

CCASE:
CHARLES HARVEY V. HOWARD QUARTIES
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

CHARLES HARVEY,
COMPLAINANT

v.

HOWARD QUARRIES,
RESPONDENT

COMPLAINT OF DISCHARGE,
DISCRIMINATION OR INTERFERENCE

DOCKET NO. CENT 81-9-DM

MSHA CASE NO. MD 80-151

Appearances:

Charles Harvey, Slater, Missouri
appearing pro se, on behalf of Complainant

E. J. Holland, Jr. Esq.
James T. Price Esq.
Kansas City, Missouri
appearing on behalf of Respondent

Before: Judge John J. Morris

DECISION

STATEMENT OF THE CASE

Complainant Charles Harvey brings this action on his own behalf alleging he was discriminated against by his employer, Howard Quarries, Inc., 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 re

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 commenced in Sedalia, Missouri on April 8, 1981. On that date the case was partially heard and complainant's motion for a continuance to produce additional evidence was granted. The hearing was concluded on June 23, 1981. The parties filed post trial briefs.

ISSUES

The issue is whether Charles Harvey was discharged because he complained about excessive dust and requested a dust respirator mask at the quarry or whether Harvey was discharged because his work was unsatisfactory.

For the reasons hereafter stated, I find in favor of Howard Quarries, and I dismiss the discrimination complaint.

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), Rev'd on other grounds, No. 80-2600 (3d Cir. October 30, 1981)*.

FINDINGS OF FACT

The references to the transcript of the April 8 hearing are prefixed as "Tr. 1" and references to the transcript of the June 23 hearing are prefixed as "Tr. 2."

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1. Charles Harvey was employed as a stockpiler by Howard Quarries, Inc., between December 26, 1979 through July 25, 1980 (Tr. 1: 10, 13, 29).
2. A stockpiler's duties include driving a truck (50% of the time), removing rock and debris from under the conveyor belts (35% of the time), and doing maintenance work on the crusher (15% of the time) (Tr. 1: 33).
3. Charles Harvey was a good truck driver, but he didn't do his assigned work of shoveling from under the conveyor belts. His work performance was poorer than other employees (Tr. 1: 34-37).
4. In May 1980 workers Winfrey, White, and Mennard complained to supervisor Rowden that they were tired of doing Harvey's share of the work (Tr. 1: 40).
5. Rowden talked to Harvey and told him he'd be let go if he didn't improve. Harvey didn't improve (Tr. 1: 39).
6. On July 24, 1980 Rowden assigned Harvey, with Burns, to shovel. Thirty or forty minutes later Harvey was laying under the conveyor (Tr. 1: 42).
7. Burns quit that day stating he couldn't work with Harvey (Tr. 1: 42).
8. Harvey was fired the next day (July 25) at quitting time. He was fired because of his work performance and due to Burn's conversation with Rowden (Tr. 1: 43).
9. During his employment Harvey never asked Rowden for a dust respirator, nor did he ever complain to Rowden or to his fellow workers about safety (Tr. 1: 43).
10. Rowden, who has discharged five workers in the past two years, didn't treat Harvey any differently from any other worker (Tr. 1: 45-46).
11. After an MSHA inspection Howard Quarries air conditioned the crusher shack and acquired a water tank which was used when needed (Tr. 1: 47; 2: 41).
12. Rowden has never disciplined any worker for complaining about dust nor has Rowden ever told an employee to buy a dust respirator (Tr. 1: 49).
13. The day before he was fired fellow worker Shively observed Harvey laying under the crusher for 15 or 20 minutes when he was supposed to be working (Tr. 2: 8-9, 18).

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14. Shively indicated Rowden was concerned about safety (Tr. 2: 15).

15. Worker Gray indicated he had seen Harvey loafing on the job (Tr. 2: 29-30).

16. After Harvey bought a respirator he used it for awhile and then gave it to Winfrey (Tr. 2: 37).

17. Normally dust masks were available at the quarry (Tr. 2: 40).

18. No worker was ever disciplined for making a safety complaint (Tr. 1: 51).

19. Rowden was concerned about dust and never hesitated to send Winfrey to water down the road (Tr. 2: 42).

DISCUSSION

Harvey would have the Commission believe that he complained about excessive dust and requested a dust mask. The credible evidence leads to a contrary conclusion. Rowden's testimony is confirmed by workers Shively, Gray, and Winfrey. Harvey never asked for a mask nor did he ever complain about safety. Harvey's use of a mask he purchased was short-lived since he gave it to Winfrey. Further, Winfrey didn't see Harvey using a mask after that event. Further, Harvey's request for a mask would hardly have been a motivating factor for his discharge since masks were generally furnished by the quarry and available to the workers.

Harvey would further have the Commission believe that the dust complaint and request for a mask motivated Howard Quarries to fire him. Again, the credible evidence leads to a different conclusion. The uncontroverted evidence also establishes that no employee was ever disciplined for a safety complaint. Further, Rowden was committed to safety and would respond quickly with the use of the water truck whenever the employees mentioned the dusty conditions. The quarry airconditioned the crusher shack and provided respiratory protection to its workers. In view of the foregoing evidence, which is uncontroverted, I conclude that Harvey's claims cannot be upheld.

In short, the evidence does not establish that Harvey was engaged in a protected activity for which he was discharged. The evidence does establish that Harvey was discharged for his poor work performance.

Some evidence describes Harvey as a "fair" worker (Tr. 1: 10; 2: 34). However, Rowden, Shively and Gray all confirm the events of July 24, 1980. Harvey's actions on that date and his prior performance caused him to be discharged. On that day Harvey was assigned to clean out from under the conveyor. Harvey spent 15 to 25 minutes laying under the conveyor. He was laughing at his supervisor Rowden while Rowden was looking for him. Burns quit because of Harvey. The evidence also reflects

that Harvey's job discipline in other respects was inadequate. There were occasions in talking to Rowden where he said he wouldn't do his assigned duties. On two

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or three occasions Harvey had tried to convince Winfrey that he (Winfrey) should stop shoveling when Rowden disappeared (Tr. 1: 41-43; 2: 10, 17, 18, 45). Howard Quarries has carried its burden of proof as required in Pasula, supra.

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

ORDER

The complaint of discrimination filed herein is dismissed with prejudice.

John J. Morris
Administrative Law Judge