FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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November 25, 2002

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, ON BEHALF OF THOMAS SULLIVAN,	:	TEMPORARY REINSTATEMENT PROCEEDING
Complainant	:	Docket No. CENT 2003-43-DM
v.	:	SC-MD 03-02
	:	
3M COMPANY, INC., AND ITS SUCCESSORS,	:	3M Little Rock Granite Plant
Respondent	:	Mine ID 03-00426

DECISION
AND
ORDER OF TEMPORARY REINSTATEMENT

Appearances: Jennine R. Lunceford, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner,
Charles C. High, Jr., Esq., KEMP SMITH, P.C., El Paso, Texas, for Respondent.

Before: Judge Zielinski

This matter is before me on an Application for Temporary Reinstatement filed by the Secretary on behalf of Thomas Sullivan pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (the "Act"), 30 U.S.C. § 815(c)(2). The application seeks an order requiring Respondent, 3M Company, Inc. ("3M"), to reinstate Sullivan as an employee, pending completion of a formal investigation and final decision on the merits of a discrimination complaint he has filed with the Mine Safety and Health Administration (MSHA). A hearing on the application was held in Little Rock, Arkansas, on November 15, 2002. For the reasons set forth below, I grant the application and order Sullivan's temporary reinstatement.

Summary of the Evidence

Thomas Sullivan had been employed by 3M since 1994 and worked in a number of jobs, most recently as an auxiliary utility operator on the third shift. His job duties were to operate heavy equipment, either a front end loader or haul truck, do general clean-up, and substitute for other workers who were absent. Immediately before his discharge, he was operating a haul truck removing a waste product called "donnafill" from the plant to one of two dump sites. He also was assigned to cover half of the shift of a first shift miner who was absent for several days. His normal working hours were from 11:00 p.m. until 7:00 a.m.. For approximately 10 days, he also worked four additional hours on overtime, from 7:00 a.m. to 11:00 a.m. Sullivan was regarded as a good worker and, generally, got along well with his immediate supervisors. He had had

some attendance problems that led to a three-day suspension prior to 2000, and had also received a suspension in 1996 for allegedly sleeping on the job. Minor disciplinary matters, such as those incidents, were to have been removed from his personnel file after one year. A union grievance filed regarding the sleeping allegation resulted in a settlement wherein 3M agreed to reduce the suspension from three to two days and to immediately remove the incident from Sullivan's personnel file. Ex. C-4. Otherwise, Sullivan's work record was good.

In the summer of 2002, Sullivan became a member of 3M's Safety Committee. As a member of the safety committee, he participated in monthly "in-house" safety inspections, in which a union member and management representative would tour a portion of the facility and note any potential health or safety hazards. The committee would continue to monitor remedial efforts with respect to such items. In the three to four month period prior to his discharge, there was an increase in the number of repetitive safety hazards being reported. In addition, 3M had been the subject of anonymous complaints to MSHA regarding alleged violations. Tr. 44, 56. Those complaints resulted in inspections and the issuance of citations. Tr. 154-57. In the summer of 2002, an MSHA inspection resulted in a closure order for a portion of 3M's plant. Tr. 256-57.

Sullivan became a steward for his labor union in 1995. He later was elected as an officer, and has served as Finance Secretary since 1998. He has participated in negotiations of the union's collective bargaining agreement. As a union officer, Sullivan was involved in any grievance that reached the forth stage of the contest process. He also was involved in resolving informal grievances that arose on the third shift, some involving safety issues. Approximately three or four weeks prior to his termination, he became involved in a dispute between management and another miner on the third shift. A screw conveyor had fallen onto the machine the miner was operating and wires were still attached to it. Management wanted the miner to continue to operate his machine until electricians on the first shift could disconnect the conveyor. The miner did not want to operate the machine until the electricity to the screw conveyor was disconnected. Sullivan was instrumental in having the conveyor disconnected before work proceeded. Tr. 20.

His involvement in union contract negotiations caused him to interact with 3M management. The union's contract expires on December 14, 2002. In preparation for negotiations, Sullivan requested certain information, by memorandum dated July 30, 2002, including "copies of the past three years dust monitoring data to include percent of free flowing crystalline silica content." Ex. C-2. On September 11, 2002, in advance of the specified due date of September 15, 2002, 3M responded to the request. However, the response did not include some of the requested data, referring to records of dust monitoring at the perimeter of the plant that were required as a result of litigation initiated by nearby residents. Tr. 111. The union officers did not believe that the response was complete and decided to file an unfair labor practice charge with the National Labor Relations Board. Tr. 54. No NLRB charge was filed prior to Sullivan's termination.

On Wednesday, September 18, 2002, Sullivan was working four hours of overtime on the first shift driving a haul truck dumping waste. Waste was dumped at one of two sites, referred to as "Freeman" and "Reynolds." Freeman was closer to the 3M plant, but was also being used by other truckers. Reynolds was a little farther away, across a state highway, but could be reached without encountering delays from truck traffic at the Freeman site. 3M had determined to discontinue using the Reynolds site and was preparing to environmentally reclaim the area. Truckloads of topsoil had been dumped there. It was to be spread out and seeded. There was no clear directive to the haul truck operators to cease using the Reynolds site. Sullivan testified, without contradiction, that he had not been instructed to stop using the Reynolds site. Tr. 24-25, 232. He had been working twelve hour shifts for several days and was tired. He began "nodding off" while driving to the Reynolds dump site and decided to take his morning break after dumping a load shortly after 9:00 a.m. He backed his truck up to a berm surrounding the site, dumped his load, rolled the cab's windows down, shut the engine off, laid down on his side in the cab of the truck and closed his eyes. He testified that he was not sleeping, and was monitoring radio communications.

About 9:30 a.m., Newell Page, the Crusher/Screener Superintendent, and Layland Watson, the Product Manager, traveled to the Reynold's dump site, ostensibly to ascertain the status of the topsoil/seeding. They testified that they observed Sullivan's truck and proceeded to investigate, wondering why it was there and whether the truck was disabled. Tr. 226-27. Page climbed a ladder and looked into the windshield. Watson climbed a ladder on the passenger side and looked into the cab through the window. They observed Sullivan, lying across the driver's and passenger's seats, with his eyes closed, apparently asleep. Tr. 227, 249. Watson and Page testified that they both called Sullivan's name twice and when he failed to respond Page rapped on the windshield and called out again, whereupon, Sullivan opened his eyes and stated "I wasn't sleeping," and, after seeing Watson, said "oh no" or "oh crap." Tr. 250. Watson told Sullivan to turn in his badge and go home. He rode back to the plant with Watson and Page. Sullivan was placed on suspension and told that he would be contacted regarding further action.

About 30 minutes after returning home, Sullivan received a call from Page requesting that he come back to the plant and submit a statement regarding the incident. He returned to the plant, and, with the assistance of a union representative, submitted a statement to 3M. Ex. R-4. He was then told that he would be contacted with further information regarding his status. The following Monday, September 23, 2002, he was discharged.

3M's "Guide to Conduct" provides that, among examples of misconduct that "may result in corrective action and/or disciplinary action up to and including discharge," is "sleeping on the job, or lying down for the purpose of rest in any area of the facility." Ex. R-1.

The disciplinary committee considered the available evidence and decided to recommend that Sullivan be discharged for sleeping on the job. Discharge decisions, unlike lesser disciplinary actions, are made at 3M's regional office in St. Paul, Minnesota. A memorandum regarding the disciplinary action, dated September 19, 2002, from Wayne Martin, 3M Little

Rock's Director of Human Resources, explained the committee's determination as follows:

> The committee discussed the issue at length. We considered similar situations and past practice. We discussed the seven tests of just cause. Because this was Tommy's second incident of sleeping on the job (10/18/96) and because this was a deliberate act of making a bed (stretched across both seats) for the purpose of sleeping on the job, the committee was unanimous in its decision to terminate his employment with 3M Little Rock.

Ex. C-5, R-7.

A memorandum, dated September 20, 2002, recommending the termination also referred to the 1996 incident and described the past practice as: "Research found several examples of employees found sleeping on the job. The results seem to point to a past practice of 3 day suspension for those who 'dozed off' while at their work stations and termination for those who made a deliberate effort to make a bed for the purpose of sleeping." Ex. C-6, R-8.

The research referred to in the memorandum was far from comprehensive. 3M did not maintain compilations of disciplinary actions in one location. Tr. 215. Its past practice of discipline in sleeping cases was determined by probing the recollections of the current members of the disciplinary committee, some of whom had limited tenure on the committee. Tr. 141, 163, 215. Subsequently, Martin prepared a table of discipline for sleeping incidents, purporting to include all such cases back to 1996. Tr. 139, 145. The table was not used in arriving at the recommendation to terminate Sullivan but, according to Martin, "most of the incidents reflected in the table had been discussed." Tr. 144. The table did not include several incidents that were the subject of testimony at the hearing. One individual was terminated in 1995 and two others, who received a written reprimand in 2001, were not included in the table.

Sullivan believed, based upon his knowledge of prior disciplinary actions involving allegations of sleeping on the job, that his conduct should result in no more than a three day suspension. Because of the expiration of time, and the settlement agreement entered into with respect to his 1996 sleeping incident, he believed that the current charge should have been considered a first offense and, if 3M had handled his case consistent with past practice, a less severe penalty would have resulted. Sullivan's personnel file apparently included a reference to the 1996 incident, but not a copy of the settlement agreement specifying that the incident be immediately removed from his file. A copy of the agreement was located in the union's files and was given to Martin, who allegedly remarked that "this should make a lot of difference." Tr. 61, 295.

Sullivan filed a complaint of discrimination with MSHA on September 27, 2002, alleging that he had been discharged for making safety complaints. He also filed an unfair labor practice charge with the NLRB, on September 24, 2002, alleging that his termination was in response to his union activities. That case remains pending.

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 his application for temporary reinstatement, the Secretary may limit his 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). The Secretary

has presented sufficient evidence on each of the elements of a *prima facie* case to establish that the claim, on the record of this temporary reinstatement proceeding, is not frivolous.

Sullivan's activities on the safety committee involved calling attention to potential health and safety hazards that required follow-up by 3M.[1] His union activities resulted in his becoming involved in informal grievances involving safety issues. In addition, his request for information regarding the monitoring of silica dust was related to his and other miners' health. The Secretary has presented substantial evidence that Sullivan engaged in protected activity through his position on the safety committee and as a union official. It is not disputed that Sullivan suffered adverse action, having been discharged on September 23, 2002.

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. *Id.* 3M had knowledge of Sullivan's ongoing protected activity, which occurred in relatively close proximity to the adverse action. There had been an increase in the number of hazards reported by the safety committee and a number of MSHA hazard investigations may have been attributable to the union's activities. Gatewood testified that on one of his visits to the plant to investigate a hazard complaint the plant manager remarked that the union was responsible for MSHA's increased activity at the plant. Tr. 154-55. There is also not insubstantial evidence that Sullivan may have received disparate treatment in the disciplinary process.

3M argues that Sullivan's termination was entirely consistent with its policy and past practice, and that the evidence does not raise a colorable claim that he was discharged for any reason other than that he was caught sleeping on the job. Although the issue of disparate treatment is usually encountered in addressing an operator's affirmative defense,[2] Respondent argues that there is no evidence that Sullivan was subjected to disparate treatment and that his discharge was entirely consistent with 3M's established policy. The difficulty with its position, however, is that there is considerable uncertainty that the "policy" articulated by Martin was as established as 3M claims. The September 20, 2002, memorandum, itself, describes the policy in equivocal terms. Martin acknowledged that he was unaware of any prior articulation of the policy in the terminology that he used. Tr. 212-13. It is also apparent that Martin's articulation

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[1] A complaint made to an operator or its agent of "an alleged danger or safety or health violation" is specifically described as protected activity in § 105(c)(1) of the Act. 30 U.S.C. § 815(c)(1).

[2] *See Ankrom v. Wolcottville Sand & Gravel Corp.*, 22 FMSHRC 137, 141-42 (Feb. 2000).

of what the past practice "seemed to be," was not based upon a thorough or exhaustive investigation of prior disciplinary incidents over an extended period of time. Rather, he canvassed the current members of the disciplinary committee, relying upon their recollections to identify other such instances, which proved to be somewhat inaccurate. There remains some uncertainty regarding the factual circumstances of prior incidents and whether they, in fact, conform to the past practice, as articulated.

Sullivan, who had been involved in union grievances, testified that he was aware of more than a dozen sleeping incidents that were not on Martin's chart. Tr. 126-29. Gatewood also testified that, in the course of his ongoing investigation, he had acquired a considerable amount of information suggesting that Martin's articulation of the policy was not accurate. Tr. 164-66. He has requested additional documentation from 3M, but has not yet received it. Tr. 144-45.

3M's explanation for the reference to Sullivan's 1996 sleeping incident could also be viewed as suspect. Pursuant to the settlement agreement, reference to that incident should have been removed from his personnel file and should have played no part in the disciplinary process, as Martin acknowledged. Tr. 138. Watson testified that the incident was discussed by the disciplinary committee, but that there was agreement that it could not be considered. Tr. 258. Martin explained that it was referred to in the recommendation to the corporate office only to show that Sullivan was aware of the consequences of sleeping. Tr. 198. However, neither of the memoranda regarding the decision of the committee contain such a qualification, and there is no evidence that the erroneous inclusion of the reference or the terms of the settlement agreement were ever transmitted to the corporate decision-makers. Sullivan did not claim that he was unaware of 3M's written policy prohibiting sleeping. Ex. R-4. Gatewood also noted that there was never any question that Sullivan was aware that sleeping on the job could lead to discipline. Tr. 169. It would not be unreasonable to draw an inference that inclusion of the reference to the prior incident, and failure to notify the corporate office of the settlement agreement, were intended to assure favorable action on the recommendation and were motivated, at least in part, by Sullivan's protected activities.

On the other hand, 3M has presented evidence that it had a clear written policy that sleeping on the job could result in disciplinary action, and Sullivan candidly admitted that it would have been reasonable for Watson and Page to believe that he was sleeping. Tr. 102. The termination decision was made by an official in St. Paul, Minnesota, who was less familiar with Sullivan's protected activities. Despite the uncertainty about accuracy of Martin's articulation of 3M's past practice, other 3M employees who had made beds for the purpose of sleeping had been terminated for sleeping on the job, although the Secretary disputes that those individuals were situated similarly to Sullivan. These issues are hotly contested and cannot, and should not, be resolved at this stage of the proceedings. A comprehensive investigation of 3M's past practice in disciplinary actions involving allegations of sleeping on the job has not been completed. Nor is it clear, at this juncture, how much knowledge corporate decision maker(s) had of Sullivan's protected activities, what degree of independence they exercise on such recommendations, and whether the outcome would have been different had the reference to the 1996 incident not been

included in the recommendation. The investigation of Sullivan's MSHA complaint has not yet been concluded and no formal complaint of discrimination has been filed on his behalf. The purpose of a temporary reinstatement proceeding is to determine whether the evidence presented by the Secretary establishes that the complaint is not frivolous, not to determine "whether there is sufficient evidence of discrimination to justify permanent reinstatement." *Jim Walter Resources, Inc.,* 920 F.2d at 744. Congress intended that the benefit of the doubt should be with the employee, rather than the employer, because the employer stands to suffer a lesser loss in the event of an erroneous decision, since he retains the services of the employee until a final decision on the merits is rendered. *Id.* 920 F.2d at 748, n.11.

I find that there is reasonable cause to believe that Sullivan 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**. 3M Company, Inc. is **ORDERED TO REINSTATE** Sullivan to the position that he held prior to September 23, 2002, or to a similar position, at the same rate of pay and benefits, **IMMEDIATELY ON RECEIPT OF THIS DECISION**.

Michael E. Zielinski
Administrative Law Judge

Distribution:(Certified Mail & Facsimile)

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