

CCASE:  
EMILIANO CRUZ V. PUERTO RICAN CEMENT  
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION  
WASHINGTON, D.C.  
April 12, 1985

EMILIANO ROSA CRUZ

Docket No. SE 83-62-DM

v.

PUERTO RICAN CEMENT COMPANY, INC.

DIRECTION FOR REVIEW AND ORDER

The petition for discretionary review filed by Puerto Rican Cement Company is granted. In his decision in this matter the administrative law judge concluded that complainant was discharged in violation of section 105(c) of the Mine Act, 30 U.S.C. 815(c), and ordered payment of backpay, interest, attorneys fees and costs, and complainant's reinstatement.

In his decision on the merits of the discrimination claim, the judge expressly declined to make factual findings concerning testimony at the hearing that complainant had threatened the life of the operator's assistant personnel manager. 6 FMSHRC 1753, 1760 (July 1984). The judge stated that since the threat allegedly was made subsequent to complainant's discharge, it was "not relevant to this proceeding." Although the alleged conduct has no bearing on whether complainant was discharged illegally, it may affect the relief to which complainant is entitled. In certain circumstances, post-discharge opprobrious conduct may render an order of reinstatement inappropriate. See, e.g., *Alumbaugh Coal Corp. v. NLRB*, 635 F.2d 1380, 1385-86 (8th Cir. 1980); *Mosher Steel Co. v. NLRB*, 568 F.2d 436 (5th Cir. 1978); *NLRB v. Yazoo Valley Electric Power Ass'n.*, 405 F.2d 479, 480 (5th Cir. 1968); *NLRB v. R.C. Can Co.*, 340 F.2d 433 (5th Cir. 1965). Such conduct may also toll the period of time for which backpay is due. *Alumbaugh Coal Corp. v. NLRB*, 635 F.2d at 1386. Therefore, we remand to the judge for reconsideration and further findings on this issue. We intimate no views, however, as to the appropriate resolution of this issue,

leaving this determination in the first instance to the trier of fact.

We also are troubled by the denial of the operator's request for an opportunity to depose complainant concerning his attempts to obtain interim employment and the extent of his interim earnings. In this proceeding, the judge first decided the merits of the discrimination claim and then ordered the parties to file written submissions as to relief. In light of complainant's written submissions, certain questions were raised by the operator concerning complainant's interim employment and earnings. The operator seeks to depose complainant and obtain a statement of his earnings from the Social Security Administration. In

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the circumstances, and in light of the need for a remand on the prior issue, we believe the operator should have this opportunity.

Elias Moses v. Whitley Development Corporation, 4 FMSHRC 1475, 1483-84 (August 1982).

Accordingly, the case is remanded to the administrative law judge for further expedited proceedings consistent with this order. Any party thereafter adversely affected or aggrieved may thereafter file petitions for discretionary review with the Commission in accordance with 30 U.S.C. 823(d)(2).

Richard V. Backley, Acting Chairman  
James A. Lastowska  
L. Clair Nelson, Commissioner

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