CCASE:
MSHA (PRICE, VACHA) V. JIM WALTER RESOURCES
DDATE:
19870803
TTEXT:

FMSHRC-WDC
August 3, 1987

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA), on
behalf of MICHAEL L. PRICE
and JOE JOHN VACHA

v. Docket No. SE 87-87-D

JIM WALTER RESOURCES, INC.

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka, and Nelson Commissioners

ORDER

BY: Backley, Lastowka and Nelson, Commissioners

In this discrimination proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $ 801 et seq. (1982), we review Commission Administrative Law Judge James A. Broderick's order of temporary reinstatement issued under Commission Procedural Rule 44, 29 C.F.R. $ 2700.44 (1986). For the reasons that follow, we affirm.

On January 1, 1987, Jim Walter Resources, Inc. ("JWR") inaugurated a "Substance Abuse Rehabilitation and Control Program" for its employees. Section II E of the program provides for random urine testing of "employees whose duties ... involve safety...." On March 2, 1987, JWR conducted urine testing of certain employees covered by this provision. Among the employees included in the test group were the complainants, Michael L. Price and Joe John Vacha, who were elected United Mine Workers of America ("UMWA") safety committeemen. Both employees failed to provide the requested urine samples, assertedly by reason of physical incapacity, and that same day were suspended with intent to discharge. JWR's stated reason

for discharge was insubordinate conduct.

Following their terminations, Price and Vacha on March 9, 1987, filed discrimination complaints with the Secretary of Labor pursuant to section 105(c)(2) of the Mine Act, 30 U.S.C.$ 815(c)(2), alleging that JWR had discharged them discriminatorily in violation of section 105(c) of the Act. 30 U.S.C. $ 815(c). On May 14, 1987, after commencing the required investigation of the complaints and determining that they were not frivolous, the Secretary filed with this independent Commission an application for the temporary reinstatement of Price and Vacha. 30 U.S.C. $ 815(c)(2). JWR filed a request for a hearing on the application.

pursuant to 29 C.F.R. $ 2700.44(a). Subsequently, the parties engaged in discovery. On June 29, 1987, a hearing was held before Judge Broderick. At the outset of the hearing, the judge permitted the UMWA to intervene.

Following the hearing, on July 7, 1987, the judge issued an order directing JWR to reinstate the complainants temporarily. The judge determined that the discrimination complaints "were not clearly without merit, were not fraudulent or pretextual" and that "the evidence establishes a reasonable cause to believe that the discharge of Price and Vacha was in violation of section 105(c)." Accordingly, the judge concluded that the complaints were not frivolously brought. On July 17, 1987, JWR filed with the Commission a petition for review of the judge's order and a motion for stay of the order. 29 C.F.R. $ 2700.44(e). Both the Secretary and UMWA have filed oppositions.

We have carefully reviewed the evidence, pleadings, and briefs, and conclude that the judge's order is supported by the record and is consistent with applicable law. The scope of a temporary reinstatement hearing is narrow, being limited to a determination by the judge as to whether a miner's discrimination complaint is frivolously brought. 30 U.S.C. $ 815(c)(2); 29 C.F.R. $ 2700.44(c). The judge properly found that the testimony and other evidence raises a non-frivolous issue as to whether the terminations of the complainants were in violation of the Mine Act.

We are not prepared at this preliminary juncture to conclude from the evidence and findings of record that section II E of JWR's drug testing program itself contravenes section 105(c)(1) of the Mine Act, as alleged by the complainants. However, although the complainants' precise theories of discrimination have not been presented with the utmost clarity, we find in the Secretary's pleadings, in the evidence, and in the closing arguments before the judge a claim that the specific manner of application of the drug testing program to Price and Vacha constituted discriminatorily disparate treatment, retaliation, or interference because of their prior protected activities. Evidence has been introduced tending to show that the complainants were active safety committeemen who had filed numerous safety complaints; that there may have been some hostility on the part of some JWR management officials towards that protected activity; and that the manner of testing the complainants and their resultant discharge may have been tainted by discriminatorily disparate treatment, retaliation, or interference. We make no determination at this point as to the ultimate merits of

a case of discrimination on this evidence. We hold only that the evidence presented to date is sufficient to support the judge's conclusion that the complaints are non-frivolous.

JWR also raises due process objections to the temporary reinstatement procedures employed below. The Supreme Court's decision in Brock v. Roadway Express, Inc., 481 U.S. , 95 L.Ed. 2d 239, 248.254 (1987), approved temporary reinstatement without prior hearing under comparable reinstatement provisions of the Surface Transportation Act of 1982. The Commission's temporary reinstatement procedures exceed the constitutional minimum sanctioned in Roadway Express. JWR has been

fairly heard in a pre-deprivation hearing in which it was allowed to present witnesses and to cross-examine the government's witnesses.

We also note that the Commission does not sit as a super grievance board to judge the industrial merits, fairness, reasonableness, or wisdom of JWR's drug testing program apart from the scope and focus appropriate to analysis under section 105(c) of the Mine Act. Finally, the Secretary is reminded of the imperative requirement and need to complete his investigation of the complaints pursuant to section 105(c)(2). Secretary on behalf of Donald R. Hale v. 4-A Coal Co., Inc., 8 FMSHRC 905, 907-08 (June 1986).

~1308

No view is intimated in this order as to the ultimate merits of this case. The only issue decided is that the complainants' discrimination complaints were not frivolously brought. JWR's request for a stay is denied and the judge's order is affirmed. This matter is remanded to the judge.

Richard V. Backley, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

Chairman Ford, dissenting:

A temporary reinstatement proceeding is limited to deciding whether or not the miner's complaint has been "frivolously brought." The judge, correctly in my view, has cast the frivolousness test in terms of whether there is "reasonable cause to believe" that a violation of section 105(c), 30 U.S.C. $ 815(c), has occurred. I agree with my colleague in dissent, Commissioner Doyle, however, that before the frivolousness issue can be addressed, the burden is on the Secretary to establish the elements of a section 105(c) claim. The record, here, fails to establish a causal nexus between the adverse action complained of (discharge for failure to provide a urine sample) and the protected activity of Messrs. Price and Vacha (engaging in safety activities in their capacities as safety committeemen).

The majority states that the Secretary's theories of discrimination have not been presented with the "utmost clarity." I find that those theories lack coherence and are not congruent with established bases for asserting a violation of section 105(c).

The Secretary argues that the Petitioner's drug abuse program is per se discriminatory apparently because complainants reasonably believed it to be so. As noted by the majority, this Commission does not sit in judgment on the relative merits or demerits of a drug testing program. More importantly, to accept such a discrimination theory requires one to believe that Petitioner, solely for the purpose of discharging the complainants, established an elaborate and expensive drug testing and rehabilitation program and then predicted that these particular employees (out of a tested workforce of 232) would be unable or unwilling to provide urine samples after being on notice to provide them for several hours. Alternatively, the Secretary argues that section 105(c) can somehow be read to grant a miner the "right to refuse to comply with a discriminatory work order" even when such an order involves no safety or health hazard. Without further amplification this newly propounded theory of discrimination does not surmount the frivolousness test. In any event, under either theory the Secretary does not establish a colorable nexus between the discharges and the protected activity.

The majority suggests that discrimination may lie in the disparate treatment of the complainants in the application of the drug abuse program, but the Secretary has not so argued and the judge did not so find. My review of the record does not reveal evidence that would support this theory.

Accordingly, I would vacate the judge's order of reinstatement but would join with my colleagues in urging the Secretary to expedite his investigation in this matter.

Ford B. Ford, Chairman

Commissioner Doyle, dissenting:

Although a temporary reinstatement proceeding is limited to resolving whether the miner's complaint is frivolous, that issue cannot be addressed unless the basic elements of a claim of discrimination are offered. Without some evidence of these elements first being presented, one cannot advance to a determination of whether a claim is non-frivolous.

In my view, the judge did not determine that there was any evidence tending to establish that adverse action was taken against the complainants in consequence of their engaging in protected activity. Absent this underlying determination, the issue of frivolousness could not be addressed. Accordingly, I would vacate the judge's order of temporary reinstatement.

Joyce A. Doyle, Commissioner

~1311
Distribution

Barry F. Wisor, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, VA 22203

James P. Alexander, Esq.
Robert K. Spotswood, Esq.
John W. Hargrove, Esq.
Bradley, Arant, Rose & White
1400 Park Place Tower
Birmingham, Alabama 35203

Robert H. Stropp. Esq.
2121 City Federal Building
Birmingham, Alabama 35203

Mary Lu Jordan, Esq.
UMWA
900 15th St., N.W.
Washington, D.C. 20005