

CLIENT ALERT

Two Recent Court Decisions Herald Positive Developments for Mine Operators in § 105(c) Whistleblower Cases

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Two recent decisions in whistleblower retaliation cases under § 105(c) of the Mine Act have important implications for mining companies and their employees.

For the first time, the Federal Mine Safety and Health Review Commission ("the Commission") explicitly held that it would apply the U.S. Supreme Court's test for what constitutes "adverse action" in Title VII whistleblower cases to cases arising under the Mine Act. In *Secretary of Labor on behalf of Pendley v. Highland Mining Co.*, citing the Court's 2006 decision in *Burlington Northern & Santa Fe Railway Co.*, the Commission held that in order to support a claim for unlawful retaliation, the action taken against the miner must be "materially adverse," which means that it would dissuade a reasonable employee from exercising rights protected under the Mine Act. In adopting a "materiality" standard, the Commission raised the bar for miners who would seek to hold their employers liable for allegedly retaliatory but objectively insignificant employment actions.

In another case of first impression, *North Fork Coal Corp.*, the U.S. Court of Appeals for the Sixth Circuit held that a miner who has been granted temporary reinstatement is not entitled to continued temporary reinstatement once the Secretary of Labor ("the Secretary") determines that no violation of the anti-retaliation provision of the Mine Act occurred, even if the miner pursues his claim on his own. Ordinarily, a miner who alleges that he was fired because he made safety complaints or engaged in other protected activity is entitled to be temporarily reinstated to his former position while the Secretary investigates his claim, provided that neither the Secretary nor the Commission finds the claim to be frivolous. Several years ago, the Secretary adopted the position that once a miner had been granted temporary reinstatement, even if the Secretary ultimately determined that no violation of the Mine Act had occurred, temporary reinstatement should nonetheless continue until a final ruling on his claim if the miner pursued the case on his own. A divided Commission accepted that view in *North Fork*, but the Sixth Circuit reversed. More might be said on this, however – the same question is currently pending before the U.S. Court of Appeals for the Seventh Circuit in *Vulcan Construction Materials*.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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