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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

WALTER A. SCHULTE,
COMPLAINANT
v.

Complaint of Discharge,
Discrimination, or Interference

LIZZA INDUSTRIES, INC.,
RESPONDENT

Docket No. YORK 81-53-DM

DECISION

Appearances: G. Martin Meyers, Esq., Denville, New Jersey, for Complainant
Frederick D. Braid, Esq., Mineola, New York, for Respondent

Before: Judge Melick

This case is before me upon the complaint of Walter A. Schulte, 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 Lizza Industries, Inc., (Lizza) discharged him on October 15, 1980, in violation of section 105(c)(1) of the Act. (FOOTNOTE 1) Evidentiary hearings were held on Mr. Schulte's complaint in Morristown, New Jersey, on October 13, 1981, and March 29, 1982, and, in a telephone conference call, on April 16, 1982.

Mr. Schulte can establish a prima facie violation of section 105(c)(1) 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 discharge of him was motivated in any part by that protected activity. Secretary ex rel David Pasula v. Consolidation Coal Company, 2 FMSHRC 276 (1980), rev'd. on other grounds, Consolidation Coal Company v. Secretary, 663 F.2d 1211 (3rd Cir. 1981). Before his discharge on October 15, 1980, Schulte had been

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employed at Lizza's Mount Hope Quarry as a bulldozer operator and laborer. He asserts three separate claims of protected activity. First, he alleges that two weeks before his discharge he made safety complaints to foreman Jesse Parzero concerning unguarded belts, inadequate "stop devices" on moving machinery, explosive and flammable material stored near electric receptacle boxes, unsafe catwalks and obstructed fire fighting equipment. Second, he asserts that around the same time he had complained to some unidentified person or persons that he had not received training needed to safely perform an assignment to stem explosives. Third, he alleges that he reported some of the above safety complaints to an official of the Federal Occupational Safety and Health Administration (OSHA) on October 6, 1980, and later that same day to Bernard Quinn, an employee of the Federal Mine Safety and Health Administration (MSHA).

While the credible evidence of record does not support Schulte's first two claims of protected activity and indeed he appears to have abandoned those claims in his posthearing memorandum, there is no dispute that Schulte did in fact report safety complaints to MSHA on October 6, 1980. (FOOTNOTE 2) These latter complaints are clearly protected activities under section 105(c)(1). Supra note 1, p. 1. Accordingly, following the Pasula analysis, the next step is to determine whether the operator, in discharging Schulte, was motivated in any part by those protected activities.

Direct evidence of motivation in section 105(c) discrimination cases is rare. Secretary ex rel Chacon v. Phelps Dodge Corporation, 3 FMSHRC 2508 (1981). In this regard, in the Phelps Dodge case the Commission quoted with approval from the circuit court decision in NLRB v. Melrose Processing Co.. 351 F.2d 693 (8th Cir. 1965):

It would indeed be the unusual case in which the link between the discharge and the "protected" activity could be supplied exclusively by direct evidence. Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence. Furthermore, in analyzing the evidence, circumstantial or direct, the "NLRB" is free to draw any reasonable inferences.

In this case, the evidence is undisputed that Mr. Schulte reported his safety complaints to MSHA on October 6, 1980, and that two MSHA inspector's

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appeared at the Mount Hope Quarry on October 14, and 15, 1980, to conduct their inspection. On the first day of their inspection, they cited the operator for inadequate guarding of a conveyor. Mr. Schulte was discharged on the second day of the inspection by plant manager Fred Oldenburg. The decision was apparently made at a meeting that day in which Oldenburg, foreman Jesse Parzero, company official Jim Greniti, and shop steward Vincent "Vinnie" Crawn were present. Both Oldenburg and Parzero admitted that at the time of Schulte's discharge, they knew of "rumors" that Schulte had initiated the MSHA inspection.

Oldenburg also testified that "Jimmy Greniti" may have brought up the fact "at this meeting" that this "Schulte's discharge" "had" absolutely nothing to do with the MSHA inspection." This gratuitous statement, while facially a denial that Schulte's complaints to MSHA had anything to do with his discharge, suggests in the overall context of the circumstances a guilty awareness that indeed the contrary was true. The remark is suggestive, moreover, of the existence of a conspiratorial agreement that in the event Schulte's discharge should be challenged the response of the conspirators would be that his discharge had "absolutely nothing to do with the MSHA inspection."

The evidence that the Lizza officials had some knowledge, albeit "rumors", that Schulte had called in the MSHA inspectors, the coincidence in time between the MSHA inspection and Schulte's discharge and the peculiar gratuitous denial that Schulte's discharge was the result of the MSHA inspection are relevant circumstantial factors in determining motivation. (FOOTNOTE 3) From this circumstantial evidence, it could very well be inferred that Mr. Schulte's discharge was at least partially motivated by his protected activities.

Even assuming, however, that Schulte had therefore established a prima facie case under Pasula, that would not be the end of the matter. The Commission also stated in Pasula that the employer may affirmatively defend against such a case by proving by a preponderance of all the evidence that, although part of its motivation was unlawful, (1) it was also motivated by the miners' unprotected activities, and (2) that it would have taken adverse action against the miner in any event for the unprotected activities alone. 2 FMSHRC at 2799-2800.

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Within this framework, Lizza alternatively defends by claiming that Schulte was fired for his attendance problems and that he would have been fired in any event for that unprotected reason alone. In support of this defense, Lizza produced Schulte's time cards dating from June 30, 1980, and warning letters evidencing progressive disciplinary action against Schulte because of attendance problems preceding his discharge. The Commission has stated that in analyzing this evidence, the function of the Administrative Law Judge is only to determine whether the asserted business justifications are credible and, if so, whether they would have motivated the particular operator as claimed. *Frederick G. Bradley v. Belva Coal Company*, 4 FMSHRC ____ (Decided June 4, 1982).

Plant Manager Fred Oldenburg, testified that Schulte was discharged because of his repeated and unexcused tardiness, early departures, and failure to show up for work. Referring to Mr. Schulte's time cards (Operator's Exhibit No. 4) Oldenburg observed that Schulte's problem began on September 14, 1980, when he "punched out" early. Presumably Mr. Oldenburg was referring to the time card for the pay period ending September 14, 1980, which reflects that on September 10, 1980, Mr. Schulte punched the time clock shortly after 2 p.m., giving him only 6-1/2 hours in a regular 8-1/2 hour work day. Oldenburg told foreman Parzero to talk to Schulte about this early departure. Oldenburg testified that he also had the letter dated September 23, 1980 (Operator's Exhibit No. 3) prepared and that he personally delivered it to Schulte on September 23, or September 24, 1980. According to Oldenburg, Schulte signed the letter in his presence and returned it without protest. The body of the letter reads as follows:

Your attendance practices leave much to be desired. These practices cannot be tolerated. I am, therefore, formally informing you that if these practices continue, you will be suspended and subsequently terminated. If you have any questions, please let me know.

Schulte acknowledged receiving that letter by his signature in pencil and by doing so, also acknowledged the following statement: "I hereby understand that if my poor attendance practices continue, I will be suspended for 3 days and terminated thereafter if the practices continue."

Schulte's attendance problems continued, according to Oldenburg, and led to the issuance of another disciplinary letter and to his later discharge. Oldenburg observed that Schulte was 6 to 10 minutes late for work on September 23, and on September 24, 1980, that he left work 1-1/2 hours early on September 30, 1980, and that he did not show up for work or call in on October 2, 1980. The corresponding time cards (Operator's Exhibit No. 4) support this testimony. Although Schulte claims that he called in concerning his absence on October 2, it is clear that none of these incidents was excused by the operator. Oldenburg told Schulte on Saturday, October 4, that he was being suspended for 3

days, and that he was not to report to work on the following Monday, Tuesday, and Wednesday. Oldenburg followed up with a letter to Schulte dated October 6, 1980,

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(Operator's Exhibit No. 2) which he personally delivered to Schulte upon Schulte's return from the 3-day suspension. The letter reads as follows:

Your attendance practices and work attitude leave much to be desired. You have been warned about these practices, yet you continue to be insubordinate. You are therefore suspended without pay for 3 days. If your performance does not improve, your employment will be terminated. If you have any questions, please let me know.

Schulte admits receiving and signing the acknowledgement on this letter, presumably on Thursday, October 9, 1980. In signing the letter, Mr. Schulte acknowledged the following statement: "I hereby understand that if my poor attendance practices and work attitude continue, I will subsequently be terminated." Schulte reportedly stated upon his receiving the letter, "I'm not going to give you any trouble. I'll sign it." (FOOTNOTE 4)

According to Oldenburg, even after the warning letters and suspension, Schulte continued to show up late and to leave early. Schulte left work one-half hour early on October 10, 1980, left early on October 14, 1980, and showed up 6 minutes late on October 14, 1980. Schulte's time cards corroborate this testimony and indeed, Schulte himself admits that he left early without an excuse on October 10 and 14. Moreover, although Schulte alleges that he called in on October 2nd, he presented no affirmative evidence that any of his absences were excused.

Schulte was thereafter discharged on October 15, 1980. The discharge letter (Operator's Exhibit No. 1) of the same date reads as follows:

You had been warned several times and subsequently suspended without pay as a result of poor attendance practices and insubordination. At a meeting held on Wednesday, October 15, 1980, you stated that your attitude had not improved and would not improve as a result of your no longer operating the bulldozer out at out Mount Hope plant.

You were reminded on several occasions, and specifically on Thursday, October 9, 1980, by your foreman, Jesse Parzero, that your job required over time each day. You have opted to neglect these instructions and have left your work area prior to the designated quitting time.

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Our prior verbal warnings, written warning, and disciplinary suspension have obviously failed to rehabilitate you. You have therefore left us no choice but to terminate your employment, effective today, October 15, 1980, at 1:30 p.m.

The uncontradicted evidence of Schulte's poor work attendance clearly supports the operator's alleged business justification for Schulte's discharge. Schulte contends, however, that his discharge was nevertheless discriminatory because other employees had equally poor attendance records but were not similarly disciplined. This contention, if true, could very well affect the credibility of the operator's alleged business justification. Belva Coal, supra. In particular, Schulte claims that co-workers Harley, Bell, and Brock had attendance records as poor as his own but were not similarly discharged. The time cards for those employees are in evidence, however, and Schulte has not shown how those records support his argument. Moreover, from my own independent appraisal of those records, I do not find that they support Schulte's contention in this regard.

In conclusion, I find that while Lizza may very well have had a "mixed motivation" for discharging Schulte, it had credible "business justifications" to discharge Schulte exclusive of any protected activities and it clearly would have discharged Schulte in any event for his unprotected activities alone. Pasula, supra., Belva Coal, supra. Accordingly, the complaint of unlawful discharge is denied and this case is dismissed.

Gary Melick
Assistant Chief Administrative Law Judge

~FOOTNOTE_ONE

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

"No person shall discharge * * * or cause to be discharged * * * or otherwise interfere with the exercise of the statutory rights of any miner * * * in any coal or other mine subject to this Act because such miner * * * 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 * * * has instituted or caused to be instituted any proceeding under or related to this Act * * * or because of the exercise by such miner * * * on behalf of himself or others of any statutory right afforded by this Act."

~FOOTNOTE_TWO

2 The first allegation of safety complaints is denied by Parzero. In addition, presumably available witnesses who it is claimed would have corroborated Schulte's allegations in this regard were not called by Schulte to testify. Under the

circumstances, it may be inferred that those witnesses would not in fact have corroborated Schulte. It is not at all clear, moreover, whether the second complaint was made to any management personnel. In addition, the credible evidence shows that Schulte was in fact trained in stemming explosives.

~FOOTNOTE THREE

3 On the subject of motivation, Schulte had also alleged that immediately after he was notified of his discharge, Parzero told him, in the presence of co-worker Robert Boisvert, "this is what you get, Mister, for bringing in MSHA". However, both Parzero and Boisvert denied that any such statement was made. Under the circumstances, I give no credence to Schulte's testimony in this regard. Schulte further alleged that shop steward "Vinnie" Crawn also said to him "you stirred up a hornet's nest -- it's a new company -- they didn't need the trouble, that's why they routed you". In the absence of any corroboration from Mr. Crawn himself, I can give but little weight to this hearsay evidence. Finally, Schulte also claimed that one of the MSHA inspectors, Robert Held, warned him that Lizza had singled him out for complaining to MSHA. Since Inspector Held flatly denied making any such statement, I am likewise able to accord but little weight to this allegation.

~FOOTNOTE FOUR

4 Schulte claims that he was handed the disciplinary letters dated September 23, 1980, and October 6, 1980, at the same time, presumably on October 9th, and signed those letters, one right after the other, using the same pen. The original letters were subsequently admitted into evidence (Operator's Exhibits 2 and 3) and clearly show that Mr. Schulte signed one in pencil and one in pen. Under the circumstances, I give no weight to Schulte's allegations in this regard.