

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JAN 16 2018

SECRETARY OF LABOR	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION (MSHA), on	:	
behalf of KEVIN R. SHAFFER,	:	Docket No. WEVA 2018-117-D
Complainant	:	MORG-CD-2018-01
	:	
v.	:	
	:	
THE MARION COUNTY	:	Marion County Mine
COAL COMPANY,	:	Mine ID: 46-01433
Respondent	:	

ORDER GRANTING TEMPORARY REINSTATEMENT

Before: Judge Bulluck

This matter is before me upon Application for Temporary Reinstatement filed by the Secretary of Labor (“Secretary”) on December 4, 2017, pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (“Act”), 30 U.S.C. § 815(c)(2), seeking an order requiring The Marion County Coal Company (“Marion County Coal”) to temporarily reinstate Kevin R. Shaffer to his former position of mobile equipment operator at Marion County Coal’s Marion County Mine, at the same rate of pay and benefits. Section 105(c) prohibits operators from discharging or otherwise discriminating against miners who have engaged in safety-related protected activity, and authorizes the Secretary to apply to the Commission for temporary reinstatement of miners, pending full resolution of the merits of their complaints. The Application is supported by the Declaration of MSHA Special Investigator Clarence Moore, III, and a copy of the Discrimination Complaint filed by Shaffer with MSHA on November 1, 2017. The Application alleges that Shaffer was terminated by Marion County Coal because he made safety complaints to management about mobile equipment that he had been operating, and requested alternative work due to the unsafe condition of the equipment.

Based on Marion County Coal’s election to brief the issue in lieu of a hearing, the parties agreed to an effective date for temporary reinstatement of December 31, 2017, and filed simultaneous briefs on January 9, 2018. The Secretary’s Brief in Support of the Application for Temporary Reinstatement (“Secretary’s Brief”) is supported by a copy of Special Investigator Clarence Moore’s Declaration. Marion County Coal’s Brief Opposing Temporary Reinstatement (“Opposition”) is supported by copies of the following: arbitration transcript of November 17, 2017 (Attachment A), and associated arbitration Decision and Award of December 11, 2017 (Attachment H); Marion County Coal’s Employee Conduct Rules (Attachment B); statement of Marion County Coal supervisor Adam Bond of October 19, 2017 (Attachment C); statement of Wheeling Diesel Shop mechanic Paul Dixon, undated (Attachment D); notes of Adam Bond regarding an August 14, 2017 Verbal Warning issued to Shaffer, undated (Attachment E); Disciplinary Notice to Shaffer of August 10, 2013 (Attachment F); and letter of suspension with intent to discharge Shaffer of October 23, 2017 (Attachment G).

Procedural Framework

The scope of this proceeding is governed by the provisions of Commission Rule 45(c), which limits the inquiry to a “not frivolously brought” standard by providing that “[i]f no hearing is requested, the Judge assigned to the matter shall review immediately the Secretary’s application and, if based on the contents thereof the Judge determines that the miner’s complaint was not frivolously brought, he shall issue immediately a written order of temporary reinstatement.” 29 C.F.R. § 2700.45(c).

It is well settled that the “not frivolously brought” standard is entirely different from the scrutiny applicable to a trial on the merits of the underlying discrimination complaint. In *Jim Walter Resources, Inc. v. FMSHRC*, the 11th Circuit Court of Appeals explained the standard as follows:

The legislative history of the Act defines the ‘not frivolously brought’ standard as indicating whether a miner’s ‘complaint appears to have merit’ -- an interpretation that is strikingly similar to a reasonable cause standard. In a similar context involving the propriety of agency actions seeking temporary relief, the former fifth circuit construed the ‘reasonable cause to believe’ standard as meaning whether an agency’s ‘theories of law and fact are *not insubstantial or frivolous*.’

...

Congress, in enacting the ‘not frivolously brought’ standard, clearly intended that employers should bear a disproportionately 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 the employer’s right to control the makeup of his workforce 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 738, 747-48 n.11 (11th Cir. 1990) (citations omitted) (footnotes omitted).

Ruling

The Mine Act accords to miners and miners’ representatives protection from discharge or other discriminatory acts, based on their exercise of any statutory right under the Act. 30 U.S.C. § 815(c). The Commission has consistently held a miner seeking to establish a *prima facie* case of discrimination to proving that he engaged in activity protected by the Act, and that he suffered adverse action as a result of the protected activity. *Sec’y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-2800 (Oct. 1980), *rev’d on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Sec’y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981).

The Secretary's allegations are based on the findings of the Special Investigator and, according to his Declaration, the following chronology of events occurred. Sec'y Br. at 1-3. On October 18, 2017, Kevin Shaffer complained to his supervisor, Adam Bond, that the transmission of the No. 4 ejector truck that he was operating, twice jumped out of neutral into reverse, and he requested alternative work due to the truck's unsafe condition. Bond reassigned him to a different piece of equipment. Later that shift, Bond told Shaffer that Wheeling mechanic Paul Dixon had reported to him that he saw Shaffer driving without headlights. Shaffer responded by denying Dixon's claim, and Bond, in turn, responded "I'm tired of this fucking shit on this equipment." The next day, Bond recounted the confrontation in an email that he sent to Marion County Coal's human resources department, alleging that Shaffer had cursed at him and made physical threats. That day, Marion County Coal suspended Shaffer pending an investigation, and then, on October 23, suspended him with intent to discharge. Moore concluded that Shaffer's Complaint, alleging that he was discharged for engaging in protected activity, was not frivolously brought. Sec'y Br. Attach. A at 2-3.

Marion County Coal's Opposition cites to portions of the arbitration testimony and written statements to establish that the operator was not motivated by Shaffer's safety complaints or refusal to operate unsafe mobile equipment when it terminated him and, therefore, that the Complaint was frivolously brought. According to Bond's testimony and written statement, on October 18, 2017, Shaffer radioed him that the No. 4 truck that he was operating was malfunctioning. Resp't Br. Attachs. A at 51; C. Bond further averred that, consistent with the manner in which he routinely handles such complaints, he told Shaffer to stop operating the truck, he called mechanic Dixon to service it, and he assigned Shaffer to a different truck. Resp't Br. Attachs. A at 51-52, 55; C. Shaffer's testimony corroborates that Bond did, indeed, take those actions. Resp't Br. Attach. A at 253. Later that shift, according to Bond's and Dixon's testimony and written statements, Dixon notified Bond that he saw Shaffer driving a truck downhill at high speed, without headlights. Resp't Br. Attachs. A at 64, 139; C; D. According to them, when Bond confronted Shaffer about Dixon's claim, Shaffer told Bond repeatedly "fuck you." Resp't Br. Attachs. A at 65-66, 138-42; C; D. Bond further testified that Shaffer also told him "I'm going to whip your ass; I'm going to take you to the gate," which is generally consistent with his prior written statement. Resp't Br. Attach. A at 68; C. Dixon testified that he recalled Shaffer yelling at Bond about "taking it to the gate," although his written statement makes no reference to Shaffer challenging Bond to a fight offsite. Resp't Br. Attach. A 138-42; D. According to Bond, he felt threatened by Shaffer, and the next day, he reported him to human resources. Resp't Br. Attachs. at 76; C.

Marion County Coal contends that it terminated Shaffer because he threatened Bond in violation of its insubordination policy, and because he had similar discipline in his personnel record. Resp't Br. at 8; Resp't Br. Attachs. B; G. It relies on *Fletcher v. Frontier-Kemper Contractors, Incorporated*, for the proposition that a complainant's violation of company policy supports a finding that his complaint is frivolous. 34 FMSHRC 2189 (Aug. 2012) (ALJ) (denying an application for temporary reinstatement where uncontradicted testimony demonstrated that the complainant violated the operator's policy prohibiting working under unsupported roof). Resp't Br. at 7.

The operator's reliance on *Fletcher* is misplaced here because the parties' supportive documentation set forth differing accounts of events precipitating the Complaint, which are not appropriately resolved at this stage of the proceedings; nor is the arbitration Decision binding on this Commission. See *Sec'y of Labor on behalf of Nickoson v. Mammoth Coal Co.*, 34 FMSHRC 1252 (June 2012); *Sec'y of Labor on behalf of Williamson v. CAM Mining LLC*, 31 FMSHRC 1085 (Oct. 2009). The Secretary has set forth allegations of adverse treatment, close in proximity to the protected activity, so as to create a nexus sufficient to raise an inference of discrimination. Moreover, I note that Marion County Coal expressly asserts that it does not dispute that Shaffer engaged in protected activity, and that Bond had knowledge of it. At best, Marion County Coal has shown its intent to defend its actions at hearing on the basis of legitimate business-related, non-discriminatory reasons. At this juncture, it is emphasized that the Secretary ultimately bears the burden of proving discrimination by a preponderance of the evidence, in order to sustain a violation under section 105(c). Accordingly, since the allegations of discrimination, as set forth in the Secretary's Application, have not been shown to be clearly lacking in merit, it must be concluded that they are not frivolous and, therefore, satisfy the lesser threshold in this proceeding.

WHEREFORE, the Application for Temporary Reinstatement is **GRANTED**, and it is **ORDERED** that The Marion County Coal Company **TEMPORARILY REINSTATE** Kevin R. Shaffer to the position of mobile equipment operator at its Marion County Mine, at the same rate of pay and benefits, effective December 31, 2017.



Jacqueline R. Bulluck
Administrative Law Judge

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