

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, DC 20001

September 30, 2009

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION, (MSHA),	:	
on behalf of LIGE WILLIAMSON	:	Docket No. KENT 2009-1428-D
Complainant	:	PIKE CD 2009-06
v.	:	
	:	
CAM MINING, LLC,	:	Mine ID 15-18911
Respondent	:	Number 28 Mine

DECISION

Appearances: Mary Sue Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Complainant;
Mark Heath, Esq., Spilman, Thomas & Battle, Charleston, West Virginia, for the Respondent.

Before: Judge Feldman

This matter, heard on September 2, 2009, in Pikeville, Kentucky, is before me based on an application for temporary reinstatement filed by the Secretary, pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. § 815(c)(2), against CAM Mining, LLC (CAM Mining) on behalf of Lige Williamson. This statutory provision prohibits operators from discharging or otherwise discriminating against miners who have complained about alleged safety or health violations, or who have engaged in other safety related protected activity. Section 105(c)(2) of the Act authorizes the Secretary to apply to the Commission for the temporary reinstatement of a miner pending the full resolution of the merits of his discrimination complaint. The parties' briefs, filed on September 24, 2009, have been considered.

I. Statement of the Case

This temporary reinstatement proceeding is analogous to a preliminary hearing. Unlike a trial on the merits of a discrimination complaint brought by the Secretary where the Secretary bears the burden of proof by the preponderance of the evidence, the scope of this temporary reinstatement proceeding is limited by statute. Section 105(c) of the Mine Act, as well as Commission Rule 44(c), 29 C.F.R. § 2700.44(c), limit the issue in an application for temporary reinstatement to whether the subject discrimination complaint has been "frivolously brought." Courts and the Commission have concluded that the "not frivolously brought"

standard in section 105(c) is satisfied when there is a “reasonable cause to believe” that the discrimination complaint “appears to have merit.” *Centralia Mining Company*, 22 FMSHRC 153, 157 (Feb. 2000) (citations omitted).

The Secretary contends Williamson engaged in protected activity on or about April 20, 2009, when he allegedly communicated ventilation related complaints to his foreman, McArthur Swiney. CAM Mining denies that the alleged ventilation complaints occurred. Williamson’s employment was terminated on May 15, 2009, following a May 13, 2009, confrontation between Williamson and Swiney. The confrontation occurred immediately after Swiney criticized Williamson when a shuttle car, operated by Williamson, struck and damaged a water line and power cable.

In view of the Secretary’s minimal burden of proof, without resolving any credibility issues, Williamson shall be given the benefit of the doubt that his alleged April 20, 2009, ventilation complaint occurred. However, the Secretary has not demonstrated that Williamson was the victim of any meaningful retaliation during the intervening period from April 20 through the May 13, 2009, confrontation. Williamson has conceded that he was not given any job assignments that were inconsistent with his job duties as a utility man. In fact, Williamson testified that, at his request, he was reassigned to lighter duty operating a shuttle car because his knee condition limited his ability to hang curtains.

Rather, Williamson’s admissions that he “cussed” Swiney on May 13, 2009, and that he believed he would lose his job for “cussing” his foreman out, reflect that there is no reasonable cause to believe there is a nexus between Williamson’s alleged April 20, 2009, protected activity and his May 15, 2009, termination for insubordination. (Tr. 92). Accordingly, the Secretary’s temporary reinstatement case shall be dismissed because it does not appear to have the requisite merit to demonstrate that it has not been frivolously brought.

II. Findings of Fact

There are two types of continuous mining sections at the No. 28 Mine. A super section is ventilated by a double split of air that allows the simultaneous operation of two continuous miners in separate entries. A normal continuous mining section is ventilated by a single split of air. In a single split of air the continuous miners operate on an alternating basis in separate entries.

Lige Williamson is 55 years old. Prior to Williamson’s May 15, 2009, termination, Williamson had been employed at CAM Mining’s No. 28 Mine as a utility man in a continuous mining section, for approximately 21 months. His job duties involved construction and maintenance of ventilation controls. Specifically, he was responsible for building concrete permanent stoppings (brattices), hanging temporary stoppings (fly pads), and maintaining the line curtain in all of the section entries. (Tr. 28, 29, 20-25).

Williamson was transferred from the No. 2 super section to the No. 1 section in the middle of April 2009. (Tr. 34). Prior to Williamson's transfer the No. 1 section had been a super section. However, in April 2009 the section was being operated on a single split of air. Williamson's new section foreman was McArthur Swiney. Swiney is 66 years old and he has approximately 49 years of mining experience. (Tr. 342). When Williamson started working on the No. 1 section, he was performing normal utility duties involving the construction and maintenance of ventilation controls.

The No. 1 section has seven entries. The left hand continuous miner operated in the No. 1 through 4 entries. The right hand continuous miner operated in the No. 4 through 7 entries. Three shuttle cars loaded coal from the two miners. The left and center shuttle cars carried loads from the left hand continuous miner. The right shuttle car carried loads from the right hand continuous miner. The shuttle cars were equipped with booms that could be raised or lowered to transfer coal from the belt on the continuous miner into the shuttle car.

After working a few days in the No. 1 section, Williamson reportedly noticed loaded shuttle cars exiting from two different entries at the same time. Although Williamson could not see or hear both the left and right hand continuous miners at the same time, he surmised that one continuous miner was starting operations before the other continuous miner had stopped. In such an event, methane and dust from the first continuous miner could be transferred in by to the other continuous miner by the same split of air sweeping the face.

a. The Alleged April 20, 2009, Protected Activity

On or about April 20, 2009, Williamson alleges that he told Swiney that he believed that there was overlapping operation of the continuous miners when each miner began its advancement into its entry. Williamson stated that Swiney did not respond to Williamson's complaint. Williamson testified, "[Swiney] didn't say nothing, just looked at me like I was stupid." (Tr. 38-39).

Williamson testified that after he complained to Swiney he was asked to do various tasks that required physical labor including shoveling ribs, shoveling the tail piece area, and building brattices. However, Williamson does not claim that he was asked to perform any job duties that were inconsistent with the duties of a utility man. In fact, Williamson testified, "I'm not going to say [Swiney] particularly made me do things outside my job title." (Tr. 40). Williamson stated that the stress caused by Swiney's treatment of him caused Williamson to seek medical treatment for chest pain. No medical documentation has been proffered.

Williamson returned to work after approximately two days of medical leave. In addition to his stress related complaints, Williamson had a history of knee problems that were exacerbated by the physical demands of constructing concrete stoppings. Upon Williamson's return Swiney permitted Williamson to switch jobs with a shuttle car operator to help lessen the stress on Williamson's knees. However, Williamson claims that before he complained about ventilation

Swiney called him “Lige.” After his complaint Williamson alleges that Swiney referred to him as “asshole.” Significantly, Williamson has conceded that he never reported his alleged ventilation complaint to any other CAM Mining official during the period of April 20, 2009, when the complaint reportedly was communicated to Swiney, until May 15, 2009, when he was terminated for insubordination. (Tr. 178, 183-84, 203-04).

Swiney testified that Williamson never complained to him about ventilation. Swiney also denies that he called Williamson “asshole.” CAM Mining denies that the continuous miners in the No. 1 section were operating simultaneously. In support of its denial CAM Mining emphasizes that Williamson’s reported belief is speculative since he did not personally observe both continuous miners operating at the same time. Moreover, CAM Mining maintains that the No. 1 section lacked the electrical capacity to operate both continuous miners simultaneously.

On May 5, 2009, 104(a) Citation No. 8227386 was issued to CAM Mining for a violation of the mandatory safety standard in section 75.370(a)(1), 30 C.F.R. § 75.3701(a)(1) that requires a mine operator to follow an approved ventilation plan. The citation was issued because the No. 1 section was operating on a single rather than two distinct splits of air as provided in the existing approved ventilation plan. The citation was terminated on May 7, 2009, after CAM Mining submitted an updated ventilation plan to conform with its single split of air operation. The violation cited in Citation 8227386 was designated as non-significant and substantial (non-S&S) in nature, and, the violation was attributed to a low degree of negligence.

b. The May 13, 2009, Insubordination

With the exception of whether or not Williamson pushed Swiney, the relevant events surrounding the May 13, 2009, confrontation between Swiney and Williamson are not in dispute. On the night of Wednesday, May 13, 2009, Swiney told Williamson to use the shuttle car to load coal from the right side continuous miner that was operating in the No. 4 entry. Williamson loaded the shuttle car and proceeded from the continuous miner down the last open cross cut making a right turn into the No. 5 entry on his way to the loading dock. Williamson testified that, upon turning in to the No. 5 entry, the shuttle car hit a wet spot in a dip in the mine floor. The shuttle car slid through the intersection severing the water line and pinching the power cable for the continuous miner. As a result, a fountain of water began streaming into the air.

Upon seeing the stream of water, Swiney approached the shuttle car to determine what had happened. Swiney accused Williamson of not raising the boom to avoid contact with the water line and cable. When Swiney approached, Williamson conceded he was aggravated because striking the cable and water line is a mistake that is not supposed to happen. (Tr. 163-164; 190-191). Specifically, Williamson testified:

Q. So you didn’t like it when Mr. Swiney came up and told you if you had your boom up, you wouldn’t hit the water line, did you?

A. When Mr. Swiney came up, I was aggravated for hitting the line. A carman does not like to make a mistake like that. You are particularly cautious about mine cable and water line. I was aggravated before Mac got over there.

Williamson alleges that upon arriving at the shuttle car Swiney shoved his finger in Williamson's face and that Swiney called him a "God damn dumb ass." (Tr. 86-87, 88). Williamson testified that Swiney retreated as Williamson exited the shuttle car toward Swiney. Williamson testified, "I told him that he was going to quit his god damn dogging on me. That he'd been dogging me for two fucking weeks and I was tired of it and it's going to fucking stop now was my basic words to him." (Tr. 91, 93)

Swiney alleges that as Williamson jumped out of the shuttle car, Williamson pushed him in the chest causing him to stumble backwards to within three to four feet from the rib. Williamson denies shoving Swiney. Immediately after their confrontation, Swiney telephoned shift foreman Danny Conn to meet him and Williamson at the end of the track so that Williamson could be escorted out of the mine. Swiney and Williamson used a man trip to travel to meet Conn. When Conn arrived he could see that both Swiney and Williamson were upset. Williamson denied Swiney's claim that he had been pushed.

When Conn and Williamson reached the surface, Williamson asked Conn if he was terminated. Conn told Williamson to return to the mine the next day to speak to Mine Superintendent Frank Smith. Williamson did not tell Conn about his alleged history of ventilation complaints because he didn't believe that was "the issue . . . at that particular moment." (Tr. 178).

At the end of the shift, Swiney completed an employee disciplinary report which stated that "Lige cut miner cable and water line with S/C Mac talked to him and he got off S/C and pushed Mac against rib." This report was co-signed by Frank Smith. (Resp. Ex. 2; Tr. 283).

Swiney also wrote a contemporaneous hand written statement to Frank Smith dated May 15, 2009, stating:

Lige cut miner cable and water line I told him if he had raised his boom he wouldn't have cut it. He jumped out of his car and started pushing me around and said that I had been on his case for 2 or 3 days. I called out and told Danny Conn to come inside and get him. If you want him to work, I don't need him, put him somewhere else.

(Resp. Ex. 1).

Thursday, May 14, 2009, Williamson returned to the mine to discuss with Smith the incident that had occurred on the previous night. Based on the information that had previously been provided to Smith by Swiney, Smith informed Williamson that he was being suspended for three days with intent. Williamson understood that to mean that he was being terminated. Williamson asked for a termination slip, but was not given one before he left the mine.

Smith forwarded a request to terminate Williamson to Jack Holbrook, CAM Mining's general manager. Holbrook signed the termination notice on May 15, 2009, citing insubordination as the basis for the discharge. (Gov. Ex. 7). Prior to his termination, Williamson did not inform Conn or Smith that he had complained to Swiney about ventilation, or, that Swiney had called him an "asshole." (Tr. 182-183).

On Friday evening, May 15, 2009, Williamson telephoned Smith at home. Williamson told Smith that if he had something to say to him he should "[have] the balls to tell him face to face." (Tr. 185). Williamson also told Smith that any rumor that Williamson had complained to MSHA inspectors was not true. (Tr. 195). The termination notice, sent to Williamson by certified mail, was received on Saturday, May 16, 2009.

III. Procedural Framework

Unlike a trial on the merits in a discrimination complaint brought by the Secretary where the Secretary bears the burden of proof by the preponderance of the evidence, the scope of this temporary reinstatement proceeding is limited by statute. Section 105(c) of the Mine Act as well as Commission Rule 44(c), 29 C.F.R. § 2700.44(c), limit the issue in an application for temporary reinstatement to whether the subject discrimination complaint has been "frivolously brought." Rule 44(c) provides:

The scope of a hearing on an application for temporary reinstatement is limited to a determination by the Judge as to whether the miner's complaint is frivolously brought. The burden of proof shall be upon the Secretary to establish that the complaint is 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 is frivolously brought.

_____ In its decision in *Jim Walter Resources, Inc., v. FMSHRC*, 920 F.2d 738 (11th Cir. 1990), the Court noted the "frivolously brought" standard is entirely different from the scrutiny applicable to a trial on the merits of the underlying discrimination complaint. In this regard, the Court stated:

_____ The legislative history of the Act defines the 'not frivolously brought standard' as indicating whether a miner's 'complaint appears to have merit' -- an interpretation that is strikingly similar to a reasonable cause standard. [Citation omitted]. In a similar context involving the propriety of agency actions seeking temporary relief, the former 5th Circuit

construed the ‘reasonable cause to believe’ standard as meaning whether an agency's ‘theories of law and fact are *not insubstantial or frivolous*.’

920 F.2d at 747 (emphasis in original) (citations omitted).

While the Secretary is not required to present a *prima facie* case of discrimination to prevail in a temporary reinstatement proceeding, it is helpful to review the elements of a discrimination claim to determine if the evidence at this stage satisfies the “not frivolously brought” standard. As a general proposition, to demonstrate a *prima facie* case of discrimination under section 105(c) of the Mine Act, the Secretary must establish that the complainant participated in safety related activity protected by the Act, and, that the adverse action complained of was motivated, in some part, by that protected activity. *See Secretary on behalf of David Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-2800 (Oct. 1980) *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Secretary on behalf of Thomas Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981).

IV. Disposition

As a threshold matter, the evidence in this preliminary temporary reinstatement proceeding must be viewed in a light most favorable to the complainant because it is not the judge’s duty to resolve conflicts in testimony at this preliminary stage of the proceedings. *Secretary o/b/o Earl Charles Albu v. Chicopee Coal Company, Inc.*, 21 FMSHRC 717, 719 (July 1999). Thus, we start with the proposition, for the purposes of this matter, that Williamson communicated a good faith ventilation complaint to Swiney on April 20, 2009.

Thus, assuming that Williamson engaged in protective activity on April 20, 2009, we must determine whether there is reasonable cause to believe that Williamson’s May 15, 2009, termination was motivated, at least in part, by that protected activity. As a threshold matter, there is no evidence that any significant retaliatory action was taken by CAM mining in response to Williamson’s alleged complaint. Even if Swiney responded to Williamson’s alleged complaint by calling him an “asshole,” there is no evidence that Swiney had any retaliatory intent. In this regard, Williamson has admitted, “I’m not going to say [Swiney] particularly made me do things outside my job title.” (Tr. 40). On the contrary, Williamson was given lighter shuttle car duty *after* his alleged complaint. Similarly, given the absence of any retaliation prior to the May 13 incident with Swiney, there is no evidence that CAM mining believed Williamson had complained to MSHA about ventilation issues. (Tr. 127).

Moreover, Williamson admits he never reported any concerns of disparate treatment by Swiney to any CAM Mining official. It is only after he was terminated that Williamson now claims his reported protected activity was a material factor in his job loss. Significantly, Williams testified he did not tell Conn about his alleged history of complaining about ventilation to Swiney because he did not believe that was “the issue . . . at that particular moment.” (Tr. 178). Williamson also did not report his alleged ventilation complaint during his May 14, 2009, meeting with Smith when Williamson was advised he was being “suspended with intent.”

Throughout this proceeding, the Secretary has treated the May 13, 2009, confrontation as a trivial event. It is not mentioned in Williamson’s initial safety complaint filed with MSHA on May 29, 2009, wherein Williamson avers that he “was discharged for making a safety complaint.” (Gov. Ex. 1). In addition, the May 13, 2009, incident is not referred to in the Secretary’s Application for Temporary Reinstatement, nor in the affidavit by MSHA Special Investigator Alan Howell filed in support of the Secretary’s application. Rather, when distilled to its core, the Secretary’s case is, in essence, that CAM Mining was lying in wait after Williamson engaged in protected activity on April 20, 2009, until it was fortuitously rewarded by Williamson’s May 13, 2009, confrontation with Swiney, with no evidence of intervening retaliatory action. In other words, the Secretary argues that Williamson’s May 15, 2009, termination for insubordination is a subterfuge for Williamson’s protected activity, despite no evidence that Conn, Smith or Holbrook, knew about Williamson’s alleged complaint, or, that Williamson was the victim of retaliation during the interim period from April 20 until his May 13, 2009, misconduct.

To determine if the evidence as presented by the Secretary reflects the subject discrimination complaint has not been frivolously brought, we examine the events of May 13, 2009. Williamson concedes he was upset with himself for striking the water line and power cable with the shuttle car. Although there is no evidence that Williamson intended to hurt Swiney, it is apparent that Swiney’s criticism was not well received. Even if physical contact did not occur, the accounts of both Swiney and Williamson support the fact that there was a serious verbal confrontation. In fact, Williamson admits he, in effect, threatened Swiney when he told Swiney he was tired of Swiney “dogging” him and “it’s going to fucking stop now.” (Tr. 91, 93). Williamson also recognized that he could be fired for “cussing” his foreman. (Tr. 92). Although profanity and expressions of aggression may be excused when they are uttered by a complainant who is provoked by a mine operator’s response to his protected activity, obviously severing a water line and damaging a trailing cable are not activities protected by the Mine Act. *Sec’y o/b/o Bernardyn v. Reading Anthracite Co.*, 22 FMSHRC 298, 305-07 (Mar. 2000) (excusing behavior that occurs in response to a mine operator’s wrongful provocation). Consequently, there are no mitigating circumstances to excuse Williamson’s aggressive response to Swiney’s criticism. Thus, even a superficial analysis of the evidence presented by the Secretary clearly reflects that, when Williamson threatened 66 year old Swiney, he did so at the risk of his termination.

As a final matter, the Secretary apparently now concedes the May 13, 2009, incident at least justified CAM Mining's suspension of Williamson.¹ However, she argues, in effect, that termination was unjustifiably harsh and motivated by Williamson's earlier ventilation complaint. Having conceded that suspension for Williamson's insubordination was warranted, the Secretary has abandoned any claim that her application for temporary reinstatement is not frivolous. Whether a miner is suspended or terminated for insubordination is within a mine operator's discretion, absent a showing that the discipline is disproportionate to the misconduct and motivated by discriminatory intent. The Secretary's disparate treatment claim, based on the assertion that other CAM Mining employees have been suspended rather than terminated for past instances of misconduct, is unavailing. Past instances of suspension for misconduct do not preclude future terminations for just cause.

In the final analysis, the "Commission does not sit as a super grievance board to judge the industrial merits, fairness, reasonableness, or wisdom of an operator's employment policies except insofar as those policies may conflict with rights granted under section 105(c) of the Act." *Delisio v. Mathies Coal Co.*, 12 FMSHRC 2535, 2544 (Dec. 1990) (citations omitted). Rather, Commission judges must "analyze the merits of a mine operator's alleged business justification for the challenged adverse action." *Sec'y of Labor o/b/o Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983).

In this preliminary proceeding, the issue to be resolved is the merits of the Secretary's assertion that CAM Mining's justification for Williamson's termination is an implausible attempt to hide its discriminatory motive. It is undisputed that Williamson's May 13, 2009, confrontation constituted insubordination. Company written policy reflects that insubordination is grounds for dismissal. (Resp. Ex. 3). The Secretary's contention that CAM Mining was also motivated by Williamson's earlier protected activity is frivolous because it is based only on speculation.

Viewing the evidence in a light most favorable for the Secretary, the Secretary has failed to satisfy her burden of demonstrating there is a reasonable cause to believe Williamson's reported protected activity played any role in his May 15, 2009, termination. Consequently, this case does not appear to have merit and is therefore frivolously brought.

¹ At trial, without providing any details, the Secretary presented testimony that CAM Mining previously had suspended William Gillespie for "cussing" his foreman. (Tr. 127-29).

ORDER

Accordingly, **IT IS ORDERED** that the Secretary's application for the temporary reinstatement of Lige Williamson **IS DENIED**. Consequently, **IT IS FURTHER ORDERED** that this temporary reinstatement proceeding **IS DISMISSED**.

Jerold Feldman
Administrative Law Judge

Distribution: (Certified Mail and Facsimile)

Mary Sue Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, 618 Church Street,
Suite 230, Nashville, TN 37219

Mark E. Heath, Esq., Spilman, Thomas & Battle, PLLC, 300 Kanawha Blvd. East, P.O. Box 273,
Charleston, WV 25321

/rps