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SHARON ACE, v. CONSOLIDATION COAL  
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Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

SHARON A. PACE, COMPLAINANT v.	Complaint of Discrimination, Discharge, or Interference
CONSOLIDATION COAL COMPANY, RESPONDENT	Docket No. SE 80-113-D Matthews Mine

DECISION

Appearances: Dorothy B. Stulberg, Esq., Mostoller & Stulberg, Oak Ridge, Tennessee, for Complainant  
Louis R. Hagood, Esq., Arnett, Draper & Hagood, Knoxville, Tennessee, for Respondent

Before: Judge Melick

This case is before me upon the complaint by Sharon A. Pace pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," alleging that she was unlawfully discharged by Consolidation Coal Company (Consolidation). A hearing was held on November 13, 1980, in Knoxville, Tennessee, at which both parties, represented by counsel, appeared and presented evidence.

The issue in this case is whether Ms. Pace was unlawfully discharged by Consolidation in violation of section 105(c)(1) of the Act because of her alleged safety-related activities at Consolidation's Matthews Mine. Section 105(c)(1) reads in part as follows:

No person shall discharge or in any other manner discriminate against \* \* \* or otherwise interfere with the exercise of the statutory rights of any miner \* \* \* because such miner \* \* \* has filed or made a complaint under or relating to this Act, including a complaint notifying the operator or the operator's agent \* \* \* of an alleged danger or safety or health violation \* \* \* or because such miner \* \* \* is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 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 \* \* \* on behalf of himself or others of any statutory right afforded by this Act.

If the complainant proves by a preponderance of the evidence that she was engaged in a protected activity and that her discharge by the operator was motivated in any part by the protected activity then she has established a prima facie case under this section of the Act. Secretary of Labor on behalf of David Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (October 14, 1980).

It is undisputed that Ms. Pace, a general laborer at the Matthews Mine since July 31, 1978, was discharged from her job on March 28, 1980. She alleges in her pleadings that the discharge was motivated by the fact that she had been interviewed by an MSHA inspector at her home on February 22, 1980, in the course of his investigation of an alleged safety violation at the Matthews Mine. For purposes of this decision, I need not determine whether such activity is protected under section 105(c)(1) since I do not find from the credible evidence of record that Ms. Pace's discharge was motivated in any part by that alleged activity. Indeed, Ms. Pace conceded in her testimony that she had no evidence, and in essence could not therefore prove, that any company official had any knowledge at the time of her discharge, that she had been so interviewed by the inspector. (FN.1) Ms. Pace appears to suggest that although she has no evidence that any company official was aware at the time of her discharge of the February 22 interview, that administrative or official notice should be taken to establish that fact and presumably to also establish that her discharge was motivated by that fact. Not even the concept of official notice would, however, permit the creation of facts which have not been shown to have any existence. McCormick's Law of Evidence, Second Edition, 1972, 357

The only affirmative evidence on point comes from the testimony of the Consolidation officials who testified at hearing. The testimony of mine superintendent Ron Smith, the person who made the decision to discharge Ms. Pace, is particularly significant. That testimony, which I find to be completely credible, confirms that the official responsible for discharging Ms. Pace did so without knowledge of the alleged confidential interview Ms. Pace had with the MSHA inspector on February 22, 1980. It follows that Complainant's discharge could not have been motivated in any part by that alleged protected activity. Complainant has thus failed in her burden of proof. Pasula, supra.

I observe that, in any event, Complainant's discharge by Superintendent Smith on March 28, 1980, was the direct result of her committing an admittedly unprotected and dischargeable offense, i.e., sleeping on the job. As to this event, I accept the credible testimony of Mack Jones, a foreman for Consolidation for over 10 years. Jones testified that around 1:30 or 2 in the morning of March 28, as he was walking along the belt line, he saw a

miner's light shining at the roof. As he moved closer, he saw someone leaning back against the rib with her eyes closed. He recognized that person as Complainant Pace. He watched her for a short time, concluded that she was asleep, then shined his light in her eyes a few times. She "jerked her head" and woke up. She admitted to Jones that she had been sleeping. Jones thereupon called outside to the mine office and set up a meeting with Superintendent Smith. According to Jones, Pace admitted several times at that meeting that indeed she had been sleeping. James Keller, Supervisor of Employee Relations, as well as Smith corroborated that Pace had indeed admitted sleeping on the job. It was at this time that Smith discharged Ms. Pace.

At hearing in this case, as at her arbitration hearing, Pace denied that she had been sleeping and denied admitting at the meeting in Smith's office that she had been asleep. In assessing the credibility of Complainant's testimony, the analysis given of her statements at the arbitration proceeding by arbitrator Thomas Phelan is worthy of consideration. See Pasula, supra, regarding the weight to be given such a determination. Phelan's analysis was as follows:

As to the proof of the charge that the Grievant [Ms. Pace] was asleep, the case is a difficult one because there were only two people present when the offense was alleged to have been committed. One of them was the foreman and the other was the Grievant. That type of situation makes the credibility of the witnesses all important and requires that all of the surrounding circumstances be carefully examined to determine whether they lend support to either party's position. In the present case, the testimony relevant to the surrounding events on March 28 support the company's position. There was no question that there was a rule against sleeping in the mine, that the Grievant was aware of the rule and aware that she would be taken out of the mine if she was caught sleeping. Knowing that, she still put herself in a position where she could reasonably be assumed to be asleep by stretching out with her head back and not moving at all even when she said that she knew she was being watched by someone. Having assumed the position of someone asleep, it was entirely reasonable for the foreman to conclude that she was asleep. Then, when the foreman asked her, or even told her, of his conclusion, she did not deny it but just followed him out of the mine. Even if the Grievant had not admitted to being asleep at that point, the lack of a denial of the charge under the circumstances takes on significance.

When the Grievant and foreman met with the superintendent there was a discussion of what happened in the mine and the testimony about that discussion is somewhat conflicting as would be expected. The company witnesses testified that the Grievant admitted twice that she had been asleep but the Grievant's testimony

was to the effect that she denied having

made such admissions. However, at the 24-48 hour meeting, she concededly did not remember what she had said at the previous meeting and that concession weakens her testimony considerably because it makes it appear that her position was changing after she knew that the company was going to go forward with the discharge. Nobody comes to an arbitration hearing with a greater presumption of credibility and all of the testimony has to be weighed in light of the surrounding circumstances. Here, the circumstances support the testimony of the company's witnesses and their testimony was entirely believable. I find as a fact, therefore, that the Grievant actually was asleep in the mine at least for a short period of time.

After making my own independent evaluation of the evidence I find that I am in complete agreement with Arbitrator Phelan's considered analysis of credibility. I conclude therefore that indeed Ms. Pace was sleeping on the job. This offense admittedly being a dischargeable one independent of any protected activity, it is clear for this additional reason that the complaint herein must fail. The complaint is accordingly DISMISSED.

Gary Melick  
Administrative Law Judge

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(FOOTNOTES START HERE.)

~FOOTNOTE\_ONE

1 Ms. Pace observed at hearing that she was also interviewed by the inspector on January 15, 1980, inside the mine, but conceded that all the other miners on her section were similarly interviewed and she admits that only her confidential interview with the inspector on February 22, 1980, sets her apart from the others.