

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 27, 2000

SECRETARY OF LABOR, MSHA	:	TEMPORARY REINSTATEMENT
on behalf of LEVI BUSSANICH,	:	PROCEEDING
Applicant	:	
	:	Docket No. WEST 2000-99-D
v.	:	
	:	Centralia Mine
CENTRALIA MINING COMPANY,	:	
Respondent	:	

DECISION AND ORDER DENYING TEMPORARY REINSTATEMENT

Appearances: James B. Crawford, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Applicant;
Timothy M. Biddle, Esq., Crowell & Moring, Washington, D.C., for Respondent.

Before: Judge Manning

This case is before me on an application for temporary reinstatement brought by the Secretary of Labor on behalf of Levi Bussanich against Centralia Mining Company (“Centralia”) under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c)(2) (the “Mine Act”). The application was filed on or about December 30, 1999. This case was assigned to me on January 6, 2000, and Centralia requested a hearing within ten days of receipt of the Secretary’s application. The application alleges that Centralia’s “decision to dismiss Mr. Bussanich was premised on his exercise of a protected activity as described in section 105(c)(1) of the Mine Act” and that Mr. Bussanich’s discrimination complaint is not frivolous. (Application at 2). A hearing in this temporary reinstatement proceeding was held in Tacoma, Washington, on January 21, 2000. For the reasons set forth below, I find that the Secretary failed to establish that the discrimination complaint was not frivolously brought.

I. BACKGROUND

The issue in a temporary reinstatement proceeding is very narrow. This case presents a rather unique set of circumstances because Centralia alleges that it did not fire Mr. Bussanich but that he quit his job. For this reason, a more detailed discussion of the factual background is necessary in this case than is typical in a temporary reinstatement case.

Centralia operates a surface coal mine in Lewis County, Washington. Mr. Bussanich was employed at the Centralia Mine for 14 years and worked as a welder for the previous 5 years. On October 10, 1999, Mr. Bussanich sustained a back injury at work and was placed on workers' compensation ("L & I leave"). On November 4, 1999, Rachel Woolley, Human Resources Administrator with Centralia, sent a memorandum to Mr. Bussanich at his home seeking information to determine if his leave is protected under the Federal Family and Medical Leave Act ("FMLA"). (Tr. 88-89; Ex R-1). Attached to the memo was a U.S. Department of Labor form entitled "Certification of Health Care Provider." When he did not respond to her memo, she sent a letter reminding Mr. Bussanich to have his attending physician complete and return the form. (Tr. 90-91; Ex. R-2). The form was never returned by Mr. Bussanich.

On November 30, 1999, Ms. Woolley received a phone call at her office from a man who identified himself as Levi Bussanich. (Tr. 91-92, 95). The conversation lasted only about a minute and ended at about 11:29 a.m. Within minutes of hanging up, Ms. Woolley recorded the conversation as follows:

Levi: I have a few issues, I am not on FMLA, I am on L & I.
Rachel: I said actually they run at the same time so you are on FMLA.
Levi: It doesn't matter, I got another job, so I quit, I'll be out to pick up my tools, all I need is my 401(k) money.
Rachel: Actually, you will need to talk to Sandy Wallace about that
Levi: O.K. fine
Rachel: What about a final check
Levi: I'll take care of that, I got another job so that's it, I am sick of this crap
Rachel: O.K. that's fine

(Exs. R-3, R-4; Tr. 96-98).

On December 3, 1999, Sandy Wallace, Senior Benefits Specialist for Centralia, sent Mr. Bussanich a letter, which noted that he quit on November 30 and which asked Mr. Bussanich to make arrangements to retrieve his tools from the mine and to schedule an exit interview to go over his retirement benefits, 401(k), and other issues. (Ex. R-6A; Tr. 159). She enclosed two checks with the letter: his final paycheck and a check for \$1,740.62 representing his accrued vacation pay. (Ex. R-6C). The checks were deposited by Mr. Bussanich on or about December 9, 1999. (Tr. 58, 183; Ex. R-10).

On December 7, 1999, Mr. Bussanich sent a letter to Ms. Wallace stating that he is under a doctor's care for an on-the-job injury and that he did not quit. (Ex. G-1). The letter states:

I have not spoken directly to Rachel Woolley in many months. I did not call her on November 30, or any other time to say that I was quitting. I did not tell anyone else at CMC that I was quitting. I did not quit. I am not quitting.

Id. Marjorie Taylor, Senior Human Resources Manager, sent a letter to Bussanich in response to his letter stating that Centralia considered him to have quit on November 30. (Tr. 28).

On December 23, 1999, Ms. Wallace conducted an exit interview with Mr. Bussanich by telephone. (Tr. 44-45, 166). Mr. Bussanich expressed interest in getting the money from his 401(k) account and pension plan quickly. (Tr. 168-71; Ex. R-8). He elected to take the entire proceeds in cash and did not roll it over into an IRA. Mr. Bussanich testified that he needed the 401(k) money to support himself and pay off some of his debts, and that he could not take part of it in cash and roll over the rest. (Tr. 45-47, 54-55, 68-69, 202). On or about December 28, 1999, Mr. Bussanich received a check for \$61,792, which is the net proceeds from his 401(k) account. (Exs. G-4, R-8; Tr. 172).

On December 18, 1999, Mr. Bussanich filed a discrimination complaint with MSHA. The complaint recites the letter he received from Ms. Wallace, his response to the letter, and Ms. Taylor's reply. The complaint then states:

I was receiving labor and industries pay, I have not been released by my doctor to return to work, why would I quit.

I feel this is another attempt by the company to terminate my employment due to my earlier complaints due to safety at the mine.

MSHA Special Investigator William Denning was assigned to investigate this complaint. He interviewed Mr. Bussanich and Mr. John Gift, Jr., another welder at the Centralia Mine. (Tr. 82). This application for temporary reinstatement was filed before interviews could be arranged with Centralia management. (Tr. 149). As a consequence, no further interviews were conducted, pending the results of this case.

After this case was filed, Centralia served a subpoena on U.S. West, the local telephone company, to determine where the phone call received by Ms. Woolley at about 11:29 a.m. on November 30 originated. The letter and memorandum that she sent to Mr. Bussanich in November concerning FMLA contained her private office phone number and she testified that the call came in on that line and not the general mine telephone number. (Tr. 50, 187). Based on information provided by U.S. West and GTE Northwest, it appears that the call originated from a phone registered in the name of Kim Whisnant, who lives in Portland, Oregon. (Exs. R-11, R-12; Tr. 191-92, 197).

Mr. Bussanich owns and operates several businesses outside of his employment with Centralia. (Tr. 66-67). One of these businesses is an independent video store in Olympia, Washington. (Tr. 59). His business partner in that venture is Bradley Whisnant, the husband of Kim Whisnant. (Tr. 48, 60, 198, 211). Counsel for Centralia subpoenaed Mr. and Mrs. Whisnant to testify at the hearing in this case. Bradley Whisnant advised local counsel for

Centralia, Mr. Paul Buchanan, that he would appear at the hearing. (Tr. 216-17; Ex. R-15). Bradley Whisnant also told Mr. Buchanan that his home phone was registered in Kim's name but that she did not have any relationship with Centralia or Mr. Bussanich. (Tr. 211). Mr. and Mrs. Whisnant failed to appear at the hearing.¹

At the hearing, Mr. Bussanich could not remember where he was or what he was doing on November 30, 1999, but he denied making a call to Rachel Woolley and denied that he quit his job. (Tr. 23, 25-26, 40, 54, 224). Mr. Bussanich testified that he owes Mr. Whisnant \$75,000 because, under the terms of their business agreement, he is obligated to buy out Mr. Whisnant's share of the business. (Tr. 49, 60-61). Bussanich testified that on or about January 18, 2000, after the subpoena was served on Mrs. Whisnant, Bradley Whisnant called him because he was upset about the subpoena. (Tr. 48, 51, 61, 63). At that time, Whisnant told Bussanich that he called the mine sometime in November to inquire about Bussanich's employment status. (Tr. 50-51, 63-64). Bussanich testified that Whisnant often called him at the mine. Whisnant also told Mr. Buchanan that he called the mine sometime in November. (Tr. 212, 221).

Bussanich testified that in November 1999 Whisnant was very concerned that Bussanich would not have the money to pay him the \$75,000 that he was owed. (Tr. 52). Bussanich and Whisnant were at the video store in November when Bussanich threw the FMLA forms sent by Ms. Woolley into the trash. Bussanich was angry that she sent the forms and, after starting to fill them out, he threw them away. (Tr. 49, 56, 212). Apparently, Whisnant retrieved these papers from the trash. (Tr. 50, 213).

There is no dispute that Mr. Bussanich engaged in protected activity on many occasions. He has three outstanding discrimination complaints pending before MSHA in addition to the complaint discussed above. His first discrimination complaint, filed on February 11, 1997, alleges that, after he raised safety concerns with an MSHA inspector, he was not permitted to leave the welding shop while at work. Apparently, MSHA has not completed its investigation of this complaint, despite the fact that almost three years have passed, and section 105(c)(3) requires the Secretary to notify the complainant of the results of her investigation within 90 days of receipt of the complaint.

His second discrimination complaint, filed on February 19, 1999, alleges that, when he was released by his doctor to return to work after a non-work related injury, the company would not permit him to work because management was "not happy with the doctor's note." In the

¹ At the hearing, Centralia moved to have the Commission enforce the subpoenas against Mr. and Mrs. Whisnant. (Tr. 229-31). The Secretary opposes the motion. Section 113(e) of the Mine Act and 29 C.F.R. § 2700.60(c) provide that a subpoena of a Commission judge may be enforced in the U.S. District Court. Temporary reinstatement proceedings are heard on an expedited basis and the issue in each case is very narrow. Enforcing the subpoena would require an additional hearing to take their testimony and would delay my resolution of this proceeding. Because I am able to resolve the issues in this case without their testimony, I deny the motion.

complaint, he alleges that other employees were allowed to return to work with similar doctors' releases and that he was treated differently because of the complaint he filed on February 11, 1997. He was eventually allowed to return to work. This complaint is still under investigation by the Secretary.

His third discrimination complaint, filed on August 26, 1999, alleges that he was forced to allow a sheriff's deputy to search his truck at the employee parking lot because someone reported that he was seen putting a stolen CB radio in his truck. Apparently, someone called the mine and reported that he had a company CB in his truck. (Tr. 134). The call may have been made from someone at the mine. (Tr. 225). After the call was received, mine management called the sheriff's office and Bussanich's truck was searched in his presence. Although he had a new CB radio in his truck, he had purchased it and it was not stolen. The complaint alleges the search was made "in retaliation [for] the (2) current complaints I have against the company with MSHA." This complaint is still under investigation by the Secretary.

In addition to these pending discrimination complaints, Mr. Bussanich made other complaints to MSHA inspectors and mine management about safety conditions at the mine. (Tr. 34-39). In November 1999, while he was on L & I leave, Bussanich received a phone call from John Gift, Jr., another welder at the mine. (Tr. 56, 72). Mr. Gift had just been fired by Centralia and had filed a grievance under the collective bargaining agreement. Mr. Bussanich advised Mr. Gift to file a discrimination complaint with MSHA. (Tr. 56, 72). Subsequently, the parties settled Mr. Gift's grievance; Mr. Gift was reinstated to his job; and the section 105(c) complaint was withdrawn. (Tr. 71, 73). Centralia management was aware that Mr. Bussanich advised Gift to file a complaint with MSHA. (Tr. 73). Mr. Bussanich testified that he filed a grievance for his own alleged termination but his union representative advised him that he had missed the deadline for filing a valid grievance. (Tr. 28-29).

II. DISCUSSION WITH FURTHER FINDINGS AND CONCLUSIONS

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act. The purpose of the protection is to encourage miners "to play an active part in the enforcement of the [Mine] Act" recognizing that, "if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation." S. Rep. No. 181, 95th Cong., 1st Sess. 35 (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 623 (1978).

"The scope of a temporary reinstatement proceeding is narrow, being limited to a determination by the judge as to whether a miner's discrimination complaint is frivolously brought." *Secretary 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). It is “not the judge’s duty ... to resolve ... conflict[s] in testimony at this preliminary stage of proceedings.” *Secretary of Labor on behalf of Albu v. Chicopee Coal Co., Inc.*, 21 FMSHRC 717, 719 (July 1999). At a temporary reinstatement hearing the judge must determine “whether the evidence mustered” by the miner to date establishes that his complaint is nonfrivolous, “not whether there is sufficient evidence of discrimination to justify permanent reinstatement.” *Jim Walter Resources*, 920 F.2d at 747.

Courts and the Commission and have equated the “not frivolously brought” standard contained in section 105(c)(2) of the Mine Act with the “reasonable cause to believe standard” at issue in *Brock v. Roadway Express, Inc.*, 481 U.S. 252 (1987). It has also been equated with “not insubstantial” and “not clearly without merit.” *Jim Walter Resources*, 920 F.2d at 747. The legislative history of the Mine Act defines the “not frivolously brought standard” as whether a miner’s complaint “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).

At the start of the hearing, the parties entered into a number of stipulations, including the following:

For purposes of this temporary reinstatement proceeding, Centralia Mining Company, by counsel, hereby stipulates that Complainant Levi Bussanich has in the past engaged in protected activity under the Mine Safety Act insofar as he filed, prior to November 30, 1999, three section 105(c) complaints against Centralia Mining Company, beginning in January 1997. Mr. Bussanich also filed a complaint on December 18, 1999. These complaints ... all apparently remain under investigation by MSHA.

Although Centralia Mining Company denies that it has taken any adverse action against Mr. Bussanich on account of these protected activities, or any other alleged protected activities, Centralia Mining Company stipulates that for purposes of this temporary [reinstatement] proceeding only, if there is a reasonable evidentiary basis that Centralia Mining Company has discharged Mr. Bussanich, then the allegation that Centralia Mining Company did so on account of Mr. Bussanich’s protected activities is not frivolous. That, therefore ... is the sole issue for hearing, whether there is a colorable claim that Mr. Bussanich was discharged.

(Tr. 5-6).

Ms. Woolley testified that she is certain that it was Mr. Bussanich who called her on November 30, 1999, because she recognized his voice and he spoke knowingly about his

employment situation, his 401(k) plan, and his tools. (Tr. 91-92, 95, 106). Immediately after she hung up, she discussed the call with Centralia's safety director, Ralph Sanich, and subsequently with Ms. Taylor. (Tr. 98, 102, 119, 180). Mr. Thomas Means, of the law firm of Crowell and Moring, was called by Mr. Sanich to seek his advice. (Tr. 102, 120, 138-39). Mr. Means was called on a speaker phone and Ms. Woolley was in the room during this conversation. Means asked whether the mine accepted oral resignations from employment. (Tr. 140-41). When Mr. Sanich replied in the affirmative, Mr. Means advised the company to treat Mr. Bussanich no differently than any other employee who resigns in such a manner. (Tr. 105, 110, 140-42, 153).

For purposes of this proceeding, I assume that Mr. Bussanich did *not* call Ms. Woolley to quit his job on November 30, 1999. I find, however, that the uncontroverted evidence establishes that Centralia management sincerely believed, and continues to believe, that Mr. Bussanich voluntarily quit his job on November 30, 1999. (Tr. 91-92, 122, 184). All of their actions from November 30 to the present are premised on that belief.²

Centralia did not fire Mr. Bussanich. Centralia separated him from his employment because it understood that he called the mine and quit his job. Given that Centralia management acted on the understanding that Mr. Bussanich quit his job, there is no colorable claim that he was discharged by Centralia for his protected activity. There is no evidence to support a theory that Centralia fired Mr. Bussanich, even accepting the Secretary's evidence. Consequently, there is no reasonable cause to believe that he was terminated from his employment as a result of his protected activity. The Secretary failed to show that the complaint is nonfrivolous.

In section 105(c) cases, the judge must bear in mind that "direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (November 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir 1983). "Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence." *Id.* (citation omitted). Although, in this temporary reinstatement case, the Secretary need only show that the evidence mustered to date establishes that the complaint is nonfrivolous; she must present a colorable theory of the case. The discrimination complaint must "appear to have merit." There has been no showing that Mr. Bussanich's discrimination complaint of December 18, 1999, has any merit.

I consider one other theory that the Secretary did not argue or present at the hearing. One could argue that, although he was not discharged from his employment, Centralia violated section 105(c) when it failed to rehire Mr. Bussanich upon receipt of his letter of December 7,

² Mr. Biddle expressed Centralia's theory as to why it believes that Mr. Bussanich quit his job. It alleges that he wanted to cash out his 401(k) plan so he could pay the debt he owed Mr. Whisnant and then he filed a discrimination complaint to get his job back. (Tr. 236-37). I make no findings on this allegation and my decision is not based on any consideration of the allegation. I mention the allegation merely to show what Centralia expressed at the hearing as a reason why it contested the application for temporary reinstatement in this case.

1999, explaining that he did not actually quit his job. The theory would be that Centralia failed to reinstate him at that time because of his protected activity. The discrimination complaint does not contain such an allegation; the Secretary did not argue this point at the hearing; and the record contains no evidence to support it. The evidence of record establishes that Centralia treated Mr. Bussanich in the same manner as other employees who orally quit their jobs. Mr. Sanich knew of no situations in which a miner quit his job and then was rehired because his resignation had been a mistake. (Tr. 127).

III. ORDER

For the reasons set forth above, the application for temporary reinstatement filed by the Secretary of Labor or behalf of Levi Bussanich against Centralia Mining Company under section under section 105(c)(2) of the Mine Act is **DENIED** and this proceeding is **DISMISSED**.

Richard W. Manning
Administrative Law Judge

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