FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
601 NEW JERSEY AVENUE N.W., SUITE 9500
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June 1, 2010

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, on behalf of RICKEY JOE STRATTIS, Applicant	:	TEMPORARY REINSTATEMENT PROCEEDING Docket No. WEVA 2010-991-D HOPE CD 2010-06
v.	:	
ICG BECKLEY, LLC, Respondent	:	Beckley Pocahontas Plant Mine ID 46-09216

ORDER ON TEMPORARY REINSTATEMENT

Appearances:

Jessica R. Hughes, Esq., U.S. Department of Labor, Arlington, Virginia, on behalf of the Applicant;
R. Henry Moore, Esq., Pittsburgh, Pennsylvania, on behalf of the Respondent.

Before: Judge Moran

Pursuant to Section 105(c) of the Federal Mine Safety and Health Act of 1977 (the "Mine Act"), 30 U.S.C. § 815, *et seq.*, as amended, and 29 C.F.R. § 2700.45, this matter is before the Court on an Application for Temporary Reinstatement filed by the Secretary of Labor ("Secretary") on behalf of Rickey Joe Strattis, Applicant. The Application seeks to have Mr. Strattis reinstated to his former position as a dozer operator at Respondent's facility.[1] A hearing on the Application, made at the request of the Respondent, was held in Charleston, West Virginia on May 24, 2010. The Court considered the evidence at the hearing, the closing statements offered by the parties and the post-hearing briefs in making its determination.

The law is well-established on the issue of temporary reinstatement under the Mine Act.

[1]The parties agreed that, should the Court make a finding that Mr. Strattis' Application was not frivolously brought, (and as reflected in the body of this Order, it does so find that the Application is not frivolous) the reinstatement will be an economic reinstatement, which is to include Mr. Strattis' benefits and which does not diminish his status as the miners' representative.

Section 105(c)(2) of the Act 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 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 examine any witness called by the Secretary and may present testimony and documentary evidence in support of its position that the complaint was not frivolously brought."

Accordingly, the scope of a temporary reinstatement hearing is narrow, being limited to a determination by the judge as to whether a miner's complaint was frivolously brought. *Sec'y of Labor on behalf of Price v. Jim Walter Resources, Inc.,* 9 FMSHRC 1305, 1306 (August 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, 95 th Cong. 1st Sess. 36-37 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources , 95th Cong. 2nd Sess., Legislative History of Federal Mine Safety and Health Act of 1977, at 6240625 (1978). The "not frivolously brought" standard has been equated to the "reasonable cause to believe" standard applied in other contexts. *Jim Walter Resources, Inc. v. FMSHRC,* 920 F.2d at 747; *Sec'y of Labor on behalf of Bussanich v. Centralia Mining Co.,* 22 FMSHRC 153, 157 (February 2000).

Although an application for temporary reinstatement need not prove a *prima-facie* case of discrimination, the elements of a discrimination claim are noted here as part of the context in which it is assessed whether the evidence meets the non-frivolous test. Commission case law has set forth the essential elements of an action under Section 105(c) of the Act, by articulating that a complaining miner bears the burden of establishing: (1) that he or she 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 Paula v. Consolidation Coal Co.,* 2 FMSHRC 2786 (October 1980), *rev'd on other grounds sub nom.; Consolidation Coal Co. v. Marshall,* 773 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 (August 1984); *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.,* 3 FMSHRC 2508 (November 1981), *rev'd on other grounds sub nom; Donovan v. Phelps Dodge Corp.,* 709 F.2d 86 (D.C. Cir. 1983).

The Commission has frequently acknowledged the difficulty of establishing "a motivational nexus between protected activity and that adverse action that is the subject of the complaint." *See, e.g., Sec'y on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953 (September

1999). Consequently, the Commission has held that, "(1) knowledge of 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 indications of discriminatory intent. *Id.* at 957. These examples are not in the conjunctive. Consequently, the coincidence in time between the protected activity and Strattis' discharge by itself can be a basis upon which to infer an illegal motive on ICG Beckley's part. *See: Durango Gravel,* 21 FMSHRC at 957.

The Court has determined that the evidence here establishes that Mr. Strattis' Application was not frivolously brought. The Secretary established that Mr. Strattis, by filing a 105 (c) complaint in November 2009, engaged in protected activity. The Secretary maintains that Mr. Strattis' subsequent discharge was motivated, at least in part, by that protective activity. MSHA investigator Mr. Kelly Acord testified that he requested information from the Respondent in connection with his investigation of the complaint on April 9, 2010. The Applicant was discharged on April 14, 2010. In this regard the Secretary notes the close temporal connection between the date on which MSHA sought additional information from the Respondent and Mr. Strattis' discharge, which occurred only three business days after that. Mr. Strattis testified that ICG Beckley's General Manager told him on the date of his discharge that MSHA had made a document request in connection with his discrimination claim and that he characterized Strattis as a "nuisance."[2] On this record it is clear that Mr. Strattis had no knowledge that MSHA had asked ICG Beckley for additional information in connection with its on-going investigation of his claim of discrimination. Although the Applicant filed his discrimination claim in November of the previous year, there had been no prior discipline meted out; he had not been suspended nor discharged until shortly after the MSHA request for additional information.

The Court also concurs with the Secretary's point that decisions, such as the Commission's recent issuance in *CAM Mining LLC*, 31 FMSHRC 1085, October 22, 2009, 2009 WL 3802726, enunciate the proper test and that the test in a temporary reinstatement proceeding is not about making credibility determinations between competing versions of the events, but rather whether the claim is frivolous.[3] For that reason, contentions raised in the Respondent's post-hearing brief, such as whether the Applicant was constantly confronting others, whether he misused his equipment, and whether the real genesis of the discrimination claim was the Applicant's desire to work a day shift, are all matters for the subsequent full proceeding on the

[2]To be clear, the Court does not make a credibility determination that Mr. Strattis' version of the events on the date of his discharge represent what transpired. Rather, the Applicant's testimony is assessed only in terms of deciding whether the claim is frivolous.

[3]Having noted the limited inquiry which is made in a temporary reinstatement proceeding, that limited determination in no way foreshadows the outcome of the full hearing on the discrimination claim because, in that setting, a court must often make credibility determinations among competing versions of the events.

claim of discrimination, as distinct from this temporary reinstatement matter.[4] Instead, the Court's task is to "evaluate[] the evidence of the Secretary's prima facie case and determine[] whether the miner's complaint of discrimination 'appear[s] to have merit." *CAM Mining* at1089.

It is undisputed that Mr. Strattis engaged in protected activity and suffered the adverse action of discharge and that, for purposes of temporary reinstatement, the claim is not frivolously brought. Accordingly, for the reasons articulated above, Respondent is ORDERED to economically reinstate Mr. Strattis to the position he held on April 14, 2010, at the same rate of pay and with the same benefits to which he was then entitled. Mr. Strattis' reinstatement will be deemed effective as of the date of his discharge.[5]

William B. Moran
Administrative Law Judge

[4]Thus the Secretary's point is well-taken that the presence of supporting and detracting evidence of protected activity in the record is not ripe for resolution now, as that would move away from the limited determination of whether the claim is frivolous.

[5]In its cover letter to the post-hearing brief, Respondent's Counsel requests that, if reinstatement is ordered, the Secretary be directed to comply with the time requirements of Section 105 (c) (3), providing that it provide the miner of the results of the investigation within 90 days of the filing of the complaint. Although not jurisdictional, reinstatement is not open-ended and the Secretary does have an obligation to complete its investigation promptly. Should there be a protracted delay in this regard, the Court trusts that the Respondent will so advise the Court with an appropriate motion.

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