FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

November 24, 1999

SECRETARY OF LABOR, MSHA	:	DISCRIMINATION PROCEEDING
on behalf of LEWIS FRANK BATES,	:	
Complainant	:	Docket No. WEVA 99-121-D
v.	:	HOPE CD 99-12
	:	
CHICOPEE COAL COMPANY, INC.,	:	Lilly Branch Surface Mine
Respondent	:	Mine ID 46-08723
	:	
SECRETARY OF LABOR, MSHA	:	DISCRIMINATION PROCEEDING
on behalf of EARL CHARLES ALBU,	:	
Complainant	:	Docket No. WEVA 99-122-D
v.	:	HOPE CD 99-12
	:	
CHICOPEE COAL COMPANY, INC.,	:	Lilly Branch Surface Mine
Respondent	:	Mine ID 46-08723

DECISION

Appearances: Robert S. Wilson, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Complainants;
Forest H. Roles, Esq., Mark E. Heath, Esq., Heenan, Althen & Roles, Charleston, West Virginia, for the Respondent.

Before: Judge Feldman

The hearing in the temporary reinstatement cases in these matters was conducted on June 2, 1999. At the temporary reinstatement proceeding, the parties advised that they had reached a settlement agreement with respect to the temporary reinstatement of Lewis Frank Bates. Specifically, the respondent, Chicopee Coal Company, Inc., (Chicopee), agreed to economically reinstate Bates by reinstating Bates' medical benefits, and paying Bates the weekly salary he was earning immediately prior to his alleged January 25, 1999, discriminatory discharge. A hearing on the merits was conducted with respect to the temporary reinstatement application of Earl Charles Albu, a/k/a Chuck Albu.

The scope of a temporary reinstatement proceeding was governed by the provisions of section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 815(c)(2), and Commission Rule 44(c), 29 C.F.R. § 2700.44(c), that limited the issue to

whether the subject discrimination complaints were "frivolously brought." The rationale for the frivolously brought standard in temporary reinstatement was addressed by the Court of Appeals, in *Jim Walter Resources v. FMSHRC*, 920 F.2d 738 (11th Cir. 1990). The Court stated:

> . . . 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 an 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. 920 F.2d at 748, n.11. (emphasis in original).

Applying this lesser burden of proof, the initial decision ordered Chicopee to temporarily reinstate Albu to the position that he held immediately prior to his January 26, 1999, discharge, or to a similar position, at the same rate of pay and benefits and with the same, or equivalent, duties assigned to him. 21 FMSHRC 673, 680 (June 1999). The Commission, intimating no view on the ultimate merits of Albu's underlying discrimination complaint, affirmed the initial decision to reinstate Albu. 21 FMSHRC 717 (July 1999).

The hearing in these discrimination complaints that gave rise to the temporary reinstatement proceedings was convened on November 2, 1999, in Charleston, West Virginia. The scrutiny applicable to a trial on the merits of the underlying discrimination complaint is entirely different from the minimal "frivolously brought" statutory standard of proof in temporary reinstatement matters. *Brock v. Roadway Express, Inc.*, 481 U.S. 252 (1987). In order to prevail, a complainant has the burden of proving a *prima facie* case of discrimination under section 105(c) of the Mine Act. In order to establish a *prima facie* case, a complainant must demonstrate that he participated in safety related activity protected by the Act, and, that the adverse action complained of was motivated, in some part, by that protected activity. *See Secretary on behalf of David Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-2800 (October 1980) *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Secretary on behalf of Thomas Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981).

A mine operator may rebut a *prima facie* case by demonstrating, either that no protected activity occurred, or, that the adverse action was not motivated in any part by protected activity. *Robinette*, 3 FMSHRC at 818 n.20. An operator may also affirmatively defend against a *prima facie* case by establishing that it was also motivated by unprotected activity and that it would have taken the adverse action for the unprotected activity alone. *See also Jim Walter Resources*, 920 F.2d at 750, *citing with approval Eastern Associated Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987); *Donovan v. Stafford Construction Co.*, 732 F.2d 954, 958-59 (D.C. Cir. 1984); *Boich v. FMSHRC*, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's *Pasula-Robinette* test).

The gravamen of the Bates and Albu discrimination complaints is that they were

terminated immediately after they expressed safety related concerns at a January 25, 1999, safety meeting. The complaints concerned the qualifications of Vecellio and Grogan personnel who had recently been designated by Chicopee to supervise certain mining operations. Vecellio and Grogan is a company specializing in road building and mining in the State of West Virginia. In addition to being Chicopee's subcontractor, Vecellio and Grogan also has provided substantial financial resources to support Chicopee's continuing operations.

The evidence appears to support a *prima facie* case of discriminatory conduct given the brief period of time that elapsed between the protected safety complaints and the Bates and Albu terminations. 21 FMSHRC at 718. However, Bates' and Albu's apparent disinclination to work with Vecellio and Grogan may have provided Chicopee with an independent business justification for their terminations that could constitute a defense to these discrimination complaints.

For example, there was testimony at the temporary reinstatement proceeding concerning threats that Albu had made against Vecellio and Grogan's superintendent, Dale McGrady. 21 FMSHRC at 676. McGrady had recently been designated by Chicopee to oversee road construction activities, responsibilities that were previously assigned to Bates. This change in Bates' assigned duties caused Bates to convene the January 25, 1999, safety meeting to "warn" his fellow employees that he was no longer responsible for ensuring the safety of the roadways. *Id.* at 677. At the safety meeting Albu complained about Vecellio's equipment, characterizing the equipment as "junk." *Id.* In short, the evidence reflects that the conduct of Bates and Albu may have been detrimental to Chicopee's ongoing relationship with Vecellio and Grogan, a company that Chicopee relied on for financial support.

At the hearing, the parties advised that they had agreed to settle these discrimination cases. The terms of the parties' settlement were presented and approved on the record. The settlement terms were committed to writing in the Secretary's Motions to Approve Settlement filed on November 15, 1999.

With respect to Bates, in lieu of temporary reinstatement, Chicopee previously has agreed to economically reinstate Bates effective May 26, 1999, pending the outcome of his discrimination complaint. Chicopee now has agreed to pay Bates a lump sum payment as consideration for Bates' withdrawal of his complaint. Chicopee also has agreed to provide Bates with a letter for prospective employers specifying Bates' dates of employment and reflecting that Bates was terminated due to a reduction in work force. Chicopee will provide employment references that are consistent with the terms of this settlement and all references to this discrimination matter shall be expunged from Bates' personnel records. Finally, Chicopee has agreed to allow Bates to retain medical coverage for his wife at Bates' expense until Bates finds new employment, or until Chicopee is no longer permitted by law to cover Ms. Bates on their company medical insurance policy.

Albu was reinstated effective June 30, 1999, pursuant to the initial decision granting the Secretary's application for Albu's temporary reinstatement. 21 FMSHRC at 680. Chicopee now has agreed to pay Albu a lump sum payment as consideration for Albu's withdrawal of his complaint. Chicopee also has agreed to provide Albu with a letter for prospective employers specifying Albu's dates of employment and reflecting that Albu was terminated due to a reduction in work force. Chicopee will provide employment references that are consistent with the terms of this settlement and all references to this discrimination matter shall be expunged from Albu's personnel records.[1]

ORDER

This decision formalizes the approval of the parties' settlement agreements that were previously approved on the record. Consistent with their agreement Ms. Bates medical insurance coverage shall continue without interruption.

IT IS ORDERED that Chicopee Coal Company immediately provide Bates and Albu with written references for employment and that Chicopee Coal Company immediately expunge all references to these temporary reinstatement and discrimination matters from the personnel records of Bates and Albu.

IT IS FURTHER ORDERED that Chicopee Coal Company tender to Bates and Albu the agreed upon lump sum payments no later than thirty (30) days from the date of this decision.

Upon timely compliance with the terms of the settlement agreements, the discrimination proceedings in Docket Nos. WEVA 99-121-D and WEVA 99-122-D **ARE DISMISSED**.

Jerold Feldman
Administrative Law Judge

[1] As part of their settlement, Chicopee has agreed to pay a civil penalty of $300.00 in satisfaction of Albu's alleged discriminatory discharge. Pursuant to Commission Rule 44(b), 29 C.F.R. § 2700.44(b), to impose this $300.00 penalty, the Secretary must file with this Commission, within 45 days, a pertinent petition for assessment of civil penalty.

Distribution:

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