CCASE:
ELIAS MOSES V. WHITLEY DEVELOPMENT
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TTEXT:
FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
August 31, 1982
ELIAS MOSES

v. Docket No. KENT 79-366-D

WHITLEY DEVELOPMENT
CORPORATION

DECISION

This discrimination case raises several issues under section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $ 801 et seq. (Supp. IV 1980). These issues include whether an operator violates section 105(c)(1) by interfering with a miner's exercise of a protected right through coercive interrogation and harassment, and whether an operator violates that section by discharging a miner on the suspicion or belief that he has exercised a protected right, when in fact the miner has not. The judge answered both these questions in the affirmative in this case, and for the reasons that follow we affirm his decision. 1/ We remand, however, for the limited purpose of allowing the parties to present arguments and additional evidence concerning the proper amount of back pay to be awarded the discriminatee.

I.

Elias Moses filed a discrimination complaint alleging that Whitley Development Corporation ("Whitley") violated section 105(c)(1) of the Mine Act by firing him because it believed he had reported an accident at Whitley's mine to the Mine Safety and Health Administration. 2_/ The administrative law judge issued a decision concluding that Whitley had unlawfully interrogated and harassed Moses as to whether he reported the accident and that it had unlawfully discharged him because it suspected he had reported the accident, even though he had not. 3/ The judge awarded Moses various forms of relief including reinstatement with back pay. We granted Whitley's petition for discretionary review of the judge's decision.

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1/ The judge's decision is reported at 3 FMSHRC 746 (March 1981).

2/ Moses filed his discrimination complaint under section 105(c)(3) of the Mine Act since the Secretary of Labor, after investigating Moses' charges, declined to file a complaint on his behalf.

3/ The judge also found that even if Whitley had not discharged Moses,

it had nonetheless violated section 105(c)(1) because it failed to retain or rehire Moses solely because he had filed a discrimination complaint. Because we agree Moses was in fact illegally discharged, we find it unnecessary to review this alternative holding.

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The factual background of this case is not complicated. Whitley, which is owned by Pascual White and his wife, operates two strip mines located in proximity to one another in southeastern Kentucky. In May 1979, Moses asked Pascual White to hire him as a bulldozer operator. Moses had worked for White as a laborer some nine years before. After Moses applied for the job, his brother-in-law, an MSHA inspector who inspected the Whitley mines, also asked White to hire Moses. White testified that he decided to give Moses a job because he felt "pressured" into taking him on, and hired him without checking his ability to operate a bulldozer. 3 FMSHRC at 748, 761; Tr. 242-44. 4/ Moses started to work for Whitley on May 9, 1979.

On June 19, 1979, a bulldozer overturned at the mine where Moses was working. Although Moses did not see the accident, he was told about it by his foreman, Richard McClure. The next day, MSHA inspectors, including Moses' brother-in-law, arrived by helicopter to investigate the site. 5/ After they had left, McClure asked Moses "if he was the one that called the federal inspectors on that accident." 3 FMSHRC at 748-49; Tr. 187. 6/ Moses replied he had not. Despite Moses' denial,

4/ The judge found that Moses was hired, in part, because of the pressure placed upon Pascual White by Moses' brother-in-law, the MSHA inspector. 3 FMSHRC at 753, 761. (Substantial evidence supports the judge's rejection of Whitley's suggestion that this pressure was the only reason Moses was hired. Id.) We endorse the judge's conclusion that it was "improper" for the brother-in-law, an MSHA inspector, to ask Whitley's owner to hire Moses. Id. at 756. While Whitley expresses general criticism of this incident (Br. at 3), it advances no claim that it was legally prejudiced in the present case by any impropriety committed by the MSHA inspector in question prior to the operative events and proceedings herein.

5/ White testified that he was aware that he could request inspection by someone other than Moses' brother-in-law if he feared biased inspection. 3 FMSHRC at 761; Tr. 260. MSHA supervisory inspector Kenneth Howard, the brother-in-law's supervisor, also testified:

> [I]t's not our practice to send an inspector to inspect a job where a member of his family is working. If I'd known ... Moses was present at the time ... and that they were related[,] I wouldn't have had [Moses' brother-in-law] sent out there. Permissiveness [in the inspection under such circumstances] is a logical

assumption to make.
3 FMSHRC at 751; Tr. 124.
6/ Section 103(g)(1) of the Mine Act grants miners the right to obtain an immediate inspection by MSHA if they believe a violation of the Act or of a mandatory health or safety standard has occurred, or if they believe an imminent danger exists. It also prohibits MSHA from revealing the name of the miner requesting the inspection. The section states in part:
Whenever a representative of the miners or a miner in the case of a coal or other mine where there is no such representative has reasonable grounds to
(footnote 6 continued)
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McClure accused him in front of other employees, on two subsequent occasions, of reporting the accident to MSHA. 7/
Near the end of June 1979, Moses was laid off because the bulldozers at the mine were out of order. He was told he would be recalled when repairs on the equipment were completed. On July 2, 1979, while the repairs were still in progress, Moses and his wife drove to Whitley's repair shop to pick up his paycheck. Moses went inside and met with White. There were conflicting versions of the heated conversation that followed and the judge credited Moses' account over that of White. 3 FMSHRC at 749-50, 756-57. Moses testified that he and White argued over whether he had called the inspectors, that he told White he had not, and that he would make White prove he had. According to Moses, at the end of the argument White threatened to fire him. Moses' wife, who overheard the argument, corroborated Moses' story.
Moses drove that night to the home of MSHA supervisory inspector Kenneth Howard. He told Howard he had been accused of reporting the bulldozer accident and asked Howard to "clear" his name. Howard agreed to go to the mine the next morning and inform White that the accident had not been reported by Moses, but rather by a woman whose name had to be kept confidential.

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footnote 6 cont'd.
believe that a violation of this Act or a mandatory health or safety standard exists, or an imminent danger exists, such miner or representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, signed by the representative of the miners or by the miner, and a copy shall be provided the operator or his

agent no later than at the time of inspection, except that the operator or his agent shall be notified forthwith if the complaint indicates that an imminent danger exists. The name of the person giving such notice and the names of individual miners referred to therein shall not appear in such copy or notification.

7/ Concerning the two subsequent conversations after McClure's initial questioning, Moses stated that McClure first said to him, in front of others, "He called an inspector on us. He called his brother-in-law." Tr. 63. Moses also testified that after the bulldozer driver who was involved in the accident returned to work, McClure said, in front of the driver, "Oh, he's happy. He called his brother-in-law inspector." The driver responded, "'You mean they was out here?" And McClure replied, "Oh yeah, they come out." Moses testified that at this point, he stated: "I don't want to hear it anymore. I'm going to make you prove it." Tr. 64. The judge credited Moses' testimony. 3 FMSHRC at 756.

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The following morning, July 3, 1979, Moses went to the mine seeking confirmation that he still had a job. At that time, the bulldozers had not yet been repaired. Moses spoke with McClure, who offered Moses the opportunity to work filling drilled holes with explosives. Moses testified the offer was made in a derogatory fashion. An exchange of profanities ensued. McClure testified that he said if Moses was not going to work, it would be better for Moses to get in his truck and "go on to the house." 3 FMSHRC at 750, 754; Tr. 236. Moses took this to mean he was fired.

Later that same morning, Inspector Howard arrived at the mine. White was not there, so Howard talked to McClure. Howard explained that Moses had been to see him the night before and feared he would be discharged because of suspicions he had asked MSHA to investigate the accident. Howard assured McClure that the accident had not been reported by Moses. McClure told Howard he had already fired Moses that morning. 3 FMSHRC at 751, 754; Tr. 117.

Moses thereafter filed a discrimination complaint with MSHA. Before the bulldozers were repaired, Whitley received a copy of the complaint pursuant to section 105(c)(2) of the Mine Act. After the bulldozer repairs were completed, Moses was not recalled to work.

II.

The first issue to which we turn is whether Whitley coercively interrogated and harassed Moses concerning the reporting of the accident and, if so, whether its actions violated section 105(c)(1) of the Act. The underlying question is whether such interrogation and harassment may ever constitute a violation of section 105(c)(1).

Section 105(c)(1) states that "no person shall discharge or in any manner discriminate against ... or otherwise interfere with the exercise of the statutory rights of any miner." (Emphasis added.) We have previously noted the high priority Congress placed upon the unencumbered exercise of rights granted miners under the Mine Act. David Pasula v. Consolidation Coal Company, 2 FMSHRC 2786, 2790 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981). As we concluded in Pasula, Congress viewed the free exercise of miners' rights as "essential to the achievement of safe and healthful mines." 2 FMSHRC at 2790. Furthermore, it is clear that section 105(c)(1) was intended to encourage miner participation in enforcement of the Mine Act by protecting them against "not only the common forms of discrimination, such as discharge, suspension, demotion ..., but also against the more subtle forms of interference, such as promises of benefit or threats of reprisal." S. Rep. 95-191, 95th Cong., 1st Sess. 36 (1977) ["S. Rep."], reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 624 (1978) ["Legis. Hist."].

We find that among the "more subtle forms of interference" are coercive interrogation and harassment over the exercise of protected rights. A natural result of such practices may be to instill in the minds of employees fear of reprisal or discrimination. Such actions may

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not only chill the exercise of protected rights by the directly affected miners, but may also cause other miners, who wish to avoid similar treatment, to refrain from asserting their rights. This result is at odds with the goal of encouraging miner participation in enforcement of the Mine Act. We therefore conclude that coercive interrogation and harassment over the exercise of protected rights is prohibited by section 105(c)(1) of the Mine Act. 8/

This brings us to McClure's conversations with Moses. The judge's findings with respect to the coercive nature of McClure's interrogation of Moses and of McClure's comments concerning him are supported by substantial evidence and to the extent that these findings are credibility resolutions, will not be disturbed on review. Under section 103(g)(1) of the Act, Moses had the right to request an inspection and to do so anonymously. The persistence with which the subject of his supposed reporting of the bulldozer accident was raised and the accusatory manner in which it was done could logically result in a fear of reprisal and a reluctance to exercise the right in the future. These conversations thus constituted prohibited interference under section 105(c)(1). We address below, as part of our analysis of

the discharge issue, the question of whether Moses' lack of actual protected activity automatically precludes a finding of interference or discrimination. As we explain below, we conclude that it does not.

III.

With regard to the issue of whether Whitley violated section 105(c)(1) by discharging Moses on the suspicion he had reported the accident, we first must determine whether Moses was in fact fired. As a threshold argument, Whitley asserts that he was not, contending that he voluntarily quit after refusing alternative employment. We conclude, however, that substantial evidence supports the judge's finding that Moses was discharged.

During the crucial discussion on July 3, 1979, McClure told Moses to "go on to the house." This term, the judge found, was commonly used in the coal fields as a synonym for discharge. 3 FMSHRC at 754. The judge's finding is supported by the testimony by White himself. Tr. 265. The judge also found that Inspector Howard stated that McClure had told him later the same morning that Moses had been fired. Id. at 751, 754. The judge credited Howard's testimony, and we see no reason to disturb his finding. Finally, the judge deemed it significant that McClure failed to tell Howard that Moses had not been discharged when Howard explained to McClure that Moses could file a discrimination complaint over his dismissal. Id. at 754. We agree with the judge that if McClure had been misunderstood by Moses, surely McClure would have explained to Howard at that point that he had not fired Moses.

8/ This is not to say that an operator may never question or comment upon a miner's exercise of a protected right. Such question or comment may be innocuous or even necessary to address a safety or health problem and, therefore, would not amount to coercive interrogation or harassment. Whether an operator's actions are proscribed by the Mine Act must be determined by what is said and done, and by the circumstances surrounding the words and actions.

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Did Moses' discharge violate section 105(c)(1) of the Mine Act? The judge found the discharge occurred because the operator thought the complainant had engaged in protected activity, even though he had not. Section 105(c)(1) prohibits discharge, discrimination, or interference "because" of "a miner's exercise of any statutory right afforded by [the] Act." While a literal interpretation of this provision might require the actual or attempted exercise of a right before the protection of section 105 comes into play, we reject such a reading for two reasons. First, such an interpretation would frustrate Congressional intent that miners fully exercise their rights as participants in the enforcement of the Mine Act. Second, that approach would also wrongly fail to redress or deter situations where

an operator, with the intent of frustrating protected activity, takes adverse action against an innocent miner.

Section 105(c)(1) was intended to "be construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the [Act]." S. Rep. at 36, Legis. Hist. at 624 (emphasis added). Miners would be less likely to exercise their rights if no remedy existed for discriminatory action based on an operator's mistaken belief that a miner had exercised a protected right. Indeed, the adverse effect of such action might be even more debilitating than discrimination over actual protected activity. In such instances, employees could reasonably fear that they might be treated adversely on the basis of suspicion alone, and thus would seek to avoid even the appearance of asserting their rights. The same reasoning applies with regard to the various forms of interference such as coercive interrogation and harassment previously discussed in this decision. An equally important consideration is that an affected miner suffers as much by mistake as he would if he were discriminated against because he had actually engaged in protected activity. We conclude that discrimination based upon a suspicion or belief that a miner has engaged in protected activity, even though,in fact, he has not, is proscribed by section 105(c)(1).

We now examine the evidence surrounding Moses' termination. In Pasula, supra, we set forth an analytical framework for deciding discrimination cases. We concluded that the complainant establishes a prima facie case of a violation of section 105(c)(1) if he proves by a preponderance of the evidence that (1) he engaged in protected activity, and (2) that the adverse action was motivated in any part by the protected activity. 2 FMSHRC at 2799. We also held that an operator may respond by either rebutting the prima facie case or if it cannot rebut, by showing in defense that even if part of its motive were unlawful, (1) it was also motivated by the miner's unprotected activities, and (2) would have taken the adverse action in any event for the unprotected activities alone. Id. at 2800. See also Robinette v. United Castle Coal Co., 3 FMSHRC 803, 818 n. 20 (April 1981). A similar, but modified, framework is appropriate for resolving allegations of discrimination for the suspected exercise of a statutory right. In such cases, the complainant establishes a prima facie case by proving that (1) the operator suspected that he had engaged in protected activity, and (2) the adverse action was motivated in any part by such suspicion. The operator may, of course; still successfully rebut or further defend along the lines summarized above.

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Applying this analysis to the facts at hand, there is no doubt on this record that White and McClure believed Moses had reported the

bulldozer accident to MSHA. The next inquiry concerning the prima facie case is whether Whitley discharged Moses in any part because of this belief.

The judge found that White was very "sensitive" to what he regarded as MSHA influence on his operation, and consequently "resented the reporting of [the] accident" and was very concerned to discover who had reported it. 3 FMSHRC at 753. The judge also credited Moses' wife's testimony that during the July 2d conversation White told Moses "You don't work for them damn inspectors. I write your checks." 3 FMSHRC at 749, 757; Tr. 170. This testimony is significant because it tends to corroborate Moses' statement that during their discussion about calling the inspector, White said "You go get [your brother-in-law, the inspector], and ... you'll not work here any more." Tr. 69. Finally, on July 3d, the day of the firing, McClure's and Moses' argument, at least in part, involved who had called MSHA. This evidence supports the conclusion that Moses lost his job, at least in part, because of Whitley's belief that Moses had engaged in a protected communication with MSHA. Thus, we conclude that Moses established a prima facie case of discrimination.

We must next examine whether Whitley nevertheless would have discharged Moses for certain unprotected activities alone that it asserts were the cause of his departure. Whitley argues that Moses repeatedly failed to discharge his duties competently, and also used bad language toward McClure and White. The evidence, however, does not support a successful defense against the prima facie case. Concerning the company's allegations of Moses' inept performance as a bulldozer driver, James Davis, who was in charge of servicing the bulldozers, stated that the breakdowns in the equipment were "about the same" after Moses came to work as they were before. Tr. 138. Davis testified that he had watched Moses operate a bulldozer every day Moses worked, and had never seen him misuse the equipment. Tr. 131. When asked if Moses possessed the skill of other operators, Davis said he had seen better bulldozer operators but he had also seen worse. Tr. 137. Bobby Durham, who also worked with Moses, concurred in Davis' assessment. Tr. 153-54. This evidence undercuts the company's claim that Moses was irresponsible with the equipment. Further, Whitley failed to present any evidence as to what its usual practices and policies were with respect to bad operators of equipment. As we have noted, evidence of practices and policies consistent with the adverse action taken may be persuasive support of an operator's defense of justifiable cause. Bradley v. Belva Coal Co., 4 FMSHRC 982, 993 (June 1982). We have previously emphasized that it is not our role to concern ourselves with the general wisdom or fairness of an operator's decision to take an adverse action. See Belva Coal, supra, 4 FMSHRC at 993-94; Chacon v. Phelps Dodge Corp.,

3 FMSHRC 2508, 2516-17 (November 1981), pet. for review filed, No. 81-2300, D.C. Cir., December 11, 1981. However, in this case, we find Whitley's evidence regarding Moses' allegedly poor performance to be so weak that this defense seems virtually pretextual, and we therefore agree with the judge (3 FMSHRC at 760) that Whitley

failed. to show that it would have fired Moses in any event for this asserted reason. 9/

Whitley's other justification for termination was that Moses had a bad attitude and used abusive language with his supervisors. The judge found that because Moses had worked for respondent in 1970, Whitley "must have known what sort of person he was hiring ... in 1979," and that therefore the record failed to support a finding Moses would have been discharged for those reasons alone in any event. 3 FMSHRC at 761. Unlike the contention that Moses was an unskilled bulldozer operator, the record reveals Moses' use of bad language (Tr. 12, 70, 190, 206, 236), and also shows his "bad attitude," at least in the eyes of White. Tr. 260. Whitley argues that its justification cannot be dismissed on the basis of speculation that White knew what Moses' personality was like merely because Moses had worked for him 9 years before. If this were all that supported the judge's conclusion, we might well agree. There is nothing in the record to indicate what Moses' work habits and relationships were when he was previously employed. However, Whitley presented no evidence showing that prior to White's and McClure's angry reactions over Moses' supposed reporting of the accident they were concerned enough with Moses to fire him for those reasons. Indeed, as the judge correctly noted, much of the language and improper attitude arose in response to Whitley's unlawful and provocative attempts to determine if Moses had called the inspectors. 3 FMSHRC at 761. We thus conclude that Whitley has not proven that it would have fired Moses for his language and attitude alone. In sum, we affirm the judge's conclusion Whitley violated section 105(c)(1) when it fired Moses on the belief that he had exercised a protected right.

IV.

The final issue concerns back pay. In his notice of hearing, the judge advised the parties of his intent to render an oral decision at the close of the evidence which would later be reduced to writing. At the close of the hearing, however, the judge did not render a bench decision, but rather requested that additional evidence be submitted, including Moses' payroll record. Neither party had introduced any evidence concerning back pay at the hearing. After Whitley sent the judge a copy of Moses' payroll sheet (marked Exhibit "H"), the judge issued his written decision. The judge ordered, among other things, that Whitley reinstate Moses and pay him back wages on the basis of a

40-hour week.

9/ In an attempt to establish Moses' abuse of equipment, Whitley submitted numerous repair bills for its equipment. Moses was not the only person to operate the bulldozers, and there was no evidence connecting Moses to any of the repairs which were paid for during and after the time Moses was employed by Whitley in 1979. Although Whitley argues that the judge improperly interpreted the bills in a variety of ways, the bills are but one item leading to the judge's conclusion that Moses' allegedly poor performance would not have led to his discharge. Other evidence supports his findings, so that Whitley's justifications fail regardless of consideration of the bills.

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Whitley argues that it was deprived of due process when the judge failed to issue an oral decision at the close of the evidence. Whitley also appears to be contending that such a decision could not have included the remedy of back pay since no evidence on that issue had been offered. It further argues that it was denied an opportunity to present argument and further evidence with respect to the issue after it submitted the payroll sheet.

We find no fault in general with the decisional process adopted by the judge. The judge's intent to issue a decision from the bench at the hearing's close was not an ironclad guarantee. The dynamics of trial often reveal complicated issues requiring further contemplation. Moreover, section 113(d)(1) of the Act requires a judge to make a decision constituting a "final disposition of proceedings," and Commission Rule 65(a) states that the judge's final disposition of the proceedings "shall be in writing." 29 C.F.R. $ 2700.65(a). We have previously held that a bench decision is not a "final disposition" until it is written. Capitol Aggregates, Inc., 2 FMSHRC 1040, 1041 (May 1980). Thus, even had the judge issued his intended oral decision, it could have been subject to revision by the judge. Moreover, a claimant's failure to present evidence as to back pay is not tantamount to abandoning a claim, and, unless there are compelling reasons to the contrary, relief should nonetheless be awarded. Bobby Gooslin v. Kentucky Carbon Corp., 4 FMSHRC 1, 2-3 (January 1982). The record in this case was left open at the close of the hearing for the submission of additional evidence regarding back pay. Whitley submitted the information requested and, indeed, offered more. 10/ Under these circumstances, we perceive no abuse of due process. Nor do we believe, strictly speaking, that Whitley was denied an opportunity to present argument concerning the payroll data it submitted or to adduce further evidence with respect to the issue. Certainly no action by the judge foreclosed such a submission. Also,

Whitley did not, as it might have done, present an interpretive analysis with its data; nor did it, as it should have done, indicate to the judge or to Moses that it had additional evidence it wished to submit. In silence and inaction, Whitley came close to waiving whatever objections it might have had.

Yet we recognize that it may have been difficult for the parties to know how to proceed with regard to back pay. Although the judge stated in his notice of hearing that the issues to be tried were "whether [Moses] was discharged in violation of section 105(c)(1) of the Act so as to entitle him to ... relief ... including reinstatement ... with back pay and other benefits," he did not spell out for the parties the procedural course he wished to take with regard to the back pay issue. While the judge was not compelled to do so, under the circumstances of this case both parties might well have benefited from a detailed explanation of the procedures to be followed. Therefore, in

10/ In a letter accompanying the payroll data, Whitley's attorney stated to the judge: "If after inspecting the enclosed documents you require any further information regarding this matter I will be most happy to provide whatever you desire."

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the interest of procedural regularity and to insure fairness to the parties, we remand this matter to the judge for the limited purpose of reconsideration of back pay issues concerning the proper amount, if any, to be awarded Moses. The judge should afford the parties the opportunity to present any argument and any additional relevant evidence on back pay issues, including but, not limited to, the interpretation of the payroll data already submitted, and the proper number of hours per week upon which to compute back pay. The parties may also submit evidence, if any, with respect to any actual interim earnings of Moses since July 3, 1979.

For the foregoing reasons, we affirm the judge's conclusions that Whitley violated section 105(c)(1) of the Mine Act, and we remand for the expedited reconsideration of back pay issues.

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

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Distribution

William E. Hensley, Esq.
First National Bank Building
Corbin, Kentucky 40701

David Patrick, P.S.C.
117 Short Street
P.0. Box 9
Harrodsburg, Kentucky 40330

Administrative Law Judge Richard Steffey
Fed. Mine Safety & Health Rev. Commission
5203 Leesburg Pike, lOth Floor
Falls Church, Virginia 22041