

CCASE:
SANDRA CANTRELL V. GILBERT
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SANDRA CANTRELL,
COMPLAINANT

Complaint Discharge,
Discrimination or Interference

v.

Docket No. WEST 82-23-DM

GILBERT INDUSTRIAL,
RESPONDENT

DECISION

Appearances: Sandra Cantrell, Bellevue, Idaho pro se
Ronald F. Sysak, Esq., Prince, Yeates & Geldzahler, Salt Lake
City, Utah, for Respondent

Before: Administrative Law Judge Broderick

STATEMENT OF THE CASE

Complainant filed this proceeding under section 105(c) of the Federal Mine Safety and Health Act of 1977, claiming that she was discharged by Respondent because of safety related activity protected under the Act. A hearing was held in Boise, Idaho, on May 25, 1982. Sandra Cantrell testified on her own behalf. Charles Hames, James Vegh, William Coffey and Ernest Kihs testified on behalf of Respondent. Both parties waived their rights to file written proposed findings of fact and conclusions of law, and stated their contentions orally at the conclusion of the hearing. Based on the evidence presented at the hearing and considering the contentions of the parties, I make the following decision.

FINDINGS OF FACT

1. Complainant was employed by Respondent beginning on March 19, 1981, as a dump person, where her basic duty was to flag and direct dump trucks. Her rate of pay was \$8.25 per hour.

2. After approximately 2 or 3 weeks as a dump person she was promoted to the position of dozer operator and her wage was increased (after 1 week) to \$9.25 per hour. Her basic duty was to clear dirt and debris from areas previously blasted and push it over into a waste pile. She worked an average of 50 hours per week.

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3. On April 14, 1981, while she was operating her dozer, the ripper accidentally touched off a cap and primer which had been left in the area after blasting.

4. The explosion shook up and frightened Complainant. It caused a ringing in her ears and a headache. She worked about 2-1/2 hours after the incident. She also worked the next day and part of the day following. She then went to a doctor for the headaches which had persisted since the accident.

5. She attempted to return to work on April 23, but was unable to work. She returned on about May 4 although she continued to be troubled by headaches and back aches. Her physician recommended that she limit herself to light work. She worked for 3 days as a flag person at a pay rate of \$7.00 per hour.

6. On about April 27, 1981, Complainant called the MSHA office in Boise and told MSHA about the incident of April 14 and her injury.

7. An MSHA inspector inspected Respondent's facility on April 29, 1981, and issued a citation for failure to notify MSHA of the occurrence of an accident as required by 30 C.F.R. 50.10.

8. On May 6, 1981, Complainant was laid off, and was told that her position (as a flag person) was terminated because a flag person was no longer needed on her shift and no other light duty was available. The foreman who laid her off was unaware of her complaint to MSHA or the subsequent MSHA inspection.

9. Complainant filed a claim for worker's compensation for the period she was unable to work following her injury. She also filed a claim for unemployment compensation.

10. Respondent needed additional flag people on approximately May 10, 1981. Respondent's Personnel Director pulled out Complainant's folder, but was unable to contact Complainant since she had no telephone. Other people were hired.

11. At the time Complainant was laid off there were other dozer operators who continued working although they had been hired subsequent to Complainant. Respondent states that it is "a merit shop company," by which it means that it does not follow seniority, nor does it have to answer to any employee or employee representative in determining lay off policies. The employees were not represented by a union.

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12. Respondent was a joint venture, the purpose of which was to prepare a site for the Cypress Hill Mines. It was formed in November, 1980, and completed its work at the site in approximately October, 1981.

13. Following her lay off, Complainant did not go back to work until January, 1982, when she went to work at a night club. She earns approximately \$140 to \$160 per week including tips.

CONCLUSIONS OF LAW

1. Respondent at all times pertinent to this case was the operator of a mine and subject to the provisions of the Federal Mine Safety and Health Act of 1977.

2. I have jurisdiction over the parties and subject matter of this proceeding.

3. Complainant failed to show by a preponderance of the evidence that she was laid off because of any activity protected under the Act.

DISCUSSION

Complainant alleges in part that she was shabbily treated in her workmen's compensation case, that she was discriminated against because she was a woman, that when she returned to light duty following her injury, her pay should not have been cut, that she should have been laid off in accordance with seniority principles. None of these allegations would, if proven, establish a claim under section 105(c) of the Mine Safety Act. Although Complainant did report her injury to MSHA, and Respondent was cited for a violation of a mandatory standard, the evidence does not show that she was discriminated against because of the report. She was returned to work at light duty subsequent to the report and inspection. I accept the evidence that the persons responsible for her layoff on May 6, 1981, were unaware of the report to MSHA, the inspection, and the subsequent citation. There is no evidence linking any adverse action against Complainant to her call to MSHA officials. Thus, Complainant has failed to establish the basic requirement for liability under 105(c): a nexus between the adverse action and protected activity under the Mine Act. Secretary/Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980), rev'd on other grounds sub nom Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981). Therefore, Complainant's case must be dismissed.

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ORDER

Based upon the above findings of fact and conclusions of law, IT IS ORDERED that this proceeding is DISMISSED.

James A. Broderick
Administrative Law Judge