FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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September 4, 2009

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, on behalf of CHARLES SCOTT HOWARD	:	TEMPORARY REINSTATEMENT PROCEEDING
Complainant	:	Docket No. KENT 2009-1427-D
v.	:	BARB CD 2009-11
CUMBERLAND RIVER COAL COMPANY, INC.,	:	Mine ID 15-18705
Respondent	:	Band Mill No. 2

DECISION
AND
ORDER OF TEMPORARY REINSTATEMENT

Appearances: Mary Sue Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Complainant, Secretary of Labor,
Tony Oppegard, Esq., Lexington, Kentucky, and Wes Addington, Esq., Appalachian Citizens Law Center, Whitesburg, Kentucky, for Charles Scott Howard,
Willa B. Permutter, Esq., and Thomas P. Gies, Esq., Crowell & Moring, LLP, Washington, D.C., for Respondent.

Before: Judge Zielinski

This matter is before me on an Application for Temporary Reinstatement filed by the Secretary on behalf of Charles Scott Howard pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2). Howard filed a complaint with the Secretary's Mine Safety and Health Administration (MSHA) alleging that his May 14, 2009, layoff was motivated by his protected activity. The Secretary contends that Howard's complaint is not frivolous, and seeks an order requiring Respondent, Cumberland River Coal Company, Inc., to reinstate Howard as an employee, pending completion of a formal investigation and final decision on the merits of the discrimination complaint. A hearing on the application was held in Whitesburg, Kentucky, on August 26 and 27, 2009.[1] For the reasons set forth below, I grant the application and order Howard's temporary reinstatement.

[1] A malfunction in the court reporter's tape recorder during the first day of the hearing resulted in the loss of approximately 15 pages of transcript. Tr. 59. The malfunction occurred during the testimony of Valarie Lee, Cumberland's manager of human resources. As noted in the body of this Decision, Lee's testimony was informative, but not particularly critical to the central issues in the case. The missing portion of the transcript has not compromised the fair and impartial disposition of this proceeding, and no party has so contended.

Summary of the Evidence

Howard was hired by Cumberland on March 21, 2005, and worked as an underground miner in a position classified as "Face." That job classification encompasses a variety of duties, including, continuous miner operator, ram car operator, scoop operator, roof bolter, and general laborer. Beginning in 2007, Howard engaged in a number of safety-related activities, and exercised other rights under the Mine Act. A listing of his claimed protected activities was submitted into evidence. Exhibit G-10. While Cumberland challenges the characterization of several of the claimed activities, it acknowledges that Howard engaged in numerous activities protected under the Act, including the filing of two discrimination actions with MSHA and the Commission, making safety complaints and testifying on safety issues before the United States Congress and MSHA. Tr. 322-23. Moreover, key management decision makers were well aware of Howard's protected activities at all times pertinent to this proceeding. Tr. 311-14, 322-47, 465-67.

The general downturn in the economy that began in 2008 resulted in reduced coal sales which, in turn, prompted Arch Coal, Inc., to reduce coal production at its subsidiary, Cumberland. Contract operations were curtailed and hours were reduced. However, Cumberland's coal inventory continued to grow, swelling in early 2009 to 224,000 tons, as compared to a normal inventory of 80,000 tons. Tr. 236-38. Gaither Frazier, Cumberland's general manager, was instructed to reduce production to bring it into line with projected sales. He instructed Cumberland's production manager Ricky Johnson, to develop plans to reduce Cumberland's production by 50,000 to 60,000 tons per month. Tr. 239.

Johnson considered several options for restructuring Cumberland's operations to meet the production goal. He eventually proposed, and Frazier approved, a plan that called for closing one mine and reducing operations at several other facilities, which necessitated laying off both hourly and salaried personnel. Frazier's overriding concern was to achieve the production targets. While he was interested in keeping as many employees as possible, he was not concerned with keeping or eliminating a particular number of jobs or laying off a specific number of employees, and he did not give Johnson any instructions in that regard. Tr. 251, 433-34, 450. The final restructuring plan prepared by Johnson specified the various facilities that would continue to operate, and the numbers and types of positions that would be filled for each shift. Tr. 251, 450. Frazier approved the restructuring plan and the specific staffing levels proposed by Johnson. Tr. 298, 450. Many positions were eliminated. However, some vacant positions at operations that were to continue were filled. As Johnson described it, there was a lot of fine tuning and a few extra positions were factored in. Tr. 450, 456.

The next step in the process was to identify the specific employees who would fill the positions that were to remain, and those who were to be laid off. The collective bargaining agreement ("CBA") between Cumberland and the Scotia Employees Association ("union") specified that three factors were to be considered in any reduction of the working force. They were, in order; a) ability and individual skill to perform the essential functions of the job; b) company seniority; and c) experience and efficient service related to the qualifications of the job.

Ex. G-4 at 8-9. An employee's qualifications for the first factor were determined by his job classification and/or whether he had performed a job under company supervision within the past seven years. *Id*. The CBA specified only two non-trainee job classifications for underground miners, "Maintenance," which required electrical certification, and "Face," which included virtually all other jobs associated with the production of coal. Ex. G-4, App. C. Other classifications are specified for different operations. Cumberland maintained a list of employees, by seniority, on which each employee was assigned a seniority number. Ex. G-3. Johnson and Valarie Lee, Cumberland's manager of human resources, examined the job classifications and qualifications of Cumberland's hourly employees, and their length of seniority, and wrote the names of employees who would fill the post-restructuring staffing plan into blank spaces on the plan. Ex. G-2. It was not necessary to consider the third factor, because no two persons in a given job classification had the same length of seniority. Tr. 147-49, 452.

Frazier had done rough estimates early in the process that reflected that 63 hourly employees might be laid off. Tr. 240-47; ex. G-11, G-12. When Johnson and Lee finished inserting employee names into the restructured operations staffing plan, there were 66 hourly and 19 salaried employees for whom no positions existed, and who had to be laid-off. Employees were notified of the restructuring on Thursday, May 14, 2009. Friday was an idle day, and production resumed on Monday, May 18, 2009. Howard, whose seniority number was 125, was the most senior employee in the underground "Face" job classification to be laid off, and would be the first to be recalled in the event an underground face position was filled. Eddie Bently, the president of the union, was given a copy of the layoff notices. The following week, he brought several errors to Cumberland's attention. Essentially, they consisted of individuals who qualified for a different job and had more seniority than a person who had been retained in that classification.[2] Those "errors' were corrected, and the previously retained employees were "bumped," i.e., laid off.

Two or three underground face employees left Cumberland's employment subsequent to the layoffs. However, Cumberland has determined not to fill those positions. The most recent vacancy occurred during the week of the hearing, and Cumberland advised, through counsel, that the position would not be filled on a permanent basis.[3] Howard has not been recalled.

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[2] One such employee, James Cress, Jr., testified at the hearing. He was carried on Cumberland's records as an underground face employee, and his seniority number was 179. He received a layoff notice on May 14, 2009. However, he was a certified electrician in the State of Kentucky, and had been working in a higher-paid "Maintenance" position for months prior to the layoff. Because he had more seniority than another maintenance employee who had been retained, he was placed into that maintenance position.

[3] Cumberland's witnesses offered several reasons why a particular position may not be filled. Positions vacated temporarily because a worker is injured are not typically filled. Cumberland also had built in some "extra" positions in the post-restructuring staffing plan, and expected one or two people who had been out on worker's compensation to return shortly.

On July 11, 2009, Howard filed a complaint of discrimination with MSHA, claiming that he had been laid off in retaliation for having engaged in protected activity. On August 4, 2009, the Secretary filed the instant Application for Temporary Reinstatement on his behalf.

Findings of Fact and Conclusions of Law

Section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2), provides, in pertinent part, that the Secretary shall investigate a discrimination complaint "and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint." The Commission has established a procedure for making this determination. Commission Rule 45(d), 29 C.F.R. § 2700.45(d), states:

> The scope of a hearing on an application for temporary reinstatement is limited to a determination as to whether the miner's complaint was frivolously brought. The burden of proof shall be upon the Secretary to establish that the complaint was not frivolously brought. In support of [her] application for temporary reinstatement, the Secretary may limit [her] presentation to the testimony of the complainant. The respondent shall have an opportunity to cross-examine any witnesses called by the Secretary and may present testimony and documentary evidence in support of its position that the complaint was frivolously brought.

"The scope of a temporary reinstatement hearing is narrow, being limited to a determination by the judge as to whether a miner's discrimination complaint is frivolously brought." *Sec'y of Labor on behalf of Price v. Jim Walter Resources, Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd sub nom. Jim Walter Resources, Inc. v. FMSHRC*, 920 F.2d 738 (11th Cir. 1990).

In adopting section 105(c), Congress indicated that a complaint is not frivolously brought, if it "appears to have merit." S. Rep. No. 181, 95th Cong., 1st Sess. 36-37 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624-25 (1978). The "not frivolously brought" standard has been equated to the "reasonable cause to believe" standard applicable in other contexts. *Jim Walter Resources, Inc.*, 920 F.2d at 747; *Sec'y of Labor on behalf of Bussanich v. Centralia Mining Company,* 22 FMSHRC 153, 157 (Feb. 2000).

While an applicant for temporary reinstatement need not prove a *prima facie* case of discrimination, it is useful to review the elements of a discrimination claim in order to assess whether the evidence at this stage of the proceedings meets the non-frivolous test. In order to establish a *prima facie* case of discrimination under Section 105(c) of the Act, a complaining miner bears the burden of establishing (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Sec'y of*

Labor on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981); *Sec'y of Labor on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842 (Aug. 1984); *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508 (1981), *rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983).

Howard has engaged in numerous activities protected under the Act, including making safety complaints and filing discrimination actions with MSHA and the Commission, two of which are currently pending. Howard's protected activity was well-known to virtually all management officials at Cumberland. In fact, when Lee realized that Howard's name appeared on the list of hourly employees to be laid-off, she expressed surprise. Tr. 179. She, Johnson and Frazier recognized that Howard, who had several "court cases" pending against Cumberland, would likely initiate proceedings to challenge his layoff. Frazier called Bob Shanks, Arch Coal's president of eastern operations, and advised him of the situation. Shanks recommended that Frazier let things fall where they were going to, i.e., that no "special consideration" should be given to Howard, and Frazier decided to allow the reduction in force to proceed as planned. Tr. 311-14, 349-50, 400, 413. It is not disputed that Howard suffered adverse action, having lost his job on May 14, 2009, pursuant to the reduction in force. Whether the Secretary has proven, by a preponderance of the evidence, that Howard's claim of discrimination is not frivolous turns on whether there is evidence that the adverse action was motivated, at least in part, by Howard's protected activity.

The Commission has frequently acknowledged that it is very difficult to establish "a motivational nexus between protected activity and the adverse action that is the subject of the complaint." *Sec'y of Labor on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (Sept. 1999). Consequently, the Commission has held that "(1) knowledge of the protected activity; (2) hostility or animus towards the protected activity; and (3) coincidence in time between the protected activity and the adverse action" are all circumstantial indications of discriminatory intent.[4] *Id.*

Cumberland argues that there was a nine-month gap between Howard's last protected activity and the layoff, which is "surely insufficient coincidence in time to support a reasonable inference of impermissible motivation." Resp. Br. At 21-22. However, Howard engaged in protected activity much closer in time to the layoff. On January 21, 2009, Howard exercised his right under section 105(c)(3) of the Act, to file a discrimination complaint with the Commission. 30 U.S.C. § 815(c)(3). The filing of "any proceeding under or related to this Act" is specifically

[4] Cumberland argues that there is no evidence of hostility toward Howard's protected activities. The Secretary contends that statements made by Frazier that he didn't like seeing a video that Howard had taken in Cumberland's mine and shown during an MSHA hearing, and a purported refusal of Howard's request for a copy of the seniority list evidence such hostility. I place little weight on that factor, because there are reasonable explanations for both of the actions. The Secretary also contends that Cumberland's failure to recall Howard to fill positions vacated subsequent to his layoff further evidences improper motive. Little weight has been placed on that evidence, for the same reason.

identified as protected activity. 30 U.S.C. § 815(c)(1). Cumberland's attempt to dismiss that protected action as simply a continuation of his original complaint of discrimination to MSHA is unavailing. Howard also claims protected activities in January and March of 2009, including the communication of a safety complaint by his attorney, the initiation of a grievance regarding that complaint, and the initiation of grievances regarding changes to Cumberland's safety policy. Cumberland challenges the characterization of those activities, and disputes that the attorney's communication constitutes protected activity by Howard. I find that the fact that the safety complaint was communicated through counsel does not alter its status as protected activity by Howard. Howard's filing of grievances regarding the incident and changes to the safety policy also appear to constitute activities protected by the Act.

More importantly, Howard's protected activities were numerous and have extended over a considerable period of time. Two discrimination actions that he filed are currently pending before the Commission. Cumberland's managers were well aware of the bulk of his activities, and anticipated that he would freely raise safety issues, and institute discrimination complaints as to any suspected retaliatory conduct. His status as a miner who engaged in protected activity was, in essence, continuing in nature, such that it could be said that the layoff was almost contemporaneous with his protected activities.

Cumberland further argues that no reasonable inference of improper motivation could be drawn because the undisputed evidence establishes that the number of hourly miners laid off was arrived at without reference to their identities, and that personnel were placed into the available slots by "mechanically applying" the terms of the CBA. Resp. Br. at 16. I have little problem with the assertion that, once the post-restructuring positions were established, proper application of the CBA resulted in Howard's layoff. Nor, apparently, does Howard.[5] However, it is not at all clear that the process by which those positions were established was as squeaky clean as Cumberland asserts.

While there is no direct evidence to counter testimony that identities of miners were not considered in determining the positions that would be kept following the restructuring, there is circumstantial evidence that could give rise to a contrary inference and that Howard's layoff was motivated, in part, by his protected activity. Johnson developed the post-restructuring staffing plan, i.e., determined the numbers and classifications of positions that would be used to conduct each of the remaining operations. He had considerable discretion in performing that task. As

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[5] There was a good deal of evidence introduced as to the interpretation and application of the CBA. While counsel for the Secretary and Howard repeatedly questioned the explanations offered by Lee, Howard's counsel eventually stated that Howard was not contending that there had been a mistake in application of the contract. Tr. 423. Lee had explained that because a previous reduction in force had resulted in the retention of union members with less seniority than those laid off, the contract had been modified to base retention largely on seniority in broad job classifications, relegating more subjective criteria to essentially tie-breaker status. Tr. 182-89; ex. G-4, R-1. There is no evidence that the union has taken issue with Cumberland's interpretation of the agreement.

previously noted, he testified that there was a lot of fine tuning of the staffing plan and some extra positions were factored in. Frazier explained that there was no specified number of personnel required to be kept, or let go, and Cumberland could have terminated fewer hourly miners, preserving Howard's job. Tr. 412.

Johnson testified that identities of miners were not considered in establishing the post-restructuring staffing plan. However, information as to miners' identities and their rank on the seniority list was readily available to him. While the process of determining exactly where the cut-off line for a given number of layoffs would fall on the seniority list can be complicated, it would have been feasible to arrive at a staffing plan that would dictate that Howard would not be retained.[6] Frazier had made preliminary estimates that 63 hourly miners might be laid off. Johnson's staffing charts dictated that 66 miners be let go. There is no detailed explanation of how the preliminary estimates of 63 were arrived at, or exactly how they differed from the eventual number of 66.[7] Johnson did not preserve drafts, notes, or other paperwork he generated in arriving at the staffing plan. Tr. 454.

Cumberland appears to overstate the Secretary's burden. It argues that "[t]o justify an order of temporary reinstatement . . . the Secretary and Howard must . . . show that the adverse action complained of was motivated in any part by [the protected] activity," *citing Sec'y of Labor on behalf of Pendley v Highland Mining Company, LLC*. Resp. Br. at 15. *Highland Mining* involved a claim of discrimination, and the quoted language addressed the complainant's burden to establish a *prima facie* case. In this temporary reinstatement proceeding, however, the Secretary need not establish a *prima facie* case of discrimination in order to prove that the complaint was not frivolously brought. It is sufficient that the evidence establish that a nonfrivolous issue exists as to whether Howard's layoff was motivated in part by his protected activity. *Sec'y on behalf of Albu v. Chicopee Coal Company,* 21 FMSHRC 717, 719 (July 1999).

The record is not devoid of evidence from which it could be inferred that Howard's layoff was motivated, in part, by his protected activity. It is not necessary, or appropriate in this proceeding, to decide whether or not to draw such an inference. I find that the evidence discussed above establishes a nonfrivolous issue as to improper motivation.

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[6] The process is complicated by potential movement between job classifications. Cress, who may have been erroneously classified on Cumberland's records, moved into a maintenance position, and avoided being laid off from an underground face position. Similarly, a maintenance worker whose position might be eliminated, and who was also qualified to be an underground face miner, could move to that job classification and "bump" a less senior face miner.

[7] Cumberland offers an explanation in its brief, pointing out that the pre- and post-restructuring staffing plans show that three additional electricians were retained at the Blue Ridge Mine. Ex. G-1, G-2. Resp. Br. at 17. However, it would seem that the retention of an additional three miners would have reduced the number affected, i.e., changed it from 63 to 60, not increased it.

I find that there is reasonable cause to believe that Howard may have been discriminated against as alleged in his complaint, and conclude that the Application for Temporary Reinstatement has not been frivolously brought.

ORDER

The Application for Temporary Reinstatement is **GRANTED**. Cumberland River Coal Company is **ORDERED TO REINSTATE** Howard to the position that he held prior to May 14, 2009, or to a similar position, at the same rate of pay and benefits, **IMMEDIATELY ON RECEIPT OF THIS DECISION**.

Michael E. Zielinski
Senior Administrative Law Judge

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