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WILLIAM McCLAIN V. WESTMONT COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

WILLIAM C. MCCLAIN,
COMPLAINANT

v.

WESTMONT COAL COMPANY,
INC.,
RESPONDENT

Complaint of Discharge,
Discrimination or Interference

Docket No. PENN 81-162-D

PITT CD 81-9

DECISION

Appearances: James T. Davis, Esq., Davis & Davis, Uniontown,
Pennsylvania, for Complainant;
Robert A. Kelly, Esq., Cauley, Birsic & Conflenti,
Pittsburgh, Pennsylvania, for Respondent

Before: Judge Melick

This case is before me upon a complaint filed under 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 William C. McClain was suspended by Westmont Coal Company, Inc. (Westmont) in violation of section 105(c)(1) of the Act. (FOOTNOTE 1) An evidentiary hearing was held on McClain's complaint in Pittsburgh, Pennsylvania, commencing September 8, 1981.

Mr. McClain can establish a prima facie violation of this section of the Act if he proves by a preponderance of the evidence that he has engaged in an activity protected by that section and that the disciplinary action against him was motivated in any part by that protected activity. Secretary of Labor ex rel. David Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980), rev'd. on other grounds, Consolidation Coal Company v. Secretary of Labor, No. 80-2600 (3d Cir., October 30, 1981). He alleges as protected activity his participation in the union safety committee and, in particular, his filing in this capacity of six safety complaints against Westmont. Westmont does not dispute that these activities are protected within the scope of section 105(c)(1), but contends that the disciplinary action taken against McClain was not motivated in any part by those activities. (FOOTNOTE 2) Westmont maintains that this disciplinary action was solely the result of McClain's misconduct on January 6, 1981, in shooting a deer on neighboring property, out of season, during the period of his work shift, and while using a company pickup truck. For the reasons that follow, I find that McClain has failed to sustain his burden of proving that the disciplinary action taken by Westmont was motivated in any part by his protected activities.

Since there is no dispute that McClain engaged in protected activities, the essential question to be decided is whether McClain has sustained his burden of proving that the disciplinary action taken against him was motivated in any part by those activities. Pasula, supra. As evidence of vindictiveness (and presumably motivation to unlawfully discipline him), McClain first points out that he issued three safety complaints on union-furnished forms to Westmont on September 9 and 10, 1980. McClain alleges that Andrew Hynick, then mine superintendent, declined to sign for the complaints and refused to accept a copy. There is no allegation that Hynick was obliged in any way to perform these acts and Hynick testified that he was fully aware of the substance of the complaints and had the cited problems corrected. According to Hynick, he declined to sign the written complaints because McClain had failed to follow customary procedures to approach him first with an oral complaint.

As further purported evidence of unlawful motivation, McClain contends that beginning in October 1980, and continuing the next 2 months, on "numerous" occasions he requested that Mr. Hynick arrange to have a "40-hour safety course" presented. McClain alleges that his persistence in seeking to have that course presented irritated Hynick to such an extent that it resulted in his discharge on February 24, 1981. Hynick testified, on the other hand, that he recalled being approached about the course only once and presumably, therefore, did not find it particularly irksome. The safety training was in fact presented in due course during the week of January 19, 1981.

~2605

McClain next contends that following an inspection by mine safety committee members on February 2, 1981, he, as a member of that committee, reported a number of safety violations to the company, including what the committee deemed to be an imminent danger regarding abandoned auger holes. McClain testified that the company was accordingly required to take immediate corrective action requiring the temporary transfer of equipment and men from production work. He also mentions a complaint that the mine safety committee filed with the company as a result of a purported explosion near working employees on February 7, 1981. McClain presumes that these too were sources of ill will toward him.

While each of these four incidents cited by the Complainant as protected activities could theoretically provide a basis for an unlawful motive, there is insufficient evidence to show any causal connection between the incidents and the disciplinary action. I find the first two incidents cited to be particularly trivial and hardly of a nature likely to give rise to the serious discriminatory response alleged. The possibility of a causal relation is made even more remote by the lapse of time--nearly 6 months between the first incident and McClain's initial discharge. Although the latter two incidents cited are of a more serious nature, no explanation is given as to why other members of the mine safety committee and the chairman of that committee did not suffer discrimination. It appears that they were equally responsible (the chairman even more so) for the safety complaints but there is no evidence that any one of these miners was singled out for any discriminatory treatment. Indeed, the only factor distinguishing McClain from these other committeemen is his admitted unlawful deer hunting. In short, I find that the Complainant has simply failed in his burden of proving that the operator was motivated in its discipline of him by any of the protected activities.

As other evidence of vindictiveness, McClain cites the testimony of former co-worker Roland Sterbetzel. Sterbetzel testified that in September 1980, he overheard a conversation between Superintendent Hynick and an employee named Roll. From what he was able to overhear, he concluded that Hynick wanted to have Roll engage McClain in a fight in order to "get rid of him because of his union activities." According to Sterbetzel, Roll disliked McClain and had apparently complained about him in the past in efforts to get McClain fired. Roll did not appear at the hearing. Hynick testified that what actually happened was that Roll approached him and offered to get into a fight with McClain so that McClain could be fired. Hynick testified that he paid no attention to Roll's offer and walked away without responding. There is no evidence that Roll ever did engage McClain in a fight and no evidence that McClain's "union activities" related to any activity protected by the Act. I find in any event that Hynick's version of the conversation to be the more credible and reliable. On the one hand, Sterbetzel had merely "overheard" the conversation or part thereof and accordingly it is not unlikely that he obtained an inaccurate understanding of it. On the other hand, the reliability of Hynick's testimony is assured by the

fact that he was a direct participant in the conversation. The failure of the Complainant to support his version of the conversation by calling the other direct participant as his witness must also be considered.

Even if it could be argued that Westmont was motivated in part by Complainant's protected activities, there is ample evidence from which it may be concluded that it would have disciplined him in any event for his unprotected activities alone. Pasula, supra. Westmont asserts herein that its action was solely the result of McClain's willful misconduct in violating Pennsylvania law and company policy in shooting a deer out-of-season on neighboring property and while using a company vehicle to aid in the accomplishment of this act during the period of his regular working shift. As a result of such misconduct, McClain subjected Westmont to potential civil and criminal liability and created a potentially damaging source of ill will with adjacent property owners and State officials. Moreover, if Westmont permitted such employee misconduct without appropriate sanctions, it could seriously erode its ability to meet legitimate management responsibilities.

At the time of the incident, McClain had been employed by Westmont at its coal strip mining operation for almost 3 years. He had been working as a bulldozer operator but on January 6, 1981, he was working the 5 a.m. to 12 noon shift as an oiler for the dragline. Shortly before 9 that morning, he drove a company truck to the fuel depot about one-half mile from the dragline. At the depot, he unloaded several barrels, picked up some rags and parts as well as his lunch bucket and a loaded rifle from his car. He claims that he intended to show the rifle to another employee who was interested in purchasing a gun. While returning to the dragline, he spotted a deer crossing the road. He claims that he was on the haulage road about 20 yards from the public township road when he actually shot the deer. He dragged the deer to the truck and transported it to the dragline where he removed it, gutted it and returned to work. He claims that only 20 to 25 minutes had elapsed from the time he shot the deer until he completed gutting it. He further alleges that he did not eat his lunch during that shift and considered that period as his lunch time.

After his shift, at around 12:25 p.m., a Pennsylvania State game warden questioned him. McClain admitted shooting the deer and turned the still loaded gun over to the warden. He had hidden it on the dragline during the remainder of his shift. McClain subsequently paid \$200 in fines for violations of State game laws and lost his hunting license for 3 years.

Only one deer was shot that day in the vicinity of the haulage/township road and the credible evidence presented at the hearing shows that that deer had been shot on the private property of Joan Waldron, who lived adjacent to the Westmont Mine. Another neighbor, Allen Wiltrout, described the spot where the deer had been shot, dragged out, and loaded onto a truck. Since the deer had apparently been shot out-of-season he had his daughter call the game warden. Wiltrout later accompanied two of the wardens as they pursued their investigation. They discovered the company pickup truck at the dragline and found blood and hair from the deer still in the truck. According to Wiltrout, the Westmont property line was clearly marked in that area by a fence

line that separated the township road from the company haulage road.

On January 7, 1981, the day after the deer was shot, John Aloe, Westmont's president, received a phone call from Joan Waldron. According to Aloe, she

~2607

was frantic, speaking in a high-pitch crackling voice. She was obviously upset. Ms. Waldron reported that a Westmont employee had been poaching on her property and wanted to have that employee transferred. Aloe thereupon began an investigation to find the responsible employee. After much effort, Superintendent Hynick finally succeeded in obtaining McClain's name from state officials. As a result, on February 19, 1981, McClain was issued a notice of disciplinary action.

Within this framework of evidence, I conclude that Westmont was indeed justified in taking disciplinary action against McClain and that it acted on the basis of his unprotected activities alone. McClain himself has conceded that he showed bad judgment. While he also produced evidence that previous mine management had permitted the carrying of guns onto Westmont property for the purpose of deer hunting on the property during hunting season, he produced no evidence to suggest that Westmont had ever permitted the use of company vehicles to further any deer hunting, the secreting of loaded weapons on company equipment, shooting deer during the employee's shift, hunting on neighboring property, or hunting out of season.

Under all the circumstances, I find that McClain has failed to sustain his burden of proof under section 105(c)(1) of the Act. Pasula, supra. The complaint herein is therefore DENIED and the case DISMISSED.

Gary Melick
Administrative Law Judge

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~FOOTNOTE_ONE

1 Section 105(c)(1) of the Act provides as follows:

"No person shall discharge or in any manner discriminate against or caused 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 any 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 evaluation 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."

~FOOTNOTE_TWO

2 McClain was discharged by Westmont by letter dated

February 1981. That action was modified, however, at arbitration proceedings and McClain was ordered reinstated but suspended without pay from February 27, 1981, to March 27, 1981, for his unlawful deer hunting activities described, infra. It is that suspension that is at issue herein.