CCASE:
JAY MONTOYA V. VALLEY CAMP OF UTAH
DDATE:
19830404
TTEXT:

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

JAY MONTOYA, COMPLAINANT	COMPLAINT OF DISCHARGE, DISCRIMINATION, OR INTERFERENCE
v.	
	Docket No. WEST 82-41-D
VALLEY CAMP OF UTAH, INC., RESPONDENT	DENV CD 81-21
	Belina No. 2 Mine

DECISION

Appearances: John L. Lewis, Esq. and Thomas Cerruti, Esq., Jones, Waldo, Holbrook & McDonough, Salt Lake City, Utah, for Complainant John A. Snow, Esq., Van Cott, Bagley, Cornwall & McCarthy, Salt Lake City, Utah, for Respondent

Before: Judge Melick

This case is before me upon the complaint of Jay Montoya 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 Valley Camp of Utah, Inc., (Valley Camp), unlawfully issued a written reprimand to him on February 13, 1981, contrary to section 105(c)(1) of the Act.(FOOTNOTE 1) Mr. Montoya further alleges that because Valley Camp refused to withdraw the alleged unlawful reprimand, he was compelled to resign under protest

on June 10, 1981. He claims that his resignation and his refusal to return to work were the result of fears for his safety and fears of future harassment through contrived infractions that would be used to set up a discharge "for cause". He argues, accordingly, that his resignation was a constructive discharge caused by the unlawful reprimand and cites supportive decisions under the National Labor Relations Act.(FOOTNOTE 2) Evidentiary hearings were held on Mr. Montoya's complaint on December 15 and 16, 1982, in Salt Lake City, Utah.

Motion to Dismiss

Valley Camp argues as a preliminary matter that the Complainant had failed to meet the time deadlines set forth in sections 105(c)(2) and 105(c)(3) of the Act. Under section 105(c)(2), if the miner believes that he has been unlawfully discharged, interfered with, or otherwise discriminated against, he may, within 60 days after the alleged violation occurs, file a complaint with the Secretary of Labor asserting such unlawful acts. The relevant legislative history provides in part as follows:

> While this time-limit is necessary to avoid stale claims being brought, it should not be construed strictly when the filing of a complaint is delayed under justifiable circumstances. Circumstances which could warrant the extension of the time-limit would include a case where the miner within the 60-day period brings the complaint to the attention of another agency or to his employer, or the miner fails to meet the time-limit because he is misled as to or misunderstands his rights under the Act.

S. Rep. 95-181, 95th Cong., 1st session, 36th (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 9th Congress, 2nd session, Legislative History of the Federal Mine Safety and Health Act of 1977, at 624 (1978), ("Legis. Hist."). See Herman v. Imco Services, 4 FMSHRC 2135 (1982). Prejudice to the operator caused by the delay is also a factor to be considered. Herman, supra.

The specific issue to be decided, then, is whether appropriate circumstances exist in this case that would justify an extension of the filing deadline set forth in section 105(c)(2) and whether the operator has been prejudiced by the delay. The operator as the moving party and

proponent of the statutory limitation period carries the burden of establishing that the Complainant is barred by those provisions. 5 U.S.C. 556(d); Raymond v. Eli Lilly & Co., 412 F. Supp. 1392, at 1401 (DCNH, 1976).

In this case, it is undisputed that the initial act of alleged discrimination occurred on February 13, 1981, when Mr. Montoya was issued the written reprimand at bar (Ex. O-3). Moreover, it is clear that Mr. Montoya did not file his formal complaint of discrimination with the Federal Mine Safety and Health Administration until August 19, 1981, more than 6 months later. (Ex. C-9). The record in this case also shows, however, that as early as March 12, 1981, Montoya brought his complaint to the attention of his employer (Ex. C-10). In a letter of that date received by the employer shortly thereafter, Montoya asserted the allegations now raised with sufficient clarity so as to have placed Valley Camp on notice of the complaint herein.

Mr. Montoya testified that in composing this letter, he relied upon a copy of regulations received when he first worked for Valley Camp and which set forth procedures for filing complaints of discrimination (Ex. C-12). While the particular regulations relied upon concern discrimination complaints under the Surface Mining and Reclamation Act, the testimony of the Complainant is credible at least to the extent that it demonstrates reasonable good faith efforts to promptly assert his rights within his limited knowledge and capacities. It is also apparent that Mr. Montoya did file a complaint with the Federal Mine Safety and Health Administration promptly upon learning that that was the proper agency with which to file. Within this framework and in the absence of evidence of prejudice to the operator caused by the filing delay, I find that extension of the time limit set forth in section 105(c)(2) is warranted. Mr. Montoya's complaint filed August 19, 1981, is accordingly deemed to have been timely filed.

Under section 105(c)(3) of the Act, the miner has the right, within thirty days of notice of the Secretary's determination that the Act has not been violated, to file an action in his own behalf before the Commission. In this case, the Secretary notified Mr. Montoya of its determination by letter dated October 19, 1981 (apparently received by the Complainant on November 3, 1981), and Mr. Montoya filed his request for review by the Commission on November 17, 1981. I find therefore that Mr. Montoya has, in fact, complied with the filing requirements under this section of the Act. For the above reasons, the operator's Motion to Dismiss is denied.

The Merits

In order to establish a prima facie violation of section 105(c)(1) of the Act, the Complainant must prove by a preponderance of the evidence that he has engaged in an activity protected by that section and

that he has suffered discrimination, interference, or discharge, which was motivated in any part by that protected activity. Secretary, ex rel. David Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (1980), reversed on other grounds, sub nom, Consolidation Coal Co. v. Secretary, 663 F. 2d 1211 (3rd Cir. 1981).

In this case, there is no dispute that Mr. Montoya had engaged in protected activities. On February 9, 1981, Montoya was on the 4 p.m. to midnight shift working as a miner operator at the face of the No. 2 entry of the first east mains section. The miner helper had previously warned Montoya of "bad" roof in that entry and Montoya had, in turn, complained about this to his foreman, Roy Tellerico. Although Tellerico did not agree that the roof was bad, he apparently agreed nevertheless to insert "I" beams to buttress the roof to satisfy Montoya. With the understanding that "I" beams would later be inserted, Montoya finished cutting the face that day. He was apparently injured the next day for reasons unrelated to the roof condition and was unable to return to work until February 13.

The "I" beams were still not in place when Montoya arrived at the No. 2 entry on February 13. Someone in the section again warned Montoya about the "bad" roof and Montoya claims that he tested the roof near the face himself by "thumping" it. It sounded hollow and debris sifted from the roof. Foreman Tellerico again disagreed with Montoya about the safety of the roof. Montoya consulted the Mine Safety Committeeman Clarence Denny. Denny also thought the roof was dangerous and told Montoya that if he refused to work under it, "he would back him on it." Denny could see that the roof was separating from the ribs and the roof sounded hollow, indicating to him a dangerous separation. Denny agreed that they indeed needed cross bars for additional roof support.

Cameron Montgomery also saw the roof conditions in the No. 2 entry at that time. According to Montgomery, three other miners also agreed with him that it was "bad top". Another union safety committeeman, Joseph Haycock, shift foreman Joe Tiller, and foreman Joe Tellerico later tested the roof and concluded it was safe. Valley Camp does not, however, dispute that the circumstances in this case were sufficient to show that Complainant's work refusal was based upon a good faith, reasonable belief that the roof condition was hazardous and that his work refusal therefore constituted a protected activity within the scope of section 105(c)(1). See Robinette v. United Castle Coal Co., 3 FMSHRC 1803 (1981). Valley Camp also acknowledges that the Complainant's report of unsafe working conditions constituted a protected safety complaint within the scope of that section.

The second element of a prima facie case is a showing that the adverse action (here, the issuance of a written reprimand and the alleged constructive discharge) was motivated in any part by the protected activity. In support of his position that Valley Camp was unlawfully motivated by his protected activity, Montoya

alleges that management

had knowledge of his protected activity, that management showed hostility towards that protected activity, that there was a close proximity in time between the protected activity and the adverse action, and that the adverse action was disproportionate to the violation alleged in the reprimand.

The evidence shows that when the Complainant refused to work under the roof at the No. 2 face, Shift Foreman George Tiller directed him and another miner, Cameron Montgomery, to perform alternate work. Ten or fifteen minutes later, Tellerico told Montoya to tram the continuous miner to the No. 4 entry. Tiller and Tellerico walked about 30 feet ahead of the miner as it was trammed. Montoya testified that as he turned into the No. 4 entry, he asked Tellerico to check for gas and thought Tellerico agreed to do so.(FOOTNOTE 3) With this alleged understanding, the Complainant trammed the miner into the last open crosscut. George Tiller, who was not a party to the alleged "understanding", saw the miner pass the last open crosscut without the necessary gas check and ordered the Complainant to turn off the miner. He threatened to issue a written reprimand for his failure to check for methane. A heated exchange ensued, ending only when the Complainant insisted on leaving the mine, claiming that he was suffering from a previously fractured thumb and a cold.

Shift Foreman Tiller subsequently issued a written reprimand to Montoya for passing the last open crosscut without performing the required methane test. According to the uncontradicted evidence, it was not out of the ordinary to have done so, and, indeed, Tiller had given a written reprimand to his own brother-in-law not long before the incident herein for the same type of violation. Moreover, during that same year, he had issued some ten to twelve oral reprimands and three written reprimands. Virgil Lam, Mine Superintendent, testified without contradiction that he, too, had on past occasions issued reprimands for miners failing to make methane gas checks.

On the next work day, February 16, 1981, the Complainant filed a grievance over the threatened reprimand with Grant Howell, the Chairman of the mine committee. A meeting was held on the Complainant's grievance a short while later. Present were the Complainant, General Mine Foreman Virgil Lam, Shift Foreman George Tiller, President of the union local, John Herinson, and the two mine safety committee chairmen, Haycock and Denny. According to Howell, Montoya initially claimed that he had not trammed the miner beyond the last open crosscut but finally admitted that he indeed committed the violation and deserved a reprimand. The grievance was dismissed and no appeal was taken.

John Herinson, the local union president, recalled, based on notes taken at the meeting, that Montoya at first insisted that he had not passed the last open crosscut but, after looking at the mine map, admitted the violation and agreed that he deserved a reprimand. Herinson also thought the reprimand was appropriate because the violation endangered the safety of all miners. Particularly because of Herinson's position as union president and the fact that he availed himself of notes taken at the grievance meeting, I accord his testimony great weight.

Evidence that Complainant's work refusal and safety complaints were made in the presence of Shift Foreman George Tiller, that Mr. Tiller was admittedly "irritated" and "angered" by the fact that miners were idled as a result of this work refusal and the brief time lapse between the work refusal/safety complaint and the events triggering the reprimand is indeed suggestive that the reprimand may have been issued at least in part because of the protected activities. From this evidence, it could be inferred that the reprimand to Mr. Montoya was at least partially motivated by his protected activities.

Even assuming, however, that Montoya 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 miner's unprotected activities, and (2) it would have taken adverse action against the miner in any event for the unprotected activities alone. 2 FMSHRC at 2799-2800.

I have already found that the credible evidence supports the conclusion that Mr. Montoya did in fact tram the miner past the last open crosscut without performing the necessary methane tests (fn. 3 supra.). Based on the credible testimony of Union President Herinson, I also find that this constituted a serious violation, endangering the safety of all the miners. Finally, based on the undisputed testimony of Shift Foreman George Tiller and Mine Superintendent Virgil Lam, I conclude that the issuance of a written reprimand under these circumstances was not out of the ordinary and clearly not disproportionate or discriminatory. Both of these officials had previously issued reprimands to miners for failing to make methane gas checks and indeed Tiller had given his own brother-in-law a written reprimand for just such a violation only a short time before Montoya's.

In conclusion, I find that even assuming Valley Camp's agent, George Tiller, had a "mixed motivation" in issuing a written reprimand against Mr. Montoya, there were credible "business justifications" for

the reprimand exclusive of any protected activities and I find that he would have issued that reprimand in any event for Mr. Montoya's unprotected activities alone. Pasula, supra. Since the reprimand itself was not unlawful, Mr. Montoya's resignation or "constructive discharge" because of that reprimand was likewise not unlawful. Accordingly, the Complaint herein is denied and this case is dismissed.

Gary Melick
Assistant Chief Administrative Law Judge

FOOTNOTES START HERE-

1 Section 105(c)(1) provides in part as follows:
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 * * * in any coal * * * 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 of the coal * * *mine of an alleged danger or safety or health violation in the coal * * * mine * * * or because of the exercise by such miner * * * on behalf of himself or others of any statutory right afforded by this Act.

2 NLRB v. Waples-Platter Co., 140 F. 2d 228 (5th Cir. 1944); Caroll Egg Co., Inc. and Amalgamated Meat Cutters and Butcher Workmen of North America, 130 NLRB 100 (1961), Cavalier Olds., Inc. and Professional Automobile Association, 172 NLRB 96 (1968), and M.R. Products, Inc. and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, 179 NLRB 17 (1969).

3 Tellerico testified that Montoya did indeed ask him to perform the methane test, but he told Montoya to do it himself. Particularly in light of the credible testimony (discussed infra) that Montoya had admitted at his grievance meeting that he in fact did tram the miner beyond the last open crosscut without the required tests, I cannot believe his contrary testimony at this hearing.