

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF THE CHIEF ADMINISTRATIVE LAW JUDGE
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July 27, 2011

SECRETARY OF LABOR, (MSHA)	:	TEMPORARY REINSTATEMENT
on behalf of KENNETH R. WILDER,	:	PROCEEDING
Complainant	:	
	:	Docket No. KENT 2011-1224-D
v.	:	BARB CD 2011-06
	:	
PRIVATE INVESTIGATION AND	:	
COUNTER INTELLIGENCE	:	Abner Branch Mine
SERVICES, INC., and BLEDSOE	:	Mine ID 15-19132
COAL CORPORATION,	:	
Respondents	:	

DECISION AND ORDER
REINSTATING KENNETH R. WILDER

Appearances: Tony Opegard, Esq., Lexington, KY, and Wes Addington, Esq., Appalachian Citizens' Law Center ("ACLC"), Whitesburg, KY, representing Kenneth R. Wilder. Matthew S. Shepherd, Esq., U.S. Department of Labor, Office of the Solicitor, Nashville, TN, representing the Secretary of Labor (MSHA) on behalf of Kenneth R. Wilder. John Williams, Esq., Rajkovic, Williams, Kilpatrick & True, PLLC, Lexington, KY, representing Bledsoe Coal Corporation. Billy R. Shelton, Esq., Jones, Walters, Turner & Shelton, PLLC, Lexington, KY, representing PICI.

Before: Judge L. Zane Gill

This matter is before me on an Application for Temporary Reinstatement filed on June 27, 2011, by the Secretary on behalf of Kenneth R. Wilder, pursuant to Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2). On May 24, 2011, Wilder filed a complaint with the Secretary's Mine Safety and Health Administration (MSHA) alleging that his termination was motivated by his protected activity.¹ The Secretary contends that Wilder's complaint was not frivolous, and seeks an order requiring the employing entities, Private Investigation and Counter Intelligence Services, Inc., ("PICI") and Bledsoe Coal Corporation

¹ Under Section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, a "protected activity" can include making a "complaint notifying the operator [. . .] of an alleged danger or safety or health violation in a coal or other mine."

("Bledsoe") to reinstate Wilder to his former position as surface staffer at the Abner Branch Mine ("Abner Branch"), pending the completion of an investigation and final decision on the merits of his discrimination complaint. Bledsoe filed a Request for Hearing on July 5, 2011. An expedited hearing on the application was held in London, Kentucky, on July 15, 2011.

For the reasons that follow, I grant the application and order Wilder's temporary reinstatement.

SUMMARY OF THE EVIDENCE

Kenneth R. "Ronnie" Wilder ("Wilder") was employed by PICI and assigned to work at Bledsoe's Abner Branch Mine ("Abner Branch") in Leslie County, KY². (Tr. 29:4-7) Wilder worked at Abner Branch from February 2010 (Tr. 28:1-3), until he was terminated on May 4, 2011. (Tr. 52:1-16) At the time relevant to this decision, Wilder worked as a "staffer" or surface laborer. (Tr. 29:20-30:6) Bledsoe and PICI have a contractual arrangement by which certain employees, including Wilder, are recruited and placed by PICI into jobs at Bledsoe. (Tr. 28:4-22) Wilder was supervised by Bledsoe management - Robert Peterson. (Tr. 31:1-5)

On May 3, 2011, Lawrence Lawson, Bledsoe's Chief Maintenance Manager at Abner Branch, instructed Wilder to remove vines that had attached themselves to a 480-volt quadraplex power line and guy wires supporting the quadraplex power pole.³ (Tr. 33:21-34:9) This was a duty normally considered part of Wilder's general surface maintenance assignment. (Tr. 29:25-30:6) It rained heavily at Abner Branch on May 3, 2011. (Tr. 32:23-33:2) Wilder attempted to remove the vines as instructed, but became concerned that he might be electrocuted in the process, given the fact that the quadraplex line was energized (Tr. 44:21-24) and he would be working in water from the rain storm. (Tr. 47:19-48:1) Wilder attempted to get help or advice from other employees, (Tr. 47:1-15) but ultimately decided he could not safely proceed. (Tr. 50:7-20)

Wilder could not immediately tell Robert Peterson, his immediate Abner Branch supervisor, that he needed assistance. (Tr. 45:7-50:13) Peterson was busy with underground duties at the time. (Tr. 48:2-10) Wilder asked other employees, some of whom he knew to have electrician experience, for help. None was able to help him. (Tr. 46:14-15) Wilder attempted to remove the vines alone using a front-end loader and a rope, (Tr. 48:2-25) but ultimately decided he could not safely remove the vines, as instructed. (Tr. 49:18-24) Wilder then told Peterson near the end of his shift that he had stopped out of fear of electrocution. Peterson told Wilder his decision not to do the task would cause Wilder "trouble." (Tr. 50:7-20; 51:1-9)

² The Abner Branch mine and the Bledsoe Coal Corporation are controlled by James River Coal Company.

³ Bledsoe had received a non-S&S MSHA citation during an earlier shift that same day relating to vines growing on these lines. (Tr. 44:5-20)

The next day, May 4, 2011, Wilder received a phone call from Don Toy of PICI in which Toy told him that management from Abner Branch had contacted PICI to tell them that Wilder could not work there any more. (Tr. 52:1-19) Wilder attempted to learn from Abner Branch why he had been fired, and was told generally that he was “not working out.”⁴ (Tr. 53:21-55:10; 57:8-16)

All other facts arising from the evidence presented at the hearing on this matter, including the justification to terminate proffered by the Petitioners, relate to issues beyond the limited scope of this proceeding and are not discussed here.⁵

DISCUSSION OF RELEVANT LAW

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act. The purpose of the protection is to encourage miners “to play an active part in the enforcement of the [Mine] Act” recognizing that, “if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation.” S. Rep. No. 181,95th Cong., 1st Sess. 35 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 623 (1978).

⁴ PICI and Bledsoe suggested at the hearing that Wilder had not been “terminated” because of a comment made by Don Toy to the effect that Wilder could apply (or re-apply) for placement at another mine. They argued that since Wilder did not pursue that option, he was somehow still employed by PICI. I decline to engage in a meaningless diversion into the semantic implications of Toy’s comment. Wilder was told that his employment at Bledsoe was terminated; for our purposes here, that is an adverse action irrespective of PICI’s version of the wording used.

⁵ The following is a list of ancillary facts broached at the hearing which may be relevant for a trial on the merits, but are beyond the scope of this limited temporary reinstatement hearing:

- Whether Bledsoe / PICI had sufficient, non-discriminatory grounds to terminate Wilder.
- How the decision to terminate Wilder was reached.
- Whether Bledsoe’s / PICI’s proffered non-discriminatory termination grounds were pretextual, including whether Wilder knew or had reason to know that Bledsoe / PICI considered his performance to be substandard.
- How to assess damages, including mitigation of damages.
- Whether, judged by the relevant evidentiary standard, Wilder’s stated fear of electrocution was believable, reasonable, and motivated his refusal to complete the task.
- Whether PICI was aware of Bledsoe’s reasons to terminate Wilder, and what those reasons were.
- Whether, judged by the relevant evidentiary standard, Wilder’s refusal to perform the task constituted a protected activity.
- Whether Wilder’s failure to re-apply with PICI for placement at another mine is factually or legally significant.
- How to assess the credibility of various witnesses, including whether Wilder’s statement about fighting “dirty” with Bledsoe / PICI affects the credibility assessment.

When a person covered by the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2) notifies the Secretary that he/she believes discrimination has occurred, the Secretary is obligated by Section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2) to investigate, “and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis [. . .], shall order the immediate reinstatement of the miner pending final order on the complaint.”

The Commission has established a procedure for making the reinstatement decision. Commission Rule 45(d), 29 C.F.R. § 2700.45(d) states:

The scope of a hearing on an application for temporary reinstatement is limited to a determination as to whether the complaint was frivolously brought. The burden of proof is upon the Secretary to establish that the complaint was not frivolously brought. In support for [her] application for temporary reinstatement, the Secretary may limit [her] presentation to the testimony of the complainant. The Respondent shall have an opportunity to examine any witness called by the Secretary and may present testimony and documentary evidence in support of its position that the complaint was frivolously brought.

29 C.F.R. § 2700.45(d)

As the above makes clear, and as I noted at the hearing on July 15, 2011, the scope of a temporary reinstatement hearing is narrow, being limited to a determination as to whether a miner’s complaint was frivolously brought. *Sec’y of Labor on behalf of Price v. Jim Walter Resources, Inc.*, 9 FMSHRC 1305, 1306 (August 1987); *aff’d sub nom, Jim Walter Resources, Inc., v. FMSHRC*, 920 F. 2d 738, (11th Cir. 1990). It is not the judge’s duty, nor is it the Commission’s, to resolve the conflict in testimony at this preliminary stage of the proceedings.” *Sec’y of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999). In reviewing a judge’s temporary reinstatement order, the Commission has applied the substantial evidence standard.⁶ *See id.* at 719; *Sec’y of Labor on behalf of Peters v. Thunder Basin Coal Co.*, 15 FMSHRC 2425, 2426 (Dec. 1993).

The legislative history for section 105(c) reveals that Congress discussed the term “frivolous” with the understanding that a complaint is not frivolous if it “appears to have merit.” S. Rep. No. 181, 95th Cong. 1st Sess. 36-37 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2nd Sess., Legislative History of Federal Mine Safety and Health Act of 1977, at 6240625 (1978). The “not frivolously brought” standard has also been

⁶ When reviewing an administrative law judge’s factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d) (2) (A) (ii) (I). “Substantive evidence” means “such relevant evidence as a reliable mind might accept as adequate to support [the judge’s] conclusion.” *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. V. NLRB*, 305 U.S. 197, 229 (1938)).

equated to the “reasonable cause to believe” standard applied in other contexts. *Jim Walter Resources, Inc.*, 920 Fed 2d at 747; *Sec’y of Labor on behalf of Bussanich v. Centralia Mining Co.*, 22 FMSRHC 153, 157 (February 2000).

Under section 105(c) of the Act, the Secretary bears the burden of establishing: (1) that the miner engaged in protected activity; and (2) that the adverse action complained of was motivated in any part by that activity. *Sec’y of Labor on behalf of Paula v. Consolidation Coal.*, 2 FMSRHC 2786 (October 1980), *rev’d on other grounds sub nom.; Consolidation Coal Co. v. Marshall*, 773 F.2d 1211 (3rd Cir. 1981); *Sec’y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981); *Sec’y of Labor on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842 (August 1984); *Sec’y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSRHC 2508 (November 1981), *rev’d on other grounds sub nom.; Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983).

Thus, an applicant for temporary reinstatement need not prove a *prima facie* case of discrimination with the attendant requirement of proving all necessary elements at a higher evidentiary standard, as would be required in a trial on the merits. But, the applicant must provide evidence of sufficient quality and quantity (substantial evidence) to allow the judge to find, by application of the “reasonable cause to believe” standard, that: (1) the applicant engaged in protected activity; and (2) that there is sufficient showing of a nexus between the protected activity and the alleged discrimination to support a conclusion that the complaint of discrimination is not frivolous.

Regarding the nexus requirement, other judges and the Commission have adopted elements of the full *prima facie* case to create an analytical framework that comports with the strictures of the limited evidentiary scope of the temporary reinstatement process yet is useful in bridging the sometimes difficult gap between alleged actions and the intentions behind them. In recognition of the fact that direct evidence of intent or motivation is rarely found, the Commission has identified several circumstantial indicia of discriminatory intent: (1) hostility or animus toward the protected activity; (2) knowledge of the protected activity; and (3) coincidence in time between the protected activity and the adverse action. *Secretary of Labor, Mine Safety and Health Administration (MSHA) on behalf of Lige Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085, 1089, 2009 WL 3802726, (F.M.S.H.R.C.), October 22, 2009, KENT 2009-1428-D.

APPLICATION OF LAW TO THE EVIDENCE

On its face, the evidence summarized above is reasonably consistent with Wilder’s claim to have been motivated by fear for his personal safety, which is a recognized “protected activity” under the Act. There is no dispute that within twenty-four hours of Wilder’s refusal to complete the assigned task, his employment at Abner Branch was terminated. There is likewise no dispute that Bledsoe was aware both that Wilder declined to perform the assigned task and that he claimed to do so out of fear of electrocution. There is also uncontradicted evidence, which if found sufficiently credible, could support a finding that Bledsoe management, i.e., Robert Peterson, acted

with hostility towards Wilder's claim of fear for his personal safety. Thus, the evidence is sufficient to create a "reasonable cause to believe" that Bledsoe Coal, the ultimate decision maker here, had knowledge of Wilder's protected activity claim, that Bledsoe (Robert Peterson) demonstrated animus toward Wilder, and that there was a temporal coincidence between Wilder's protected activity, the employer's animus, and his termination.

Petitioner's argument that they had a valid non-discriminatory reason to fire Wilder is an issue for a hearing on the merits of the entire discrimination case and is beyond the limited scope of this temporary reinstatement proceeding.

ORDER

For these reasons, Bledsoe and PICI are **ORDERED** to reinstate Wilder to the position he held on May 3, 2011, or to an equivalent position, at the same rate of pay and with the same hours and benefits to which he was then entitled. Wilder's reinstatement is not open-ended. It will end upon a final order on Wilder's complaint. 30 U.S.C. § 815 (c)(2). Therefore, it is incumbent on the Secretary to determine promptly whether or not she will file a complaint with the Commission under section 105(c)(2) of the Act based on Wilder's complaint to MSHA. Accordingly, the Secretary is **ORDERED** to advise counsel for Bledsoe and PICI and the court of her decision by September 30, 2011, and, if a decision has not been made by that date, I will entertain a motion to terminate the reinstatement.

L. Zane Gill
Administrative Law Judge

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