

A Primer on Section 105(c) Complaints and Temporary Reinstatement

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I. Introduction

When Congress passed the Mine Safety and Health Act of 1977 (the “Mine Act”), it decided to include strong anti-retaliation provisions to encourage miners to become more involved in voicing concerns about mine safety. According to Congress, “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.”¹ Section 105(c)(1) of the Mine Act is the source of this protection.

This article will explain the basic issues involved the litigation of a discrimination complaint under Section 105(c) of the Mine Act. Section II will give a broad overview of the reach of Section 105(c)(1), as well as Congress’s intent for this provision as found in the legislative history of the Mine Act. Section III will discuss the various procedural requirements identified in Section 105(c)(2), and the timeframe in which a discrimination complaint will be addressed and adjudicated. Section IV will address the substantive law regarding litigation under Section 105(c)(1), including the elements to a complaint, defenses, possibly remedies, and the use of temporary reinstatement. An outline of case law examples is provided in Section V outlining common situations where discrimination has been found and where it has not been found. Finally, Section VI concludes by describing potential statutory changes to Section 105(c) that may be included in the proposed Miner Act II.

¹ S. Rep. No. 95-181 (1977).

II. Overview of Section 105(c)(1)

A. The Broad Reach of 105(c)(1)

Miners receive protection against various types of discrimination in Section 105(c)(1) for engaging in the protected activity of voicing concerns about mine health and safety issues. In passing the Mine Health and Safety Act of 1977, Congress expanded protections for miners based on the belief that the miners' willingness to assist in observing and reporting issues of mine safety to their supervisors was a vital component in the effort to improve mine health and safety standards overall. Section 105(c)(1) states the following:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.²

This statute strengthened support for not only miners, but also other groups of people affected by the Mine Act.

² 30 U.S.C. § 815(c)(1).

The protections of 105(c)(1) extend beyond miners to also include representatives of miners and applicants for employment.³ The statute also broadly defines protected activity. Worth noting are the various forms of protected activity provided for in the statute, including protection from discharge, discrimination, and interference of an individual's statutory rights that are connected to the miner's filing of a complaint related to the Mine Act, being subject to medical evaluation and transfer, and testifying or exercising rights under the Mine Act.

B. Legislative History of the Mine Act

The legislative history of the Mine Safety and Health Act of 1977 shows Congress's concern for encouraging miners to step forward and advocate for their safety without fear of reprisal. In its attempt to achieve this goal, Congress enacted a provision that broadly interpreted the definition of protected activity. Specifically, "the Committee intends that the scope of the protected activities be broadly interpreted by the Secretary, and intends it to include not only the filing of complaints . . . but also the refusal to work in conditions which are believed to be unsafe or unhealthful" as well as "the refusal to work in conditions which are violative of the Act or any standard promulgated there under, or the participation by a miner or his representative in any administrative and judicial proceeding under the Act."⁴

Furthermore, the legislative history of the Mine Act indicates Congress wanted to prohibit forms of discrimination that were not always the most obvious. It was "the Committee's intention to protect miners against not only the common forms of discrimination, such as discharge, suspension, demotion, reduction in benefits, vacation, bonuses and rates of pay, or changes in pay and hours of work, but also against the more subtle forms of interference, such as

³ See *Sec'y of Labor on behalf of Dixon v. Pontiki Coal Corp.*, 19 FMSHRC 1009 (June 19, 1997) (ALJ Melick) (holding that a non-employee representative of miners could file a discrimination complaint under Section 105(c)(1) on behalf of 11 unnamed miners who had designated him as their Mine Act representative, even though the miners did not sign the initial complaint).

⁴ S. Rep. No. 95-181 (1977).

promises of benefit or threats of reprisal.”⁵ In extending these protections, Congress hoped that miners would be more likely to become actively involved in advocating for improved safety and health standards in mining.

III. Processing of Complaint

A. The Charge Process and 60 Day Deadline

When a miner, applicant for employment, or representative of miners feels that his or her protected rights have been violated, certain procedures must followed, as set forth in the Mine Act, to file a complaint with the Secretary. Under Section 105(c)(2) of the Mine Act, a miner or applicant for employment or representative of miners (hereinafter “protected individual”) “who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary, alleging such discrimination.”⁶

The Commission has held that the 60 day deadline is not jurisdictional. However, “although the Commission repeatedly has held the time limit for filing a complaint is not jurisdictional, to withstand dismissal, the miner must establish justifiable circumstances for the late filing, or to be granted the dismissal, the operator must show it has suffered material prejudice.”⁷ Therefore, while the 60 day deadline does represent a statute of limitations bar, a miner who does not file his complaint within 60 days of the alleged discrimination must have a good reasonable for doing so or else the case can be dismissed.

⁵ *Id.*

⁶ 30 U.S.C. § 815(c)(2).

⁷ *Cole v. Newmont Midas Operation*, 26 FMSHRC 818 (2004) (ALJ Barbour).

B. MSHA Investigation

After receiving a complaint, the Secretary must “forward a copy of the complaint to the respondent” and begin an investigation as he deems appropriate.⁸ The Secretary must initiate its investigation within 15 days of the Secretary’s receipt of the complaint.⁹ Under Section 105(c)(3), the Secretary must provide written notice to the protected individual who filed the complaint within 90 days, regarding whether he has determined that a violation has occurred.¹⁰ Under Section 105(c)(2), “[i]f upon such investigation, the Secretary determines that . . . [the operator has discriminated against the complainant, the Secretary] shall immediately file a complaint with the Commission.”¹¹ The Secretary must file this complaint within 30 days of making its written decision.¹²

During its investigation of the complaint, MSHA focuses on five elements. First, the investigator must address whether the complainant was part of a protected class (i.e. miner, representative of miners, or applicant for employment).¹³ Second, whether the complainant was involved in a protected activity.¹⁴ Third, whether a discriminatory act was committed.¹⁵ Fourth, whether there was a nexus between the complainant’s protected activity and the alleged discriminatory action.¹⁶ Fifth, whether the operator has any affirmative or other defenses to the complaint.¹⁷

⁸ 30 U.S.C. § 815(c)(2).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² 29 C.F.R. §§ 2700.40(a) and 2700.41(a).

¹³ MSHA Handbook Series, Special Investigations Procedures Handbook, Chapter 2, Ex. 2-15 (August 2005).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

C. MSHA Closeout and Ability of Complainant to Proceed on his Own

If the Secretary does not find that a violation has occurred, “the complainant shall have the right, within 30 days of notice of the Secretary’s determination, to file an action on his own behalf before the Commission, charging discrimination or interference in violation” of the Mine Act.¹⁸ If an action is filed on the complainant’s own behalf, the Commission will “afford an opportunity for a hearing . . . and thereafter shall issue an order, based upon findings of fact, dismissing or sustaining the complainant’s charges, and, if the charges are sustained, granting such relief as it deems appropriate.”¹⁹ Any order is final 30 days after it is issued, and is subject to judicial review.²⁰

IV. Substance of Retaliation Complaint

A. Elements of Complaint

In order to establish “a *prima facie* case of discrimination under Section 105(c) of the Act, [the complainant] bears the burden of establishing (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity.”²¹ “On these issues, the complainant must bear the ultimate burden of persuasion.”²² Basically, there must be a connection between any adverse action, such as discharge or disparate treatment, and a miner’s protected right under the Mine Act.

B. Defenses to Charge

The operator may rebut a miner’s *prima facie* case by proving that no protected activity occurred or that any adverse action was not motivated in any part by protected activity.

¹⁸ 30 U.S.C. § 815(c)(3).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Secretary on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (October 1980), *rev’d on other grounds.*

²² *Id.*

According to *Secretary on behalf of Pasula v. Consolidation Coal Co.*, if the prima facie case cannot be rebutted, “[t]he employer may affirmatively defend . . . by proving by a preponderance of all the evidence that, although part of his motive was unlawful, (1) he was also motivated by the miner's unprotected activities, and (2) that he would have taken adverse action against the miner in any event for the unprotected activities alone.”²³

In *Pasula*, the Commission further held that “the employer must bear the ultimate burden on persuasion” on these issues.²⁴

It is not sufficient for the employer to show that the miner deserved to have been fired for engaging in the unprotected activity; if the unprotected conduct did not originally concern the employer enough to have resulted in the same adverse action, we will not consider it. The employer must show that he did in fact consider the employee deserving of discipline for engaging in the unprotected activity alone and that he would have disciplined him in any event.²⁵

However, an operator does not establish what is called the *Pasula-Robinette* affirmative defense if a work rule or policy that the miner is alleged to have violated was applied discriminatorily to the miner or in a manner deliberately calculated to render his compliance difficult or impossible in such cases.²⁶

C. Range of Remedies and Penalties

According to the legislative of the Mine Act, “[i]t is the Committee’s intention that the Secretary propose, and that the Commission require, all relief that is necessary to make the complaining party whole and to remove the deleterious effects of the discriminatory conduct.”²⁷

²³ *Secretary on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799-2800 (Oct. 1980), *rev'd on other grounds*; see also *Sec'y of Labor on behalf of Robinette v. United Castle Co.*, 3 FMSHRC 817 (April 1981).

²⁴ *Secretary on behalf of Pasula v. Consolidation Coal Co* 2 FMSHRC, 2786, 2800 (Oct. 1980), *rev'd on other grounds*.

²⁵ *Id.*

²⁶ *Sec'y of Labor on behalf of Price v. Jim Walter Resources, Inc.*, 12 FMSHRC 1521 (Aug. 20, 1990).

²⁷ S. Rep. No. 95-181 (1977).

This includes “reinstatement with full seniority rights, backpay with interest, and recompense for any special damages sustained as a result of the discrimination.”²⁸

Interestingly, a miner’s refusal of reinstatement can cut off back pay at the time of the refusal. In *Sec’y of Labor on behalf of McClain v. Misty Mountain Mining, Inc.*, four miners were discharged in retaliation for safety complaints.²⁹ Where the miners were offered reinstatement, and turned the offer down, ALJ Hodgdon stated that the miners were “entitled to back pay up until the time that they turned down reinstatement, but not thereafter.”³⁰

D. Temporary Reinstatement

The Mine Act provides for a low threshold with regard to the evidence needed to find temporary reinstatement for a miner. Under Section 105(c)(2) of the Mine Act and Commission Rule 45(d), the scope of a temporary reinstatement hearing is limited to a determination of whether a miner’s complaint was “frivolously brought.”³¹ “[I]f the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis, upon application of the secretary, shall order the immediate reinstatement of the miner pending final order on the complaint.”³² Furthermore, “[t]he burden of proof shall be upon the Secretary to establish that the complaint was not frivolously brought.”³³

In *Jim Walter Resources v. FMSHRC*, the United States Court of Appeals for the Eleventh Circuit equated the “frivolously brought” standard to a “reasonable cause” standard used in other contexts.³⁴ In order to satisfy this standard, the claims of both (i) law and (ii) fact

²⁸ *Id.*

²⁹ *Sec’y of Labor on behalf of McClain v. Misty Mountain Mining, Inc.*, 27 FMSHRC 690 (Oct. 21, 2005) (ALJ Hodgdon)

³⁰ *Id.* at 705.

³¹ See 29 U.S.C. § 2700.45(d); 30 U.S.C. § 815(c)(2).

³² 30 U.S.C. § 815(c)(2).

³³ 30 U.S.C. § 2700.45(d).

³⁴ *Jim Walter Resources v. FMSHRC*, 520 F.2d 738, 747 (11th Cir. 1990) (citing *Boire v. Pilot Freight Carriers, Inc.*, 515 F.2d 1185, 1189 (5th Cir.1975), *cert. denied*, 426 U.S. 934 (1976)).

must not be “insubstantial or frivolous.”³⁵ In creating a standard that can be met without much difficulty, Congress felt that “temporary reinstatement is an essential protection for complaining miners who may not be in the financial position to suffer even a short period of unemployment or reduced income pending the resolution of the discrimination complaint.”³⁶

V. Case Law Examples

The factual scenarios of past decisions of the Commission and its ALJs can provide guidance regarding what constitutes discrimination under Section 105(c) of the Mine Act. This section outlines specific case examples of circumstances under which discrimination was found under Section 105(c) and situations where there was no finding of discrimination. These cases touch on a variety of situations where discrimination was or was not found, based on factors such as whether there was protected activity, whether there was an adverse action by the company against the miner, and whether a nexus exists between a protected activity and an adverse action.

A. Discrimination Found

In *Sec’y of Labor on behalf of Keene v. Mullins*, the D.C. Circuit upheld the Commissions finding that a mine operator committed two 105(c) violations where it discharged an electrician that refused to bridge out equipment to bypass safety mechanisms, and then tried to rehire him subject to the same condition.³⁷ With regard to the secondary violation, the court held that “an offer of reemployment conditioned on a miner’s willingness to work under dangerous conditions of which a miner has previously complained surely qualifies as a more subtle form of

³⁵ *Id.*

³⁶ S. Rep. No. 95-181 (1977).

³⁷ *Sec’y of Labor on behalf of Keene v. Mullins*, 888 F.2d 1448 (D.C. Cir. 1989).

discrimination.”³⁸ This is a clear example of an adverse action, the discharge, which was directly connected to the miner’s refusal to work under unsafe conditions.

Similarly, in *Sec’y of Labor on behalf of Gray v. North Star Mining, Inc. et al*, the Commission vacated an ALJ’s dismissal of a discrimination claim where a mine official threatened a miner.³⁹ In this case, a mine official confronted a miner and stated that he would “kill” the miner if he testified against him.⁴⁰ This led to his constructive discharge.⁴¹ Here, even though there was no formal discharge, the Commission held that an operator’s coercive interrogation could violate Section 105(c)(1) of the Mine Act if it interfered with the miner’s exercise of protected right to participate or testify in proceedings related to the Mine Act.⁴²

A constructive discharge can also be more subtle than overt threats or harassment. In *Sec’y of Labor on behalf of Glover v. Consolidation Coal Co.*, the Commission found a violation of Section 105(c) where two miners who exercised their protected rights to be “walkaround representatives” were transferred to more dangerous assignments.⁴³ The two miners were transferred from their positions as scooter barn mechanics to positions as underground mechanics.⁴⁴ Here, the Commission found a link between this adverse action, a job transfer, and the exercise of rights protected under the Mine Act.

B. No Discrimination Found

Where there is no nexus between a complaint and an alleged adverse action, there can be no discrimination under Section 105(c). In *Dowlin v. W. Energy Co.*, an operator’s reassignment of a miner to a job that he thought was “boring” was not a wrongful provocation, and the miner

³⁸ *Id.* at 255.

³⁹ *Sec’y of Labor on behalf of Gray v. North Star Mining, Inc. et al.*, 27 FMSHRC 1 (Jan. 12, 2005).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Sec’y of Labor on behalf of Glover v. Consolidation Coal Co.*, 19 FMSHRC 1529 (Sept. 29, 1997).

⁴⁴ *Id.*

was not constructively discharged, even though he had made a safety complaint a few years earlier.⁴⁵ According to ALJ Manning, the miner was not involuntarily terminated where the miner's "behavior led the company to believe that he had quit," because "a reasonable miner would not have been compelled to quit."⁴⁶ In addition, the length of time between the safety complaint and the alleged adverse action played a part in ALJ Manning's decision.⁴⁷

Also, a miner who feels he was discriminated against under Section 105(c) must clearly voice the complaint rather than keeping it to himself. In *Underwood v. Hunt Midwest Mining, Inc.*, a discrimination complaint was dismissed where a miner was absent from work for three consecutive days.⁴⁸ Although the miner asserted that he refused to report to a new job assignment because he was not qualified to perform the job safely, the evidence showed that the miner accepted the job assignment and never actually refused to work.⁴⁹ Here, because there was no explicit complaint made, there could be no violation of 105(c).

In addition, there can be no discrimination without an adverse action on the part of the mining operator. In *Woodruff v. Hollinger Construction, Inc.*, the complainant failed to prove that his employer took any adverse action against him or constructively discharged him.⁵⁰ In this case, the complainant alleged that he quit his job because there were no respirators available for him at the plant at that time.⁵¹ Although asking for a respirator is protected activity under Section 105(c), without termination or discipline, there was no adverse action.⁵² Also, the

⁴⁵ *Dowlin v. W. Energy Co.*, 28 FMSHRC 23, 32 (Jan. 20, 2006) (ALJ Manning).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Underwood v. Hunt Midwest Mining, Inc.*, 23 FMSHRC 1070 (Sept. 18, 2001) (ALJ Melick).

⁴⁹ *Id.*

⁵⁰ *Woodruff v. Hollinger Construction, Inc.*, 24 FMSHRC 957 (Nov. 5, 2009) (ALJ Manning).

⁵¹ *Id.*

⁵² *Id.* at 961.

complainant failed to prove that his employer “created or maintained conditions that were so intolerable that a reasonable miner would have felt compelled to resign.”⁵³

VI. Proposed Statutory Changes in Miner Act II

At this time, a number of changes to the Mine Act, and Section 105(c), are under consideration for inclusion in proposed legislation called Miner Act II. Among the sources of insight for possible changes is an April 20, 2009 letter from Hilda L. Solis, Secretary of Labor, in which she offered her thoughts on what should be included in Miner Act II.⁵⁴ Two provisions being discussed that relate to Section 105(c) involve changes to penalties that can be imposed on mine operators and presumptions of discrimination. One potential change would increase the range for monetary penalties against mine operators for Section 105(c) violations to between \$10,000 and \$100,000. A second change would require a rebuttable presumption of discrimination when an adverse action occurs within six months of protected activity. The inclusion of a rebuttable presumption would make it easier for MSHA to prosecute Section 105(c) violations. Although these potential changes could be included in the proposed Miner Act II, they are currently only a few of the many topics being discussed in relation to the proposed legislation.

⁵³ *Id.*

⁵⁴ It should be noted that this letter was written before Joe Main took office as the Assistant Secretary of Labor for Mine Safety and Health (MSHA) on October 21, 2009, and, therefore, the opinions contained therein may not reflect the current stance of the administration.