

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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July 23, 1999

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION, (MSHA),	:	
on behalf of Rodney Smith,	:	Docket No. KENT 99-243-D
Complainant	:	
v.	:	BARB CD 98-26
	:	BARB CD 98-33
LEECO, INCORPORATED,	:	BARB CD 99-02
Respondent	:	
	:	Maces Creek
	:	Mine ID 15-17911

ORDER GRANTING TEMPORARY REINSTATEMENT

Before: Judge Bulluck

This matter is before me on an application, filed by the Secretary on July 6, 1999, pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c)(2), for an order requiring Leeco, Incorporated (“Leeco”) to temporarily reinstatement Rodney Smith to his former position as a roof bolter, third shift belt examiner and assistant foreman at Leeco’s Maces Creek Mine, or to a similar position at the same rate of pay. Section 105(c)(2) prohibits operators from discharging or otherwise discriminating against miners who have engaged in safety related protected activity, and authorizes the Secretary to apply to the Commission for temporary reinstatement of miners, pending full resolution of the merits of their complaints. The application is supported by Declaration of Ronnie L. Brock, Mine Safety and Health Administration (“MSHA”) supervisory investigator assigned to the Barbourville field office, and a copy of discrimination complaints filed by Smith with MSHA on June 23, 1998, July 23, 1998, and December 3, 1998, respectively.¹ The application alleges that Smith was 1) suspended for three days because of his designation as a miners’ representative, 2) subjected to interference and prevented from carrying out his duties pursuant to his miners’ representative designation, and 3) constructively discharged from his employment with Leeco by being required to work and travel in belt entries under unsafe, hazardous roof conditions.

¹Discrimination Complaint of June 23, 1998, alleges that “[Smith] was given three days off, for following direct orders given by [his] supervisor.” Discrimination Complaint of July 23, 1998, alleges that “On July 22, 1998, [Smith] was refused [his] rights as a miners’ representative to travel with MSHA inspector. [He] was sent home.” Discrimination complaint of December 3, 1998, alleges that “[Smith] was forced to quit for reporting safety violations and management made no attempt to correct them, and [he] was harassed for being a miners’ representative.”

Leeco elected not to request a hearing and on July 16, 1999, filed its Response, therein denying that the company had prevented Smith, as a miners' representative, from engaging in "walk-around" duties with an MSHA inspector, or suspended him for discriminatory reasons, or that Smith was constructively discharged. Leeco's Response was supported by Affidavit of Leeco's president, Joseph Evans.

Procedural Framework

The scope of this proceeding is governed by the provisions of Commission Rules 45(c), 29 C.F.R. §2700.45(c), which limits the inquiry to a "not frivolously brought" standard by providing that "If no hearing is requested, the Judge assigned the matter shall review immediately the Secretary's application and, if based on the contents thereof the Judge determines that the miner's complaint was not frivolously brought, he shall issue immediately a written order of temporary reinstatement."

It is well settled that the "not frivolously brought" standard is entirely different from the scrutiny applicable to a trial on the merits of the underlying discrimination complaint. In *Jim Walter Resources v. FMSHRC*, 920 F.2d 738, the Court explained the standard as follows:

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*).

Congress, in enacting the 'not frivolously brought' standard, clearly intended that employers should bear a proportionately greater burden of the risk of an erroneous decision in a temporary reinstatement proceeding. Any material loss from a mistaken decision to temporarily reinstate a worker is slight; the employer continues to retain the services of the miner pending a final decision on the merits. Also, the erroneous deprivation of the employer's right to control the makeup of his work force under section 105(c) is only a *temporary* one that can be rectified by the Secretary's decision not to bring a formal complaint or a decision on the merits in the employer's favor. *Id.* at 748, n. 11 (*emphasis in original*).

Ruling

The Mine Act accords to miners and miners' representatives protection from discharge or

other discriminatory acts, based on their exercise of any statutory right under the Act. 30 U.S.C. §815(c). The Commission has consistently held a miner seeking to establish a *prima facie* case of discrimination to proving that he engaged in activity protected by the Act and, that he suffered adverse action as a result of the protected activity. *Secretary on behalf of Pasula v. Consolidation Coal Company*, 2 FMSHRC 2786, 2797-2800 (October 1980), *rev'd on other grounds, sub nom. Consolidation Coal Company v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Secretary on behalf of Robinette v. United Coal Company*, 3 FMSHRC 803, 817-18 (April 1981).

The Secretary's allegations are based, in part, on Inspector Brock's review of the investigative reports, respecting Smith's discrimination claims. Brock found that on June 23, 1998, Smith, the sole non-supervisory miners' representative who traveled with MSHA inspectors, was suspended for three days for working inby unsupported roof, a common practice at the mine, for which no other employee had been similarly disciplined. Brock further found that on July 22, 1998, mine superintendent Arnold Lowe prevented Smith from accompanying MSHA inspector Buford Conley on a Triple A inspection of the mine, by sending Smith home and permitting a shift foreman, not yet officially confirmed as a miners' representative, to travel with Conley. Brock's review also found support for Smith's claim that he was constructively discharged on December 1, 1998, due to Leeco's failure to address hazardous roof conditions reported by Smith in the pre-shift and belt examination books. In this regard, Brock found that other employees had been making notations of corrective actions in the examination books, which actions were not, in fact, being taken, and that on November 30, 1998, Smith refused to sign the pre-shift book that falsely reported corrective roof support measures. Finally, Brock concluded that Smith's allegations of constructive discharge due to Leeco's failure to correct hazardous conditions in the belt entries where Smith traveled and worked, and harassment due to his designation as a miners' representative, were not frivolous.

Leeco's Response, supported by president Evans' Affidavit, seeks to establish that the complaints were frivolously brought by, rebutting each allegation made by the Secretary. Leeco asserts that Smith and two other employees intentionally, deliberately and repeatedly traveled under unsupported roof, and that all three were suspended for three days. Respecting the July 22, 1998, inspection, Leeco states that Smith had completed his shift prior to the inspection and was not sent home, suffered no loss of pay, and was among several miners' representatives at the mine, one of whom traveled with Inspector Conley during his inspection. In response to the constructive discharge allegation, Leeco asserts that Smith certified that corrective action had, in fact, been taken, respecting conditions found by him, to the degree that he consecutively signed several pre-shift and belt examination book entries. Moreover, Leeco states that Smith voiced no specific health, safety or other concerns to mine management, respecting his general job dissatisfaction, and that he voluntarily resigned on December 1, 1998.

It is clear that the Mine Act protects miners' representatives from harassment or intimidation in the exercise of their duties. Moreover, since Leeco has waived its right to a hearing on the Secretary's application, while I have considered Leeco's Response, my review

must accept as true the events, as alleged. At best, Leeco has shown an intent to defend its actions at hearing, on the basis of legitimate business-related, non-discriminatory motivations. The Secretary has set forth allegations of discipline of Smith and interference in the exercise of his duties as a miners' representative, sufficient to raise an inference of discrimination. Likewise, respecting constructive discharge, the Secretary's allegation sets forth protected activity and refusal to work under unsafe roof conditions, under circumstances that are protected under the Mine Act, if proven. While the Secretary ultimately bears the burden at hearing of proving these allegations by a preponderance of the evidence, in order to sustain a violation of section 105(c), they are not, as set forth in the Secretary's application, clearly lacking in merit and, therefore, satisfy the lesser threshold in this proceeding, of not being frivolously brought.

ORDER

For the reasons set forth above, it is **ORDERED** that Leeco, Incorporated, immediately reinstate Rodney Smith to the position that he held immediately prior to his resignation from employment on December 1, 1998, at the same rate of pay and benefits, or to a similar position at the same rate of pay and benefits, with the same or equivalent duties.

Jacqueline R. Bulluck
Administrative Law Judge

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