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ROSALIE EDWARDS, v. AARON MINING,
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

ROSALIE EDWARDS, COMPLAINANT	COMPLAINT OF DISCHARGE, DISCRIMINATION, OR INTERFERENCE
v.	
	DOCKET NO. WEST 80-441-DM
AARON MINING, INC., RESPONDENT	MD 80-112

Appearances: Rosalie Edwards Pro Se
Starr Route
Boewawe, Nevada 89821
Bruce T. Beesley Esq.
Woodburn, Wedge, Blakey and Jeppson
One East First Street
Reno, Nevada 89505, For the Respondent
Before: Judge John J. Morris

DECISION
STATEMENT OF THE CASE

Complainant Rosalie Edwards brings this action on her own behalf alleging she was discriminated against by her employer, Aaron Mining, Inc., (Aaron), in violation of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq.

The statutory provision, Section 105(c)(1) of the Act, now codified at 30 U.S.C. 815(c)(1), provides as follows:

> 105(c)(1) 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.

After notice to the parties a hearing on the merits was held in Reno, Nevada, on April 28, 1981. Respondent filed a post trial brief.

ISSUES

The issues are whether respondent discriminated against complainant in failing to furnish toilet facilities. A further issue is whether complainant voluntarily quit her employment or was discharged.

For the reasons hereafter stated I sustain the claim of discrimination and enter an award in favor of complainant.

APPLICABLE CASE LAW

The Commission has ruled that to establish a prima facie case for a violation of 105(c)(1) of the Act a complainant must show by a preponderance of the evidence that (1) he engaged in a protected activity and (2) that the adverse action was motivated in any part by the protected activity. The employer may affirmatively defend, however, 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, David Pasula v. Consolidation Coal Company 2 FMSHRC 2786 (1980). Reversed on other grounds, United States Court of Appeals, Third Circuit, Docket No. 80-260, (October 1981). Further, in order to support a valid refusal to work the miner's perception of the hazard must be reasonable, Robinette v. United Castle Coal Company 3 FMSHRC 803, (1981).

FINDINGS OF FACT

The facts are essentially uncontroverted.

1. Complainant Mrs. Rosalie Edwards was employed by Aaron from January 21, 1980 to March 15, 1980 (Tr. 7 - 10).

2. Mrs. Edwards worked at the company mine assaying gold samples (Tr. 9, 10).

3. There were no toilet facilities in the work area. The closest outhouse, where the sanitary conditions were "appalling", was 3/4 of a mile away. It could only be reached over a haul pack road with limited visibility (Tr. 17, 41).

4. In addition to working as an AA Assayor (atomic absorption with cyanide) Mrs. Edwards' duties also included writing up daily safety reports to the company. Under "remarks" Mrs. Edwards indicated the need for a facility. There was no reply from the company except her supervisor said they would put in a restroom "soon" (Tr. 18, 19).

5. After four weeks on the job Mrs. Edwards began having bladder problems for which she took off a week (Tr. 19).

6. Mrs. Edwards terminated her job on March 15, 1980. At that time she was working 48 hours per week and earning $1,500.00 per month (Tr. 33, 34).

7. When she quit Mrs. Edwards told her supervisor she would return when they had restroom facilities (Tr. 34, 37, 46, 50).

8. Mrs. Edwards could not find any employment until October, 1980 (Tr. 34).

9. On October 23, 1980, Mrs. Edwards learned that Aaron was no longer affiliated with the property and she was hired by its successor, the Miller-Kappas Company (Tr. 20).

10. Mrs. Edwards expenses for the hearing include $21.36 for lodging, $15.00 for meals, and 600 miles (roundtrip) to drive to and return home from the hearing site (Tr. 35).

DISCUSSION

30 C.F.R. 56.20-8, a mandatory regulation promulgated by the Secretary, provides as follows:

> 56.20-8 Mandatory. Toilet facilities shall be provided at locations that are compatible with the mine operations and that are readily accessible to mine personnel. The facilities shall be kept clean and sanitary. Separate toilet facilities shall be provided for each sex except where toilet rooms will be occupied by no more than one person at a time and can be locked from the inside.

The credible facts establish that Aaron failed to comply with the regulation in several respects. First, the facilities were, even by Aaron's evidence, a half mile from Mrs. Edwards' laboratory. In addition the toilet could only be reached over a haul pack road which had restricted visibility. The facility accordingly was not "readily accessible" to Mrs. Edwards. In addition the toilet was neither clean nor sanitary. Mrs. Edwards undisputed testimony indicates the sanitary conditions in the outhouse were "appalling."

Mrs. Edwards duties, in addition to assaying gold included the filing of daily written safety reports. On such reports under "remarks" Mrs. Edwards continually pointed out the need for toilet facilities. When she quit Mrs. Edwards also indicated she would return when the company had such facilities. Aaron failed to provide the facilities.

The law is clear that a miner may not be fired for refusing to work under conditions that she reasonably believes are unsafe or unhealthy. Phillips v. Interior Board 500 F 2d 772 (D.C. Cir., 1974), Pasula, supra. In this unusual factual situation Mrs. Edwards alternatives were severely limited. First, she could complain to the company but she had done that. Aaron already had received written and oral complaints for about 7 weeks. Second, she could use the toilet facilities at her home, a 20 mile round trip. In fact, with Aaron's knowledge she did this on a number of occasions (Tr. 19, 36). During her employment she developed a bladder infection. An infection of this nature would support her belief that an unhealthy condition existed. A ten mile journey is not "ready accessibility." A third alternative would be the use of the outhouse which I find from the facts was 3/4 of a mile from the laboratory. That was hardly "readily accessible." A fourth alternative was to quit. She did. The first three alternatives are unreasonable and in law they are no alterative at all. Cf McCoy v. Crescent Coal Company PIKE 77-71. In any event even a palatable alternatives would not excuse compliance with a mandatory standard.

I, accordingly, conclude that Mrs. Edwards was engaged in a protected activity in filing daily written safety reports complaining about the lack of toilet facilities. Further, Mrs. Edwards was constructively discharged while engaging in that activity. McCoy v. Crescent Coal Company, supra.

Portions of the evidence in this case should be discussed. Mrs. Edwards testified she applied in October for employment with Miller Kappas Company, the successor to Aaron (Tr. 20) After being hired by Miller Kappas Mrs. Edwards was told to drop her discrimination case or be terminated. These directives came through Pat Daugherty, a Miller Kappas supervisor. This double heresay directive is attributed to Andrew Robertson, the President of Aaron. I do not find this evidence relevant nor credible. The record here fails to disclose any connection between Robertson and Miller Kappas Company. Further, any issues raised in connection with her discharge by Miller Kappas Company are the subject of another discrimination claim made by Mrs. Edwards. Apparently the Solicitor of Labor had taken no action on that matter at the time of the instant hearing.

AARON'S CONTENTIONS

Aaron contends that Mrs. Edwards case fails for a number of reasons. Aaron cites the case law that to sustain a violation a complainant must show notification, discriminatory action, and motivation of discriminatory action by the employer. Aaron relies on Munsey v. Morton 507 F. 2d 1202 (D.C. Cir., 1974) and Baker v.

U.S. Department of Interior Bd. 595 F. 2d 746 (D.C. Cir., 1978).

Specifically, Aaron says that Mrs. Edwards voluntarily left her employment and that Aaron did not discriminate against her.

For the reasons previously stated I find that Mrs. Edwards was constructively discharged by Aaron. Further, she was discriminated against in that Aaron failed to provide toilet facilities, a condition which Aaron choose to ignore for seven weeks. The fact that Mrs. Edwards was permitted and encouraged by Aaron to use the restroom facilities at her home, a 20 mile round trip, does not eliminate the discrimination. In addition, Aaron's offer of a salary increase to Mrs. Edwards as an inducement to stay cannot avoid the discrimination.

The cases relied on by Aaron are not inopposite the views expressed here. In Munsey, supra. the Court of Appeals for the District of Columbia construed the 1969 Coal Act. Neither the facts nor the law set forth in Munsey support Aaron. The same result pertains in Baker, supra. where the Court of Appeals for the District of Columbia construed the notice provisions of the 1969 Coal Act.

Aaron's post trial brief attacks the double hearsay evidence from Mrs. Edwards of statements by Pat Daugherty, a Miller Kappas supervisor, referring to statements he made about directives he received from Andrew Robertson, President of Aaron. For the reasons previously stated I do find that evidence credible. Likewise, I disregard the post trial affidavit filed by Andrew Robertson regarding that matter. The consideration of such an affidavit after the testimony was concluded would be to deny Mrs. Edwards her right of cross examination.

BACK PAY, COSTS, AND EXPENSES

Section 105(c)(3) of the Act, now 30 U.S.C. 815(c), authorizes an award for back pay, interest, as well as all costs and expenses.

Mrs. Edwards seeks to recover her back wages from the date of her discharge on March 15, 1980 (Letter dated September 11, 1980). At the time of her discharge she was earning $1,500.00 per month. She could not find employment until she was hired by Miller Kappas Company on October 23, 1980. Accordingly, her back pay is for seven months and one week (March 15, 1980 to October 23, 1980) at $1,500.00 per month. Back pay is therefore $10,875.00 ($1,500 x 7) á ($375 x 1). Respondent as the employer is responsible for withholding all statutory deductions, including federal and state taxes. Further, Aaron is to pay interest on said back pay at the rate of 12 1/2% per annum.(FOOTNOTE.1)

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Mrs. Edwards is further entitled to recover her incidental expenses for meals, lodging, and mileage. The meals and lodging cost were $36.36. I calculate her mileage expense at 18 1/2¢ per mile which was the amount authorized by the United States Government for the use of a privately owned vehicle on government business. Complainant's mileage expense is therefore $111.00 (600 x 18 1/2¢).

CIVIL PENALTIES

In this case the Secretary of Labor did not represent complainant. However, the Act provides that any violation of the discrimination section shall "be subject to the provisions of section 108 and 110(a)." [30 U.S.C. 818, 820]. The statute authorizes the imposition of a penalty in an amount not to exceed $10,000.00. [30 U.S.C. 820(a)].

Considering the pertinent statutes and in view of the facts as stated above, I deem a penalty of $1,000.00 to be an appropriate civil penalty in this case.

Based on the foregoing findings of fact and conclusions of law I enter the following:

ORDER

1. Complainant's claim of discrimination is sustained.

2. Respondent is ordered to pay the sum of $10,875.00 less deductions to complainant as back pay. Respondent is further ordered to pay interest on said back pay at the rate of 12 1/2% per annum.

3. Respondent is ordered to pay the sum of $147.36 to complainant for incidental expenses as follows:

Meals	$ 15.00
Lodging	21.36
Mileage	111.00
	$147.36

4. A civil penalty of $1,000.00 is assessed against respondent for violating Section 105(c) of the Act. Said amount is payable 40 days after the decision of the Commission becomes a final order. Said civil penalty shall be paid in accordance with Section 110(j) of the Act [30 U.S.C. 820(j)].

John J. Morris
Administrative Law Judge

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~FOOTNOTE_ONE

Interest rate used by Internal Revenue Service for underpayments and overpayments of tax, Rev Ruling 79-366. Cf Florida Steel Corporation, 231 N.L.R.B. No. 117, 1977-78, CCH,

N.L.R.B. Para 18,484; Bradley v. Belva Coal Company WEVA 80-708-D (April 1981).