FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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REUBEN SHEMWELL, Complainant v. ARMSTRONG COAL CO., INC., Respondent	DISCRIMINATION PROCEEDINGS Docket No. KENT 2014-0297-D Docket No. KENT 2014-0327-D Docket No. KENT 2014-0521-D
REUBEN SHEMWELL & ANTHONY YOUNG, Complainants v. ARMSTRONG COAL CO., INC., Respondent	Docket No. KENT 2014-0323-D Docket No. KENT 2014-0324-D Docket No. KENT 2014-0325-D Docket No. KENT 2014-0326-D
ANTHONY YOUNG, Complainant v. ARMSTRONG COAL CO., INC., Respondent	Docket No. KENT 2014-0389-D Docket No. KENT 2014-0390-D

ORDER GRANTING MOTION TO CONSOLIDATE
ORDER DENYING ARMSTRONG'S MOTION FOR JUDGMENT ON THE PLEADINGS

Before: Judge McCarthy

These cases are before me based upon discrimination complaints filed pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977 (the Act or Mine Act). 30 U.S.C. § 815(c). Three motions are currently pending in the above-captioned dockets. On

June 30, 2014, Respondent filed a Motion for Judgment on the Pleadings for Failure to State a Claim Upon Which Relief Can Be Granted in Docket No. KENT 2014-0297. On July 5, 2014, Complainant Reuben Shemwell filed a Motion in Opposition. Complainants Shemwell and Anthony Young also filed two Motions to Consolidate on July 5, 2014, seeking to consolidate Docket No. KENT 2014-0323 with Docket No. KENT 2014-0324, and Docket No. KENT 2014-0325 with Docket No. KENT 2014-0326.

Given the likelihood that these cases will involve similar or overlapping issues, witnesses, and evidence, I find that consolidation of all of the above-captioned cases would further the interests of judicial economy and efficiency. Commission Rule 12 states that "[t]he Commission and its judges may at any time, upon their own motion or a party's motion, order the consolidation of proceedings that involve similar issues." 29 C.F.R. § 2700.12. The Commission has held that "[a] determination to consolidate lies in the sound discretion of the trial judge." *Pennsylvania Electric Company*, 12 FMSHRC 1562, 1565 (Aug. 1990).

Upon consideration of the grounds proffered in the Motions to Consolidate and in the interest of judicial economy and efficiency in resolving all the dockets, it is **ORDERED** that the above-captioned dockets be **CONSOLIDATED**.

For the reasons set forth below, I **DENY** the Respondent's Motion to Dismiss.

I. Procedural Background

Complainant Reuben Shemwell is a welder for Respondent Armstrong Coal Company. Shemwell was discharged from his job in September 2011 for allegedly making safety complaints and engaging in two safety-related work refusals. On January 23, 2012, Shemwell filed his first discrimination complaint with the Mine Safety and Health Administration (MSHA) against Armstrong Coal. *See Sec'y of Labor ex rel. Shemwell v. Armstrong Coal Co., Inc. & Armstrong Fabricators, Inc.*, 38 FMSHRC 1865 (June 2013) (ALJ). After MSHA investigated and declined to prosecute in July 2012, Shemwell filed an action on his own behalf with the Commission under 105(c)(3). *See Sec'y of Labor ex rel. Shemwell v. Armstrong Coal Co. Inc. & Armstrong Fabricators, Inc.*, 35 FMSHRC 248 (Jan. 2013) (ALJ).

On August 22, 2013, Armstrong filed suit against Shemwell in Kentucky state court for "wrongful use of civil proceedings," alleging that Shemwell knew that he had not been discharged for safety-related conduct when he filed his 105(c)(3) action. Shemwell then filed a retaliation complaint with MSHA under 105(c)(2), alleging that the state suit court was an unlawful attempt to stifle the filing of safety complaints in contravention of section 105(c) and the Mine Act. In January 2013, after further investigaton, the Secretary of Labor filed a Complaint of Discrimination on Shemwell's behalf. *See Shemwell*, 38 FMSHRC at 1866–67.

While Shemwell's 105(c)(3) action was still pending, the Secretary prevailed in the retaliation suit before the Commission. Armstrong and Shemwell then entered into a

confidential settlement agreement for both cases, resulting in Shemwell's return to work as a welder on August 9, 2013. Compl. ¶ 11–12.[1]

II. Factual Background

The instant proceeding arises from events that took place after Shemwell's return to work on August 9, 2013.

On August 8, 2013, the day before Shemwell returned to work, Shemwell alleges that Matt Dunlap, the welding supervisor, held a meeting with other welders and instructed them to keep notes on Shemwell's statements and actions because Shemwell would be keeping notes on them. For example, Dunlap allegedly told the welders to take notes if Shemwell was one minute late for work, or if he got on a ladder without using a safety harness. *Id.* at ¶ 12. In its Answer, Armstrong admits that Dunlap informed other welders that Shemwell would be working with them, but denies that Dunlap specified when Shemwell would return to work or that Dunlap informed the miners that Shemwell would take notes on them and that they should take notes on him. Answer ¶ 14.

During the week of August 12, 2013, Shemwell alleges that he asked his foreman, Lee Winton, for welding sleeves and a welding jacket, and that he received them a few days later. Compl. ¶ 13. Armstrong admits that Shemwell asked for such personal protective equipment. Answer ¶ 15.

On August 20, 2013, Shemwell allegedly told Dunlap that he wanted the material safety data sheets (MSDS) for both stainless steel wire and 58GV wire because he was concerned about the health effects of working with the wire. According to Shemwell's Complaint, Dunlap was visibly upset and only gave Shemwell an MSDS for the stainless steel wire. *Id.* at ¶ 14–15.

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[1] Before its determination not to proceed on the merits of Shemwell's original 105(c)(2) complaint, MSHA filed an Application for Temporary Reinstatement seeking to reinstate Shemwell to his job pending a final order on the complaint. *See* 30 U.S.C. § 815(c)(2). Upon finding that Shemwell's complaint was not frivolously brought, Administrative Law Judge Jerold Feldman ordered Armstrong to temporarily reinstate Shemwell. *See Sec'y of Labor ex rel. Reuben Shemwell v. Armstrong Coal Co., Inc. & Armstrong Fabricators, Inc.*, 34 FMSRHC 1464 (Jan. 2013) (ALJ), *aff'd*, 34 FMSRHC 1580 (2013). Thereafter, Armstrong and Shemwell executed an "Agreement Regarding Economic Reinstatement," whereby Shemwell was paid full wages and benefits, but agreed to stay off Armstrong's property. *Sec'y of Labor ex rel. Reuben Shemwell v. Armstrong Coal Co., Inc. & Armstrong Fabricators, Inc.*, 34 FMSRHC 2009 (Aug. 2012) (ALJ). After the Secretary's successful suit on Shemwell's behalf regarding his 105(c)(2) retaliation case, Judge Feldman dissolved the order approving the temporary economic reinstatement. *Sec'y of Labor ex rel. Reuben Shemwell v. Armstrong Coal Co., Inc. & Armstrong Fabricators, Inc.*, KENT 2012-0655-D, Unpublished Order dated Sept. 12, 2012.

Armstrong denies that Dunlap was upset, and asserts that Shemwell only requested the MSDS for the stainless steel wire. Answer ¶ 16–17. Shemwell alleges that he received a box of regular wire the next day and read the enclosed MSDS. He then called Dunlap. When Dunlap arrived at his work site, Shemwell told him about the MSDS requirements for the regular wire. Dunlap allegedly dismissed Shemwell's concerns and stated that welders would "die early anyway" because of "all of the shit" they breathe while they weld. Dunlap used his own father-in-law as an example of a welder "dying early" from "all the shit that they breathed." Dunlap said his father-in-law had been a welder and had died in his early 50s. Shemwell replied that he just wanted to know what he was dealing with when he welded. Compl. ¶ 16–17. Armstrong argues that Dunlap's remarks about dying early because of "all the shit they breathe" were in reference to Shemwell's smoking habit, and that Dunlap offered his father-in-law's death as an example of dying early because his father-in-law had died from smoking. Answer ¶ 18–19.

On August 22, 2013, safety director Richard Hicks, safety representative Matt McGehee, and Dunlap met Shemwell at his work station. Dunlap allegedly told Shemwell that MSHA Inspector Wendell Crick thought that Armstrong was providing all required personal protective equipment. Dunlap allegedly also told Shemwell that the "court order" said that Shemwell would be welding, and that if Shemwell refused to weld, Armstrong would have nothing for Shemwell to do. During the same conversation, Hicks allegedly asked Shemwell whether he had chosen welding as a career. When Shemwell replied in the affirmative, Hicks allegedly said, "You may want to think about another career." Compl. ¶ 18–20. Armstrong admits that Hicks asked Shemwell whether he had chosen welding as a career, but denies that Hicks made the alleged threat that Shemwell ought to think about another career. Answer ¶ 20.

On August 23, 2013, Shemwell filed a section 105(c)(2) Discrimination Complaint with MSHA. Compl. ¶ 2. On February 26, 2014, after MSHA declined to prosecute the complaint, Shemwell filed the instant action under section 105(c)(3). In essence, Shemwell alleges three instances of interference under section 105(c)(1): 1) on August 8, 2013, Dunlap attempted to ostracize Shemwell from his fellow welders and build a disciplinary record against him; 2) on August 20, 2013, Dunlap allegedly expressed the futility of inquiring about safety data involving welding wire because welders would "die early anyway" because of "all the shit they breathe;" and 3) on August 22, 2013, Hicks and Dunlap implicitly threatened Shemwell with job loss if he continued to pursue safety concerns. Compl. ¶ 21–23. Armstrong denies that its conduct violated the Mine Act, denies that Shemwell suffered any adverse action motivated in any part by protected activity, and argues that any adverse action that Shemwell did suffer was based solely on his unprotected activity. Answer ¶ 27–31.

II. Principles of Law

A. Standard of Review for Judgment on the Pleadings

Federal Rule of Procedure 12(c) allows parties to move for a judgment on the pleadings "after the pleadings have closed—but early enough that it will not delay trial." Fed. R. Civ. P. 12(c). In practical terms, a "rule 12(c) motion for judgment on the pleadings for failure to state a claim upon which relief can be granted is nearly identical to that employed under a Rule 12(b)(6) motion to dismiss." *Kottmeyer v. Maas*, 463 F.3d 684 (2006) (citations omitted). A motion to dismiss under Rule 12(b)(6) challenges the formal sufficiency of the complaint. The moving party must show there is no legal authority to grant relief, even assuming that all the facts alleged in the complaint, and the inferences drawn from them, are true. *Sec'y of Labor, ex rel. Steven Feagins v. Denver Coal Co.*, 23 FMSHRC 47, 48 (Jan. 2001) (ALJ) (*citing* Fed. R. Civ. P. 12(b)(6); *Haines v. Kerner*, 404 U.S. 519 (1972)). Conversely, "the plaintiff[] must plead factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Jackson v. Sedgwick Claims Mgmt. Servs.*, 731 F.3d 556, 562 (6th Cir. 2013) (en banc) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

In evaluating Armstrong's motion to dismiss, the undersigned "must [therefore] construe the complaint in the light most favorable to the [complainant], accept its allegations as true, and draw all reasonable inferences in favor of the [complainant]." *Jackson*, 731 F.3d at 562 (citing *Directtv, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007)). In the context of discrimination cases, courts have recognized that a complainant need not establish a prima facie case in order to overcome a motion to dismiss. Therefore, a complaint "need not present detailed factual allegations, [but only] allege sufficient factual content from which a court, informed by its judicial experience and common sense, could draw the reasonable inference" that the complainant was discriminated against. *Keys v. Humana, Inc.*, 684 F.3d 605, 610 (6th Cir. 2012) (citing *Iqbal*, 556 U.S. at 508).

B. Commission Interference Precedent

Section 105(c)(1) of the Act provides that

> [n]o person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or *otherwise interfere with* the exercise of the statutory rights of any miner . . . because such miner . . . has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner . . . has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner . . . on behalf of himself or others of any statutory right afforded by this Act.

29 U.S.C. § 815(c)(1) (emphasis added). The Commission has acknowledged that "Congress viewed the free exercise of miners' rights as essential to the achievement of safe and healthful mines." *Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475, 1478 (1982) (citing *Pasula v. Consol. Coal Co.*, 2 FMSHRC 2786 (1980)). Section 105(c) "encourages miner participation in the enforcement of the Mine Act by protecting them against not only the common forms of

discrimination, such as discharge, suspension, demotion . . . but also against the more *subtle forms of interference, such as promises of benefit or threats of reprisal.*" *Id.* (citing S. Rep. 91-191, 95th Cong., 1st Sess. 36 (1977) *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 624 (1978)) (emphasis added). Such practices instill in the minds of miners the fear of reprisal or discrimination, and may not only chill the exercise of protected rights by miners directly affected, but also cause other miners, who wish to avoid similar treatment, to refrain from asserting their rights. This collides with the goal of encouraging miner participation in enforcement of the Mine Act. *Id.* at 1778–79.

The Commission has long-recognized that an operator's interference with statutory rights violates section 105(c)(1). *See, e.g., Moses*, 4 FMSHRC 1475 (1982). The *Moses* test, reaffirmed in *Sec'y of Labor ex rel. Gray v. North Star Mining, Inc.*, 27 FMSHRC 1 (2005), has its genesis in section (8)(a)(1) of the National Labor Relations Act (NLRA), 29 U.S.C. § 158(a)(1), which makes it unlawful for an employer to "interfere with, restrain, or coerce" an employee in the exercise of statutory rights. *Gray*, 27 FMSHRC at 10. Interference may come in many forms, including, but not limited to, surveillance, interrogation, coercion, harassment, threats of reprisal, promises of benefit, and statements of futility.[2] Whether interference has occurred is generally evaluated by examining the operator's statements to determine whether they have a reasonable tendency to interfere with the free exercise of statutory rights, regardless of motive or whether the interference succeeded or failed. *Gray*, 27 FMSHRC at 10 (citing *American Freightways Co.*, 124 NLRB 146, 147 (1957)). Applying this test, the Commission has emphasized that "in determining whether a statement is an impermissible threat . . . language used by the parties . . . must not be isolated nor analyzed in a vacuum, but must be considered in light of the circumstances existing when such language was spoken." *Gray*, 27 FMSHRC at 7 (citing *TRW v. NLRB*, 654 F.2d 307, 313 (5th Cir. 1981)). In other words, the judge must consider the "totality of circumstances." *See Gray* 27 FMSHRC at 9-10; *Moses*, 4 FMSHRC at 1478 n. 8.

IV. Analysis

Dunlap's August 8, 2014 attempt to ostracize Shemwell from the other welders and to "build a record" against him by instructing the other welders to take notes on his workplace actions can be construed as creating an impression of surveillance due to Shemwell's prior protected activity. Dunlap's statement, conveyed to other miners and communicated back to Shemwell, could have a reasonable tendency to interfere with the miners' right to pursue safety and health complaints. Dunlap's instruction to take notes on Shemwell's actions may be construed, in context, as essentially an order to surveil and "bird-dog" him, arguably because of his prior protected activity. In fact, in Docket Nos. KENT 2014-0324 and KENT 2014-0325, Shemwell and Young allege that Respondent hired a consultant named David Stacer to do just

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[2] *See, e.g., Johnnie's Poultry Co.*, 146 NLRB 700, 775 (1964) (coercive interrogations violate the NLRA); *N.L.R.B. v. Intertherm, Inc.*, 596 F.2d 267, 274–275 (1979) (surveillance and coercive interrogation violate the NLRA); *N.L.R.B. v. St. Francis Healthcare Centre*, 212 F.3d 945 (6th Cir. 2000) (coercive statements that union membership is futile violate the NLRA); *Sec'y of Labor ex rel. Gray v. North Star Mining, Inc.*, 27 FMSHRC 1, 7 (2005) (threats of reprisal violate the Mine Act); *Ivy Steel & Wire, Inc.*, 346 NLRB 404 (2006) (unlawful surveillance of union activities violates the NLRA).

that. Although Dunlap's instructions might have been motivated by a legitimate concern with Shemwell's work performance, Shemwell argues that he has no history of any punctuality problems or non-compliance with safety standards. Furthermore, even if motive were relevant, Shemwell has a colorable claim of disparate treatment.

Dunlap's August 20, 2013 statement to Shemwell that welders "die early anyway" because of "all the shit that they breathe" could have a reasonable tendency to interfere with Shemwell's statutory rights because it arguably conveys the impression that it was futile for Shemwell to raise safety-related complaints about the welding process. The statement came shortly after Shemwell expressed concerns about the stainless steel and 58GV wire and asked for the material data safety sheets. From Shemwell's perspective, the statement could reasonably be interpreted to mean that Armstrong was not taking his safety complaints seriously and that Shemwell's future exercise of protected rights would have no effect on reducing potentially harmful health and safety hazards for the welders.

Similarly, Hicks' August 22, 2013 statement to Shemwell that he may want to think about another career could have a reasonable tendency to interfere with Shemwell's exercise of statutory rights because it could be construed as an indirect threat of discharge for engaging in prior protected activity. In fact, Shemwell had recently expressed safety concerns regarding the appropriate personal protective equipment and the material safety data sheet for stainless steel and 58GV wire. It can be reasonably inferred that the purpose of the subsequent visit to Shemwell's work station by safety director Hicks, safety representative McGehee, and Dunlap was to send an implicit message to Shemwell that they did not appreciate his recent continuation of protected activity. From Shemwell's point of view, Dunlap's statement to the effect that if "Shemwell did not want to weld, Armstrong would have nothing for him to do," could be construed as a threat that Armstrong would terminate Shemwell's employment if he expressed any more welding-related safety concerns.

V. Order

The facts pled by Shemwell in his complaint are sufficient to support the inference that Armstrong interfered with the exercise of statutory rights by miners under section 105(c)(1) of the Mine Act. Accordingly, Respondent's Motion for Judgment on the Pleadings is **DENIED.**

Thomas P. McCarthy
Administrative Law Judge

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