

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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May 27, 1999

SECRETARY OF LABOR, : TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 99-262-D
ON BEHALF OF : MSHA Case No. DENV CD 99-07
RODNEY E. STEPHENS, :
Complainant : Willow Creek
22. : Mine
ID 42-02113
:
CYPRUS PLATEAU MINING CORP., :
Respondent :

DECISION
AND
ORDER OF TEMPORARY REINSTATEMENT

Appearances: Ann M. Noble, Esq., Office of the Solicitor, U.S.
Department of Labor, Denver, Colorado, for Complainant;
R. Henry Moore, Esq., Buchanan Ingersoll, P.C.,
Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Hodgdon

This case is before me on an Application for Temporary Reinstatement filed by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), on behalf of Rodney E. Stephens, pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). The application seeks reinstatement of Mr. Stephens as an employee of the Respondent, Cyprus Plateau Mining Corporation, pending a decision on the Discrimination Complaint he has filed against the company.¹ A hearing was held on the application on May 20, 1999, in Salt Lake City, Utah. For the reasons set forth below, I grant the application and order Mr. Stephens' temporary reinstatement.

¹ The Secretary has not yet filed a Complaint of Discrimination with the Commission.

Summary of the Evidence

On December 8, 1998, Stephens filed a discrimination complaint with MSHA alleging that he had been discharged on November 11, 1998. In the Summary of Discriminatory Action he stated:

On August 19th 1998 Cyprus Amax took me off of mine examiner (fire boss) because I was putting violations in the Week Book. I had been battling with the company over rock dust in returns, hydrocarbons not being taken care of in the mine, was being pumped outside with the discharge water [sic]. Standing water where I would have to go physically put in pumps to take care of the problem in the main escape ways out of the mine [sic].

Stephens testified that he had worked for Cyprus Plateau since 1990 and began working at the Willow Creek mine in 1996. In August 1998 he was working as a Mine Examiner, also known as Fire Boss. In this position, he was required to examine the intakes, returns, entries and other areas where people worked and to take gas and air readings. He recorded his findings in the mine's preshift and weekly examination books.

On August 19, 1998, he was reassigned from Mine Examiner to the crib crew. It was Stephens' belief that this occurred for the reasons he set out in his complaint. He elaborated at the hearing that he was "very vocal" that the company had to "have an adequate bleeder system" to get rid of the gas in the mine and that he complained about not keeping up with the rock dusting necessary to dilute the float coal dust in the mine. (Tr. 82.) He testified: "I believe that the company was waiting to try to find something to get me out of the way so I wouldn't bother them about the conditions of the mine." (Tr. 115.)

Stephens was discharged by the company on November 11, 1998. In his opinion, this was a culmination of all the complaints he had made about unsafe things in the mine. He claimed that he was discharged because "I was a trouble maker . . . I complained too much about safety violations." (Tr. 118.)

The company presented the testimony of Kimberly Coleman, Human Resources Assistant, and Jerry H. Fortson, Human Resources Manager. They testified that Stephens was reassigned from his Fire Boss position as the result of a sexual harassment complaint made against him. They determined after investigating the complaint that it was valid, and by reassigning him, among other things, he was removed from coming in contact with the woman

making the complaint.² As a result of this complaint, Stephens was informed that any future violations of company rules would result in his termination. (Resp. Ex. A.)

Victor H. Ewell, Shift Foreman, and Fortson testified that Stephens was terminated because he subsequently violated safety rules. Specifically, when directed to do so in his capacity as fill-in crib crew foreman, they alleged that he did not adequately determine whether a member of his crew had been task trained on operating a scoop, that two days later he committed a safety violation himself by leaving a scoop running and unattended, and while being questioned about that, he allowed the crew member, who it turned out had not been task trained, to drive a can setter out of the mine.

Stephens averred that the sexual harassment and the safety violations were pretexts for getting rid of him.

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 provided for this procedure with Rule 45, 29 C.F.R. § 2700.45.

Rule 45(d), 29 C.F.R. § 2700.45(d), states that:

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 h[er] application for temporary reinstatement, the Secretary may limit h[er] 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.

² He continued to receive the same pay he had been making as Fire Boss.

Thus, the issue at hand is not to determine whether or not Stephens was discriminated against, but rather to determine whether his complaint "appears to have merit." *Jim Walter Resources v. FMSHRC*, 920 F.2d 738, 747 (11th Cir. 1990). I conclude that it does.

Taken in their best light, Stephens' claims of protected activity are vague and sketchy. However, if they are found to be credible and if it is determined that there is a connection between them and his discharge, then he would be entitled to relief under the Act. Stephens' testimony was not inherently incredible, nor was any evidence presented that he was unworthy of belief.

The company's evidence indicates that it may well have a valid defense to Stephens' claims, but that was not the issue in this proceeding. The conflicts between Stephens' assertions as to what occurred and the company's raise credibility issues which arise in any case. By itself, this evidence does not demonstrate that his claim is frivolous or clearly without merit. Furthermore, it is apparent that a determination on the merits is not contemplated in a temporary reinstatement hearing by the express limitation of the scope of the hearing and by the fact that the Secretary can limit her case to the testimony of the Complainant. As Chairman Jordan and Commissioner Marks have stated: "The Secretary should not, at this juncture, be expected to present that which is necessary to prove that a violation occurred, or to prove that retaliatory animus existed." *Secretary on behalf of Markovich v. Minnesota Ore Operations, USX Corp.*, 18 FMSHRC 1349, 1352-53 (August 1996).

In a temporary reinstatement proceeding, 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. *Jim Walter Resources* at 748 n.11. Accordingly, I conclude that Stephens' discrimination complaint has not been frivolously brought.

Order

Rodney E. Stephens' Application for Temporary Reinstatement is **GRANTED**. The Respondent is **ORDERED TO REINSTATE** Mr. Stephens to the position he held on November 11, 1998, or to a similar position, at the same rate of pay and benefits, **IMMEDIATELY ON RECEIPT OF THIS DECISION**.

T. Todd Hodgdon

Administrative Law Judge

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