FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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May 29, 2002

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2002-114-D
on behalf of Jimmy Caudill and	:	BARB CD 2001-11
and Jerry Michael Caudill,	:	
Complainants	:	
v.	:	
	:	
LEECO, INC., and BLUE DIAMOND	:	No. 75
COAL COMPANY,	:	
Respondents	:	

ORDER DENYING RESPONDENTS' MOTION FOR SUMMARY DECISION

This case is before me on a complaint of discrimination filed by the Secretary of Labor on behalf of Jimmy Caudill and Jerry Michael Caudill pursuant to Section 105(c) of the Federal Mine Safety and Health Act of 1977 ("Mine Act" or "Act"), 30 U.S.C. § 815(c). Respondents have moved for summary decision, advancing several arguments. The most significant issue raised by the motion is whether a miner, or applicant for employment as a miner, may assert a claim of discrimination based upon the protected activity of a third party, in this case the miner's father. For the reasons set forth below, I hold that the allegation that Jimmy Caudill suffered adverse action as a result of protected activity by his father, Jerry Caudill, states a cause of action under section 105(c) of the Act. I also reject the other arguments raised by Respondents and deny the motion for summary decision.

Facts

For purposes of this motion, the facts alleged in the complaint, as clarified and expanded by the motion's papers, are assumed to be accurate. On or about February 15, 2001, Jimmy Caudill applied for a position as a roof-bolter at a mine operated by Respondent, Leeco, Inc. He was told to complete experienced miner training and report for duty at 2:15 p.m. He attended the training at the mine site and was subsequently paid for the time he spent in training. When he reported for work at about 2:10 p.m., however, he was told that another miner had decided to come back to work, and that he would not be working for Leeco. The miner that performed the roof bolting duties that day, however, was a current employee who had been assigned to maintain conveyor belts, not a miner returning to employment with Leeco. On February 26, 2001, Caudill filed a discrimination complaint with MSHA, alleging that he "was fired because of [his] family history of Safety and Discrimination Complaints." The Secretary maintains that shortly before Jimmy Caudill reported for work, another miner discussed his family's history of

making safety complaints with the mine superintendent, and it was that information that prompted Leeco to refuse to allow him to start work.

The "family history" Jimmy Caudill was referring to was that of his father, Jerry Michael Caudill. Jerry Caudill had worked as a miner for Leeco in the past, during which time he actively asserted rights under the Act. He became the first miners' representative at Leeco and made safety complaints to MSHA. He was discharged from Leeco in 1997, and initiated a discrimination action against Leeco, alleging that his discharge was motivated by his protected activity. An application for temporary reinstatement was successfully prosecuted on his behalf by the Secretary, and a subsequent discrimination complaint pursuant to section 105(c)(2) was settled. Jerry Caudill last worked for Leeco in 1997, and has not sought employment with, or worked for, either Respondent since that time. Jerry Caudill continued his activism for miners' rights after leaving Leeco. A subsequent termination from another mine operator in the area was also the subject of a discrimination complaint. At the time of the alleged discrimination against Jimmy Caudill, Jerry Caudill was employed as a miner with Gin Coal, which is not affiliated with either Respondent.

Jimmy Caudill does not claim to have filed safety complaints or engaged in any other activity protected by the Act, prior to submitting his complaint to MSHA. Jerry Caudill did not file a complaint of discrimination with MSHA regarding the allegedly discriminatory action against his son.

The discrimination complaint in this case was filed on behalf of both Jimmy Caudill and Jerry Caudill and names as Respondents Leeco, Inc., and Blue Diamond Coal Company, Leeco's corporate affiliate currently operating the subject mine. Respondents answered the complaint and moved for summary decision pursuant to Commission Procedural Rule 67, 29 C.F.R. § 2700.67.

The Motion

Respondents advance several arguments in support of their contention that, as a matter of law, a cause of action cannot be maintained on behalf of either miner under section 105(c) of the Act. Respondents contend that: 1) Jimmy Caudill did not engage in protected activity and cannot base his claim on the protected activity of a third party; 2) any protected activity was too remote in time from the allegedly discriminatory act to support causation; 3) Jerry Caudill's failure to file a complaint of discrimination with MSHA is fatal to his claim; 4) Jerry Caudill is not a miner as to Respondents; and 5) Jerry Caudill suffered no adverse action.

Jimmy Caudill's Reliance upon Jerry Caudill's Protected Activity

The central issue raised by the motion is whether a discrimination action can be maintained on behalf of Jimmy Caudill based upon his father's protected activity. Section 105(c)(1) of the Act provides, in pertinent part:

> No person shall discharge or in any manner discriminate or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, . . . or because such miner, representative of miners or applicant for employment 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, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

Respondents argue that the plain meaning of the statute, principally the phrase "because such miner," requires that the protected activity prompting the unlawful motive must be that of the miner complaining of adverse action, not that of a third party. They rely on *Fogleman v. Mercy Hospital, Inc.*, 283 F.3d 561 (3d Cir. 2002), where the court rejected a claim of discrimination under similar provisions of the Americans with Disabilities Act ("ADA") and the Age Discrimination in Employment Act ("ADEA") brought by a son, claiming unlawful retaliation for his father's protected activity.

The Secretary counters that the Commission and courts have rejected strict literal interpretations of section 105(c)(1) that are inconsistent with the legislation's purpose, and that refusing to allow Jimmy Caudill's claim of retaliation based upon protected activity by his father would nullify some of the most important protections intended by Congress. The Secretary also points out that similar anti-discrimination provisions in Title VII, the Equal Pay Act and the Occupational Safety and Health Act, as well as the National Labor Relations Act, have been interpreted so as to allow a cause of action for retaliation based upon the protected activity of a third party.

Discussion

As the Commission stated in *Thunder Basin Coal Co.*, 18 FMSHRC 582, 584 (April 1996):

> The first inquiry in statutory construction is "whether Congress has directly spoken to the precise question at issue." *Chevron* [*U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984)]. If a statute is clear and unambiguous, effect must be given to its language. *Id.* at 842-43. Deference to an agency's interpretation of the statute may not be applied "to alter the clearly expressed intent of Congress." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (citations omitted). Traditional tools of construction, including examination of a statute's text and legislative history, may be employed to determine whether "Congress had an intention on the precise question at issue," which must be given effect. *Coal Employment Project v. Dole*, 889 F.2d 1127,

> 1131 (D.C.Cir. 1989) (citations omitted). "In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart*, 486 U.S. at 291. (citations omitted). . . .

If the statute is found to be ambiguous or silent on the specific issue in dispute "[a] court must defer to the agency's interpretation so long as it is reasonable, consistent with the statutory purpose, and not in conflict with the statute's plain language. . . ." *Coal Employment Project*, *supra*, 889 F.2d at 1131. Under the statutory scheme of the Mine Act, the Commission is required to accord deference to the Secretary's reasonable interpretations of the law. *RAG Cumberland Res. LP v. FMSHRC*, 272 F.3d 590, 595 (D.C.Cir. 2002).

Ambiguity

Neither the Secretary, nor Respondents, have cited any provision in the statute or the legislative history revealing Congressional intent with respect to the specific issue presented here, whether to permit or preclude a cause of action like that urged on behalf of Jimmy Caudill. It is doubtful that Congress considered the question of such claims. While, as Respondent argues, a strictly literal reading of section 105(c)(1) would suggest that a miner complaining of discrimination must, himself, have engaged in protected activity, the determination of whether a particular statutory provision is ambiguous entails more than an examination of the specific statutory language. As noted above, the design of the statute as a whole and the available legislative history should also be consulted to determine whether Congress had an intention on the precise issue presented.

The primary purpose of the Mine Act was to protect mining's most valuable resource - the miner, and Congress intended the Act to be liberally construed. *See, e.g., Sec'y of Labor v. Cannelton Indus., Inc.*, 867 F.2d 1423, 1437 (D.C.Cir. 1989) (citing cases). It is also clear that the Act's anti-discrimination provisions were deemed critical to the enforcement scheme and that Congress specifically intended that section 105(c)(1) be "construed expansively to assure that miners will not be inhibited in any way from exercising any rights afforded by the legislation." *Donovan v. Stafford Construction Co.*, 732 F.2d 954, 960 (D.C.Cir. 1984) (quoting legislative history); *see also, e.g., Moses v. Whitley Development Corp.*, 4 FMSHRC 1475, 1480 (Aug. 1982), *aff'd.* 770 F.2d 168 (6th Cir. 1985) (table).

In *Moses*, the Commission held that "discrimination based upon a suspicion or belief that a miner has engaged in protected activity, even though, in fact, he has not, is proscribed by section 105(c)(1)." 4 FMSHRC at 1480. The Commission explained that:

> Section 105(c)(1) prohibits discharge, discrimination or interference "because" of "a miner's exercise of any statutory right afforded by [the] Act." While a literal interpretation of this provision might require the actual or attempted exercise of a right before the protection of section 105 comes into play, we reject such a reading for two reasons. First, such an interpretation would frustrate Congressional intent that miners fully exercise their rights as participants in the

> enforcement of the Mine Act. Second, that approach would also wrongly fail to redress or deter situations where an operator, with the intent of frustrating protected activity, takes adverse action against an innocent miner.

Id.

The court, in *Donovan*, also rejected a literal interpretation of section 105(c)(1) which would have been inconsistent with the expressed congressional intent:

> Although a literal reading of the statute might indicate that a discharge is illegal only if the employee has testified or is about to testify against the employer, we decline to adopt such a hypertechnical and purpose-defeating interpretation. Instead, we hold that an employee's refusal to agree to provide MSHA investigators with testimony that the employee in good faith believes to be false is protected activity, regardless of whether the employee eventually happens to be asked for a statement.

732 F.2d at 959.

Considering the statutory language and the intent of Congress as to the Mine Act and the specific provision at issue, I find, section 105(c)(1) ambiguous when applied to the claim asserted on behalf of Jimmy Caudill.

Deference to Secretary's Interpretation

The Commission is "required to accord deference to the Secretary's reasonable interpretations of the language of the Mine Act." *RAG Cumberland, supra*, 272 F.3d at 596. It appears beyond dispute that construing the statutory language as permitting a discrimination action by Jimmy Caudill, based upon his father's protected activity, would be reasonable and far more consistent with the statute's purpose than the contrary interpretation urged by Respondents. Even in *Fogleman*, the case relied on by Respondents, it was recognized that interpreting the similar anti-discrimination provisions of the ADA and the ADEA so as to preclude such a cause of action would be "at odds with the policies animating those provisions." 283 F.3d at 568. As the court noted:

> There can be no doubt that an employer who retaliates against the friends and relatives of employees who initiate anti-discrimination proceedings will deter employees from exercising their protected rights. Indeed, as the Seventh Circuit sagely observed, "To retaliate against a man by hurting a member of his family is an ancient method of revenge, and is not unknown in the field of labor relations." *NLRB v. Advertisers Mfg. Co.*, 823 F.2d 1086, 1088 (7th Cir. 1987). Allowing employers to retaliate via friends and family, therefore, would appear to be in significant tension with the overall purpose of the anti-retaliation provisions, which are intended to promote the reporting, investigation, and correction of discriminatory conduct in the workplace. *See DeMedina* [*v. Reinhardt*, 444

F.Supp. 573, 580 (D.D.C. 1978)] (concluding that "tolerance of third-party reprisals would, no less than the tolerance of direct reprisals, deter persons from exercising their rights under Title VII").

Id. at 568-69.

Several comparable statutory provisions have also been held to allow such causes of action. *See EEOC v. Ohio Edison Co.*, 7 F.3d 541, 543-44, n.1 (6th Cir. 1993) (Title VII, 42 U.S.C. § 2000e-3(a)); *Brock v. Georgia Southwestern College*, 765 F.2d 1026 (11th Cir. 1985) (Equal Pay Act, 29 U.S.C. § 215(a)(3)); *Reich v. Cambridgeport Air Systems, Inc.*, 26 F.3d 1187 (1st Cir. 1994) (Occupational Safety and Health Act of 1970, 29 U.S.C. § 660(c)).[1]

Conclusion

Respondents have submitted a well-written and persuasive argument that the plain meaning of the statute precludes Jimmy Caudill's cause of action. While they concede, as did the court in *Fogleman*, that there is no consensus in the cases deciding the issue under other statutes, they have attempted to distinguish, with some success, the cases adverse to their position. Ultimately, however, I find that the absence of statutory language or legislative history on the precise issue presented, and the clearly expressed intent of Congress for a broad interpretation of the anti-discrimination provision, cannot support a conclusion that the statutory language constitutes a clear an unambiguous Congressional intent to preclude such causes of action.[2]

The reasons expressed by the Commission for rejecting a literal reading of § 105(c)(1) in *Moses*, are equally applicable here – a contrary interpretation would "frustrate the enforcement of the Mine Act . . . [and] would also wrongly fail to address or deter situations where an operator, with the intent of frustrating protected activity, takes adverse action against an innocent miner."

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[1] The Secretary also relies upon cases decided under the NLRA, although, as noted in *Fogleman*, 283 F.3d at 570-71, that statute contains another provision, 29 U.S.C. § 158(a)(1), that has been viewed by the courts as more expansive than provisions more comparable to the Mine Act's anti-discrimination language.

[2] While not essential to the analysis, it appears that there are more compelling reasons to allow such a cause of action under the Mine Act than under more broadly applicable employment statutes. Mining typically takes place in a rural environment, where employment opportunities are less diverse and employment of multiple family members and relatives as miners may not be unusual. The interpretation urged by Respondents would leave the family members of a miner who engaged in protected activity without recourse under the Mine Act and subject to blatantly retaliatory conduct. It would be hard to imagine a result more repugnant to the statutory scheme.

4 FMSHRC at 1480.

For the above-stated reasons, I find that the allegations made by the Secretary on behalf of Jimmy Caudill state a claim upon which relief can be granted under § 105(c)(1).

Jerry Caudill's Claim

Respondents advance several arguments in opposition to the claim asserted on behalf of Jerry Caudill: that he failed to submit a claim of discrimination to MSHA, that he is not a miner as to them, and that he suffered no adverse action.

Section 105(c)(2) of the Act specifies, in pertinent part:

> Any miner * * * who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. . .

The filing of an administrative complaint of discrimination with MSHA within the time frame specified in section 105(c)(2) is not jurisdictional. *Hollis v. Consolidation Coal Co.,* 6 FMSHRC 21 (Jan. 1984); *Herman v. IMCO Services*, 4 FMSHRC 2135 (Dec. 1982). The provision is primarily designed to assure fairness to the opposing party by apprising it of the substance of the allegation and potential scope of relief. *Id.* at 2138-39. In *Sec'y of Labor on behalf of Dixon v. Pontiki Coal Corp.*, 19 FMSHRC 1009, 1016-18 (June 1997), the Commission reversed an ALJ's determination that a complaint of discrimination filed by the Secretary was limited to allegations on behalf of the miner who filed the initial complaint with MSHA. The Commission found that the Act was ambiguous on the issue of whether the Secretary was "limited to the bare allegations of the initiating complaint to MSHA in drawing up her complaint to the Commission" and that the Secretary's interpretation that it was the "scope of the Secretary's *investigation*, rather than the initiating complaint, that governs the permissible ambit of the complaint filed with the Commission," was entitled to deference. *Id.* (emphasis in original). The Commission held that the Secretary's complaint may include not only miners represented by the complainant, but other miners' representatives affected by discrimination who were not named in the complaint submitted to MSHA. It went on to observe that, in that case, the complaint filed by the Secretary "alleged the same discriminatory conduct [that had been] alleged . . . in the initiating complaint filed with MSHA" and the "addition of the unnamed miners [changed] neither the relief sought not the basis of the charge as originally filed." *Id.*

Pontiki directly decides the issue raised by Respondents. Jimmy Caudill's complaint to MSHA, which prompted the investigation, clearly identified the act of discrimination and the grounds for the complaint. There is no contention, at present, that his reference to "my family history of Safety and Discrimination Complaints" was misleading or could have been construed as anything other than a reference to his father's activities, which were well-known to Leeco.

The addition of Jerry Caudill as a named complainant changes neither the basis of the charge as originally filed nor, in any meaningful way, the relief sought. The Secretary's investigation, of necessity, included Jerry Caudill's protected activity and the alleged unlawful motivation of Leeco resulting from it. Respondent's challenge to the claim brought on behalf of Jerry Caudill, based upon the fact that he did not personally file a complaint of discrimination with MSHA, is rejected.

Respondents also argue that the complaint on behalf of Jerry Caudill should be dismissed because he was not "a miner as to them," i.e., was not employed by them on the date of the alleged discrimination. However, the Mine Act specifies that "No person shall . . . in any manner discriminate . . . or otherwise interfere with the exercise of the statutory rights of any miner." The legislative history of the Act makes clear that the anti-discrimination provisions of the statute are to be broadly interpreted and that it applies "not only to the operator but to any other person directly or indirectly involved." S.Rep. No 95-181, at 36 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624 (1978). Jerry Caudill was a miner employed by Leeco at the time that he engaged in substantial protected activity. He was also a miner at the time of the alleged discrimination. The Act does not require Jerry Caudill to have been employed by Respondents at the time of the alleged discrimination.

Jerry Caudill clearly suffered adverse action within the meaning of the Act, which, as explained in the legislative history, was "intended to protect miners against not only the common forms of discrimination such as discharge, suspension, demotion, reduction in pay and hours of work, but also against the more subtle forms of interference, such as promises of benefit or threats of reprisal." *Mosley*, 4 FMSHRC at 1478 (quoting legislative history). Here, it is alleged that Leeco actually engaged in a reprisal against Jerry Caudill for the exercise of his rights under the Act. The Amended Complaint, at para. 9, alleges that Jerry Caudill suffered adverse action, in that he was discriminated against and the exercise of his rights under the Act were interfered with by Leeco's discharge of, or failure to hire, his son. As noted in *Mosley*, such actions may "chill the exercise of protected rights by the directly affected miners, [and] may also cause other miners, who wish to avoid similar treatment, to refrain from asserting their rights." *Id*. at 1479.

Respondents challenges to the claim made on behalf of Jerry Caudill must also be rejected.

Causation

Respondents argue that Jerry Caudill's protected activity while employed by Leeco extended no further than the end of 1997 and, as a matter of law, that protected activity could not be found to be a causative factor in the adverse action complained of. While it is true that there is a gap in time exceeding three years between Jerry Caudill's protected activity directed at Leeco and the instant actions complained of, proximity in time is only one of the considerations involved in evaluating circumstantial evidence of discriminatory motive. *Chacon v. Phelps Dodge Corp.*,

3 FMSHRC 2508, 2510-11 (Nov. 1981), *rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C.Cir. 1983).

The cases relied upon by Respondents do not command a different result, and are distinguishable in that there was no ongoing employment relationship between Jerry Caudill and Leeco during the three year period. Where the complaining miner has an ongoing employment relationship, opportunities for retaliatory action are presented daily. As time passes following the protected activity, any inference that adverse action was prompted by the protected activity logically diminishes. Here, however, Jerry Caudill's employment relationship with Leeco ended in 1997, and, on the present record, there were no opportunities for Leeco to take actions in retaliation for that protected activity until Jimmy Caudill sought employment. In any event, the Secretary does not rely solely on past protected activity to establish unlawful motive. It is alleged that Jerry Caudill's protected activity was discussed directly with the mine superintendent immediately before the apparent reversal of Leeco's intention to have Jimmy Caudill work as a roof-bolter on the second shift.

Respondents did not support their causation argument with affidavits, or otherwise attempt to establish the absence of a genuine issue as to any fact material to the unlawful motive issue. It would be most inadvisable and inappropriate to decide that issue virtually at the pleadings stage of this proceeding.

ORDER

For the reasons stated above, Respondents' motion is **DENIED**.

Michael E. Zielinski
Administrative Law Judge

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