FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 14, 2015

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of **LEONARD MADRID**, Complainant, v. AMERICAN MINING & TUNNELING, LLC, & CHRIS CORLEY, Respondents.	DISCRIMINATION PROCEEDING Docket No. WEST 2015-549-DM RM-MD-15-04 Mine: Midas Mine Mine ID: 26-02314

ORDER DENYING MOTION FOR SUMMARY DECISION

Before: Judge Moran

This case is before the Court upon a complaint of discrimination filed by the Secretary of Labor on behalf of Leonard Madrid under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2) (2012) ("Act" or "Mine Act"). Respondents American Mining & Tunneling, LLC, ("AMT") and Chris Corley have filed a motion for summary decision, stating that there is no evidence in the record that Respondents knew of Leonard Madrid's hazard complaint to MSHA. Consequently, they argue, they are entitled to summary decision as a matter of law. For the reasons that follow, their motion is **DENIED**.

Legal Standards

This discrimination complaint is brought under section 105(c)(2) of the Mine Act, alleging a violation of section 105(c)(1), which states, in relevant part:

> No person shall discharge or in any manner discriminate against or cause to be discharged . . . any miner . . . because such miner . . . has filed or made a complaint under or related to this chapter, including a complaint notifying the operator or the operator's agent at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine.

30 U.S.C. § 815(c). The Commission reviews section 105(c) cases according to the *Pasula-Robinette* framework. In order to establish a prima facie violation of section 105(c)(1), a complainant must "establish[] a prima facie case of discrimination by showing (1) that he engaged in protected activity, and (2) that he thereafter suffered adverse employment action that

was motivated in any part by that protected activity." *Pendley v. FMSHRC*, 601 F.3d 416, 423 (6th Cir. 2010). An operator may rebut the complainant's showing by demonstrating "either that no protected activity occurred or that the adverse action was in no part motived by protected activity." *Driessen v. Nev. Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998). Failing that, the operator may have an affirmative defense if it can prove "that it also was motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone." *Id.* at 329.

Commission Procedural Rule 67(b) provides the grounds upon which a motion for summary decision shall be granted:

> (b) Grounds. 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 fact; and
>
> (2) That the moving party is entitled to summary decision as a matter of law.

29 C.F.R. § 2700.67(b). The Commission has long analogized Rule 67(b) to Rule 56 of the Federal Rules of Civil Procedure. *See, e.g., Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007). Accordingly, the Court must draw all inferences in the light most favorable to the nonmoving party. *Id.* (citations omitted).

Factual Background

The Secretary's Amended Complaint provides two instances of protected activity engaged in by Madrid in December 2014: (1) Madrid told his supervisor and Project Superintendent Christopher Corley that he refused to bypass a non-functioning safety switch on a tractor, and (2) Madrid told Corley that his supervisor performed welding on a man basket when he was not certified to do so and AMT did not have the proper facilities to make the modifications. Am. Compl. ¶ 8. On December 27, 2014, Madrid made a hazard complaint to MSHA, which was investigated on December 29, 2014. Sec'y's Mem. Opp. Summ. J. 4; Resp'ts' Mem. Supp. Summ. J. 2. On December 30, 2014, Madrid was terminated. Am. Compl. ¶ 8; Resp'ts' Mem. 3.

Respondents' Motion

In their motion and accompanying memorandum, Respondents argue that they are entitled to summary decision because the Secretary will not be able to satisfy his burden of proof as a matter of law. Resp'ts' Mem. 2. First, they contend that the two instances of protected activity alleged in the Amended Complaint are no longer at issue because "Madrid testified . . . that he was terminated only because he made a complaint to MSHA and that upon finding out that he made a complaint to MSHA, AMT terminated his employment." *Id.* Second, they argue that "there is no evidence that anyone knew that Madrid had made a complaint to MSHA until after his termination." *Id.* at 4. Without showing knowledge on the part of Respondents that

Madrid made a hazard complaint to MSHA, Respondents argue that they could not have been motivated by that protected activity to terminate him.

Discussion

As noted, the Secretary, in his amended complaint, alleges two instances of protected activity: Madrid's work refusal and Madrid's safety complaint to Corley about Madrid's direct supervisor. Am. Compl. ¶ 8. The Secretary also states, and Respondents do not dispute, that Madrid was terminated on December 30, 2014. Sec'y's Mem. 4; Resp'ts' Mem. 3.

As stated by the Commission in *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), "[d]irect evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." Where direct evidence of motivation is unavailable, the Commission has identified several indicia of discriminatory intent, including, but not limited to: "(1) knowledge of the protected activity; (2) hostility towards the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant." *Turner v. Nat'l Cement Co. of Cal.*, 33 FMSHRC 1059, 1066 (May 2011) (citing *Chacon*, 3 FMSHRC at 2510).

There remains a factual dispute regarding Respondents' motivation for terminating Madrid. Respondents argue that there is no evidence that Corley or Woelki were aware that Madrid made a complaint to MSHA, but the MSHA complaint is not the only protected activity alleged in this case. *See* Am. Compl. ¶ 8. Madrid has stated that in December 2014, he refused to bypass a safety switch, and, later, when he refused to do work on a man basket because he was not certified, Woelki told him that he could not refuse the work, because Woelki was his supervisor. Sec'y's Mem. 3-4. Completely distinct from those events, on December 27, 2014, he made a hazard complaint to MSHA. *Id.* at 4. MSHA investigated on December 29, 2014, and Madrid was terminated on December 30, 2014. *Id.* at 4-5; Am. Compl. ¶ 8.

The Respondents' Motion suffers from a crucial deficiency. First, the Secretary has not amended the Complaint a second time to confine the claim to Respondents' knowledge of Complainant's communications with MSHA, and Madrid's deposition does not do that either. Respondents fail to realize that there is no obligation for a complainant to allege that his or her safety complaint was transmitted to MSHA at all. Thus, if the two grounds declared in the Complaint are established, and there is a nexus between those alleged instances of protected activity and Madrid's termination, a prima facie case will have been established. At that point the *Pasula-Robinette* framework, as summarized above, is applied. Accordingly, Respondents have misapprehended the process for assessing discrimination complaints and consequently failed to show that there is no genuine issue as to any material fact. The Secretary's Response makes these points as well, although the result reached here would have been the same, even in the absence of a response. Given the identified deficiencies, summary decision is inappropriate.

Conclusion

Accordingly, for the foregoing reasons, the motion for summary decision is **DENIED**. At the hearing, set to begin on September 22, 2015, in Reno, Nevada, the Court will hear evidence from the parties relating to the protected activity alleged by Complainant, Respondents' motivation for terminating Leonard Madrid, and any affirmative defenses claimed by Respondents.

SO ORDERED.

William B. Moran
Administrative Law Judge

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