Pamela Sherman.

<sup>1</sup> Payment should be sent to: Mine Safety & Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

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Jeffrey & Pamela Sherman, J.L. Sherman Excavation Co., P.O. Box 250, Newport, WA 99156

Kelly Rawley, P.O. Box 0045, Laclede, ID 83841

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