FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 12, 2001

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2001-2-D
on behalf of Steven Feagins, *et al.*,	:	Denv 2000-2
Complainant	:	
v.	:	
	:	
DECKER COAL COMPANY,	:	Mine ID No. 24-00839
Respondent	:	Decker Coal Mine

DECISION
GRANTING MOTION TO DISMISS

Before: Judge Schroeder

INTRODUCTION

This case is before me upon the complaint by the Secretary of Labor, on behalf of Steven Feagins and all similarly affected employees of Decker Coal Company. The Respondent, Decker Coal Company, filed a Motion to Dismiss. The Secretary filed a Reply to the Motion to Dismiss and Decker Coal Company filed a Response to the Reply. Neither party has requested an opportunity for oral argument. For the reasons given below, I have concluded the Motion to Dismiss should be granted without prejudice to filing a new complaint consistent with the conclusions reached below.

The complaint alleges discrimination by Decker Coal Company in violation of Section 105(c) of the Federal Mine Safety and Health Act of 1977 (the "Act"), 30 U.S.C. § 815(c)(1), against all of its miner employees at the Decker Mine in Big Horn County, Montana. The complaint seeks (1) a finding of discrimination, (2) a civil penalty in the amount of $8,000, (3) an award of damages for all affected employees for lost wages, and (4) other appropriate relief, including interest and costs.

Motion to Dismiss

A Motion to Dismiss is an attack on the formal sufficiency of the complaint. The moving party bears the heavy burden of showing that it is not possible to establish facts within the four corners of the complaint which would be a legal basis for relief to be ordered. Stated in different terms, for a Motion to Dismiss to succeed, the moving party must show there is no legal authority for granting relief, even assuming all the facts alleged in the complaint are true, including any inferences which could reasonably be drawn from the facts alleged when viewed in the light most favorable to the complainant. F.R.Civ.P. 12(b)(6). *Haines v. Kerner,* 404 U.S. 519 (1972).

Facts From the Complaint

According to the complaint, Decker Coal Company has operated a mine in Big Sky County, Montana since at least 1992. The mine is subject to the requirements and limitations in the Federal Mine Safety Act. It employs approximately 244 miners. Since 1992, miners at Decker have been paid under a compensation plan that appears to divide each miner's pay into a fixed portion and a bonus portion. The bonus portion is calculated monthly based on productivity of the mine. It is alleged that in the past few years the bonus portion has averaged approximately $600 per month per miner. In November, 1999, the method of computing compensation for miners at Decker was changed. While the details of the changes are not totally clear because of the failure to put all the details in writing, it is not disputed that a change was made which relates the bonus portion of each miner's pay to accident experience at the mine.

Under the amended plan, the bonus portion is subject to reduction or elimination in any particular month based on the accident experience at the mine. More particularly, the bonus portion of every miner's pay employed at Decker is reduced (a) by 50 percent in any month the mine experiences one recordable injury, (b) by 100 percent in any month the mine experiences more than one recordable injury, and (c) by 100 percent in any month the mine experiences one or more lost time accidents. Implementation of the plan has resulted in at least two months (January and April, 2000) in which bonus payments were reduced by 50 percent. Assuming an average monthly bonus of $600 and an average payroll of 244 miners, this indicates a reduction in expected compensation of approximately $146,400. It is not alleged that the 1999 amendment to the compensation plan made any overt changes in the requirements for miners to report accidents or to report situations with a risk of accidents. It seems a fair inference, however, that the bonus plan, as amended, could create strong economic incentives for both failure to report accidents whenever possible and as well as proactively to report situations with a risk of accident which could be avoided with remedial steps. The complaint does not allege specific facts upon which one could reasonably infer the actual motive and purpose of management for making the 1999 change in the compensation plan. *Briehl v. General Motors Corp.,* 172 F.3d 623 (8th Cir. 1999).

The Secretary contends, on behalf of the miners employed by Decker, that the 1999 amendment to the Decker compensation plan constitutes discrimination on its face by Decker in violation of Section 105(c) of the Act.

Legal Standard Under Section 105(c)

The inquiry in this case must begin with the statute. The critical language appears in section 105(c)(1) as follows:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, [. . .] in any coal or other mine subject to this Act because such miner, [. . .] in any coal or other mine subject to this Act because such miner, [. . .] has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, [. . .] is the subject of medical evaluation and potential transfer under a standard published pursuant to section 101 or because such miner, [. . .] 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, [. . .] on behalf of himself or others of any statutory right afforded by this Act. (Emphasis added)

Controversy as to the purpose, meaning and scope of these words has occupied the Commission's attention on many occasions over the years since their enactment. Respondent has correctly identified the cases decided by the Commission which express the basic principles used in applying the statute to particular situations. The key Commission decision is *Swift v. Consolidation Coal Co.*, 16 FMSHRC 201 (1994) which incorporates important earlier decisions in *Secretary on behalf of Paula v. Consolidation Coal Co.,* 2 FMSHRC 2786 (1980), rev'd on other grounds sub. nom. *Consolidation Coal Co., v. Marshall,* 663 F.2d 1211 (3d. Cir., 1981) and *Secretary on behalf of Robinette v. United Castle Coal Co.,* 3 FMSHRC 803 (1981). The Commission upheld as not discriminatory the "chronic injury" disciplinary plan challenged in the *Swift* case.

The Secretary, in response to the Motion to Dismiss, argues first that these cases support the claim of discrimination against Decker in its bonus compensation plan, and then argues that if these cases do not support that claim the cases represent incorrect application by the Commission of the controlling law. The Secretary cites as authority for this proposition the cases of *NLRB v. Great Dane Trailers,* 388 U.S. 26 (1967); *Local 702 v. NLRB,* 215 F.3d 11 (D.C. Cir. 2000); *International Paper Co. V. NLRB,* 115 F. 3d 1045 (D.C. Cir. 1997); *Forest Products Co. v. NLRB,* 888 F2d 72 (10 Cir. 1989); and *NLRB v. American Can Co.,* 658 F2d 746 (10 Cir. 1981).

The Commission follows a sequential analysis which can easily be mapped to the analysis used by the Supreme Court in the *Great Dane Trailer* case. The first inquiry by the Commission is whether the challenged action overtly imposes negative consequences to a person for the exercise of a right created or protected by the Act. This is equivalent to the *Great Dane Trailers* inquiry as to whether the action challenged is "inherently destructive" of union member rights. The key concept at this stage of the inquiry is causal relationship, i.e. discrimination is present *prima facia* only when the exercise of a protected rights is the acknowledged cause of damage to the person attempting to exercise the protected right. The burden of a person complaining of discrimination is to allege facts demonstrating that cause and effect relationship.

If the answer to either form of this question of *prima facia* cause is no, the complainant is still entitled to go on to allege and prove that the challenged action was taken with the intent to damage or deny rights assured under the Act even if there is no overt causal connection between the damage suffered and the exercise of a protected right. If a showing is made that a protected right has been damaged by the challenged action, the respondent may then still undertake the task of showing that the challenged action was motivated or caused, at least in part, by nondiscriminatory reasons which would be sufficient by themselves to justify the action taken. *Swift, supra,* at 208. A virtually identical sequence of analysis is sanctioned by the Supreme Court in *Great Dane Trailers* and related cases.

Evaluation of Decker Plan

While the Decker bonus plan as amended in November, 1999 does involve significant adverse action by the operator toward miners in the event of one or more reportable accidents[1], it does not appear to involve miner's rights created or protected by the Act. The Commission in the *Swift* case makes the specific distinction between the right of a miner to report an injury or a risk of injury on the one hand and the event of incurring or causing an injury on the other. While it would be discrimination without proof of intent for an operator to reduce the pay of a miner for the action of reporting an injury or a risk of an injury, that is not the case before me. Here, the pay consequence of the occurrence of an injury to a miner at the Decker mine does not fall specifically on the miner who reported the injury or who reported the risk of injury prior to the event. The pay consequence falls, rather, on all the miners working at the mine during the month the injury occurred regardless of any involvement in the events which produced the injury.

The lack of a causal relationship between reduction in bonus pay and exercise of a protected right is clearest in looking at the right to report hazardous conditions, including the right to refuse to work under hazardous conditions. It appears that miners at Decker can report hazardous conditions every day without any consequences for their bonus pay. Likewise, a

[1] MSHA regulations, 30 C.F.R. Part 50, distinguish between "reportable" accidents and "first aid." Not every injury suffered at a mine is a "reportable accident."

miner's bonus pay could be reduced for an accident of which the miner had no knowledge and hence no opportunity to make a report.

I cannot find a provision of the Act or the implementing regulations which would prevent a mine operator from establishing a compensation plan of this kind or which would prevent a miner from agreeing to work under this kind of compensation plan. Nothing in the plan as described in the papers filed at this stage of this case suggests that the responsibilities of either miners or management for the reporting or preventing of accidents has been diminished in any way. The Secretary's speculation that the plan will lead miners to fail to report accidents is not an inference compelled by any of the facts currently alleged in the complaint. The sentence in the complaint which is the key to the Secretary's argument appears in paragraph 9. The Secretary alleges "[t]he potential financial losses faced by all miners under the basic operation of the bonus reduction policy plainly interfere with the protected activity of reporting accidents and injuries to management." That an incentive plan will produce this result is, at this time, pure conjecture by the Secretary.

The Secretary makes several attempts to distinguish the Decker plan from that contested in the *Swift* case. First, the Secretary points out that the plan in *Swift* resulted in negative consequences only to injured miners while the Decker plan affects all mine workers equally. Second, the Secretary notes the *Swift* plan included remedial counseling as well as punitive measures while the Decker plan appears to be only punitive. These distinctions between the two plans may be accurate but they miss the critical point. The issue is not the strength or harshness of a particular action taken by a mine operator but rather the nature of the interest affected by the action. The question to be asked under both *Swift* and the *Great Dane Trailer* cases is what right of the employee is damaged by the employer's action. Unless the right damaged is a right which is protected under the relevant statute, it makes no difference whether the right is only slightly bruised or is totally crushed.

The right imperiled by the Decker plan is essentially the same as the right in the *Swift* case which the Commission found not protected by the Act. The right was characterized by the Commission as the right to deal with the consequences of injury as opposed to the right to report injury or a risk of injury to people with the responsibility to take corrective action. The right to deal with the consequences of injury is not protected by the Act and hence a curtailment of that right does not form the basis for a claim of discrimination.

The Secretary makes a collateral argument that the plan sanctioned by the Commission in *Swift* contain an overt requirement for miners to report accidents but the Decker plan does not contain such a requirement. The Secretary notes that Decker has been particularly terse in explaining its plan. This terseness suggests to the Secretary an intent to curtail rights.

The simple response to this argument is that miners have multiple existing instructions to report accidents or risks of accident so that it would be unnecessary for the Decker plan to reinforce that requirement. I find no need to speculate further as to motives.

The Secretary makes a final argument to avoid the Motion to Dismiss based on deference to administrative expert knowledge. The Secretary correctly notes that she declined to support a contention of discrimination in the *Swift* case. The decision by the Secretary to not support the employees in *Swift* was made under the Secretary's responsibility under the Act to monitor and prevent discrimination against miners who assert rights protected by the Act. Because of this long standing responsibility to monitor and prevent discrimination, argues the Secretary, a body of expert knowledge has been accumulated by the Secretary as to what constitutes discrimination. She contends the Commission is obligated to give deference to the application of that expert knowledge to the Decker plan, at least for purposes of a Motion to Dismiss. The mere filing of a complaint, goes the argument, is the expression of an expert opinion by the Secretary as to the presence of discrimination to which the Commission is required to give deference.

To credit such an argument would effectively take the Motion to Dismiss out of the list of options available to a litigator in this forum. It also misses the point of deference normally given to administrative expertise. Deference normally runs to interpretation of an Act where it's meaning and purpose is unclear or to the application of a regulation to complex facts peculiarly within expert competence. *Smiley v. Citibank,* 517 US 735, 739 (1996); *Chevron U.S.A. v. Natural Resources Defense Council, Inc.,* 467 US 837 (1984). The decision in *Secretary of Labor, on behalf of Wamsley v. Mutual Mining, Inc.,* 80 F.3d 110 (4th Cir. 1996) does not support the Secretary's position in this case. In *Wamsley,* the Secretary took the position that an award of back wages for a miner damaged by discrimination should not be reduced by the amount of unemployment compensation received by the miner. The Court of Appeals held that the Secretary's position was a reasonable interpretation of the meaning and purpose of the Act which was entitled to deference by the Commission and the Court.

The present case involves neither of these reasons for deference to administrative expert knowledge. The Act has already been interpreted by the Commission to the point of reasonable clarity. The Secretary is not interpreting the Act but rather is interpreting essentially adjudicatory facts. The effect of a bonus plan is not a subject which is so complex as to be uniquely within the special expert knowledge of the Secretary.

I conclude, therefore, that the complaint does not succeed as a matter of pleading at the initial stage of the analysis require by *Swift* and *Great Dane Trailers,* i.e. it has not been alleged as a matter of fact that the Decker bonus plan is discriminatory on its face under Section 105(c) or that it involves consequences which are "inherently destructive" of rights created or protected by the Act. Because the complaint fails to state a claim upon which relief could be granted, it must be dismissed.

Further Pleading

The final sentence of the complaint, paragraph 9, is the following:

> Moreover, the bonus reduction policy is so antagonistic to injury and accident reporting, that the Respondent's motive in implementing the policy can only be characterized as discriminatory.

While I conclude this sentence is almost entirely speculative rather than factual in nature, it is apparent the Complainant intended an alternative position challenging the motives of Decker management in the event the bonus plan were to be found not discriminatory on its face. The sentence as it now reads contains insufficient factual allegations to proceed with a determination of whether it was motivated by an unlawful intent to discriminate and has the actual consequence of damaging rights protected by the Act. Because of the importance of the prevention of discrimination related to mine safety, the Secretary should be afforded a reasonable opportunity to decide to file a new complaint making such additional factual allegations as the Secretary finds warranted to support this contention. Therefore, this dismissal is made without prejudice to the filing of a further complaint.

ORDER

For the reasons stated above, I conclude that the Complaint fails to state a claim upon which relief can be granted and that the Motion to Dismiss should be granted with leave to the Complainant to amend the complaint within 15 days following the entry of this Order. Therefore, the complaint is **DISMISSED** without prejudice.

Irwin Schroeder
Administrative Law Judge

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