



Mining MSHA – Discrimination Complaints

Insights

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Welcome to “Mining MSHA,” a regular series of posts focusing on mine safety fundamentals – but designed for both new and experienced mine safety professionals. This series will help safety professionals develop their MSHA legal knowledge, as we explore over 40 years of case law developed by the Federal Mine Safety and Health Review Commission and its bench of Administrative Law Judges. You will want to share this series with your safety personnel at all levels, because understanding what MSHA can and cannot legally do is the first step in managing your relationship with this enforcement agency. Join your Fisher Phillips Mine Safety team as we mine legal knowledge from the body of Federal Mine Safety and Health law.

We now move to one of the more complex areas of mine safety and health law – discrimination complaints. Section 105(c) of the Federal Mine Safety and Health Act provides protections against retaliation for engaging in conduct protected under the Act. This article will explain what a discrimination case is and what steps operators can take to successfully navigate this area of law.

What Is A Discrimination Complaint?

Section 105(c) of the Mine Act provides:

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 . . . has filed or made a complaint under or related to this Act, including a complaint notifying the operator . . . of an alleged danger or safety or health violation . . . or because such miner . . . is the subject of medical evaluations and potential transfer . . . or because such miner . . . 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 . . . of any statutory right afforded by this Act.

30 U.S.C. Section 815(c)(1)

As you can see, a discrimination complaint under 105(c) of the Mine Act has several elements. Basically, a member of a protected class claims they have engaged in protected activity and suffered some form of adverse action because of that protected activity.

Protected Class

A miner is any individual working in a coal or other mine and includes supervisory employees and owner-operators. Protected class members include:

- Miners (including supervisors and foremen);
- Miners' representatives; and
- Applicants for employment.

Protected Activity

To encourage active participation in the enforcement of the Mine Act, Congress provided protection for miners who engage in matters of mine safety and health against any possible discrimination they might experience as a result of their participation. The scope of protected activity is interpreted broadly, and this list is not exclusive. Protected activity can be:

- Making a complaint to MSHA;
- Making a complaint to management;
- Reporting conditions observed during workplace examinations;
- Participating in an MSHA inspection;
- Refusing to work in unsafe conditions; or
- Participating in any proceeding under the Mine Act, such as a hearing or special investigation.

Adverse Action

Adverse action typically involves discharge or suspension but can take many forms where the miner is forced to resign from their job because of the actions of the operator or other person. It could also be a multitude of other retaliatory actions that subject the miner to a detriment to their employment status. Adverse action may involve:

- Termination, discharge, laying off;
- Demotion;
- Refusal to hire;
- Pay reductions or other reductions in benefits, such as vacation time or bonuses;
- Reduction in pay or hours worked;
- Transfer to less desirable job position or shift;
- Harassment or permitting an employee to be harassed; and
- Interference with rights afforded by the Mine Act.

Causal Nexus

There must be some connection between the alleged protected activity and the adverse action. Very few cases have direct evidence of what motivated an operator's actions, so cases often focus on

evaluating factors that may show the presence of improper motivation. Among the factors that might be considered are:

- Operator knowledge of the alleged protected activity;
- Evidence of disparate treatment;
- Hostility toward protected activity;
- Timeliness between the alleged protected activity and adverse action; and
- Operator admission of discrimination.

Affirmative Defenses

Operators can defend against a discrimination claim by proving that the miner would have been disciplined for unprotected activity alone. For example, the miner would have been terminated for subordination, dishonest, absenteeism, poor or unsafe work performance, and other similar offenses. Operators have affirmative defenses available, involving:

- There was a legitimate business reason for any adverse action based on unprotected activity;
- The miner voluntarily quit or was laid off pursuant to a contract; and
- The operator was not aware of the miner's protected activities.

Liability

Section 105(c) prohibits "any person" from discriminating against miners engaged in protected activity. This means any individual, partnership, association, corporation, firm, or subsidiary can be liable for violating the provisions of 105(c). This expansive definition includes labor unions. The only potential limitation to liability may be that any "person" must affect the employment status of the miner.

Remedy

Remedies under section 105(c) are intended to restore a miner subject to discrimination to the position where they would have been but for the discrimination. The miner may be rehired, may receive backpay and interest, or any such remedy that might be appropriate.

Typically, an award of back pay includes any benefits or other payments and contributions in a wage-benefit package, including possible vacation pay. Back pay may be reduced by the amount a miner earned at another job during any discharge or suspension or if the miner has failed to mitigate damages by seeking other employment. There is also the potential for civil monetary penalties if a violation of 105(c) is found.

Avoiding 105(c) Liability

Operators should be familiar with the elements of a discrimination case and how to handle employee discipline and miner complaints. Know your policies and procedures and treat everyone the same.

Many operators have found themselves in the position of having to explain employee discipline in one case but not another when it arises out of the same incident.

Operators should also take steps to train employees on all policies and procedures. Make sure your employee handbook has clear policies and an employee acknowledgement form that employees sign stating they understand the policies. Encourage employees to bring concerns to management – and address any concerns raised. Operators should have a plan for how to handle employee concerns and even how to conduct internal investigations if significant issues are discovered.

In the next issue, we will cover another important topic – Temporary Reinstatement. Stay tuned, and don't forget to reach out to your mine safety lawyer, or [any attorney in our Mine Safety & Health group](#), for specific questions and guidance on any of the topics covered in this series.

This Legal Alert provides an overview of a specific developing situation. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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