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BRADLEY ABNER V. ANAMAX MINING
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

BRADLEY ABNER, COMPLAINANT	DISCRIMINATION PROCEEDING
	Docket No. WEST 83-54-DM
v.	
	MSHA Case No. MD 83-06
ANAMAX MINING COMPANY, RESPONDENT	Anamax Mine

DECISION

Appearances: Bradley Abner, Tucson, Arizona, pro se
Charles L. Fine, Esq., O'Connor, Cavanagh, Anderson, Westover Killingsworth & Beshears, Phoenix, Arizona, for Respondent

Before: Judge Broderick

STATEMENT OF THE CASE

Complainant contends that he was discharged from the position he had with Respondent as a maintenance mechanic, because of activities protected under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., ("the Act"). Respondent filed a motion to dismiss on the ground that the complaint was not timely filed and did not state a cause of action under section 105(c) of the Act. The motion was denied by order issued March 24, 1983.

Pursuant to notice the case was called for hearing in Tucson, Arizona, on June 7, 1983. Bradley Abner testified on his own behalf. Ben Dorris and Linda Trice testified on behalf of Respondent. At the conclusion of the hearing, each party was given the opportunity to argue his position on the record. Based on the entire record and considering the contentions of the parties, I make the following decision:

FINDINGS OF FACT

Complainant began working for Respondent in June, 1979. He was hired as a maintenance mechanic. Although he had previously worked as a welder, a maintenance welder and a mechanic, his job at Anamax was the first job he had in the mining industry.

While employed at Respondent's mine, Complainant at various times worked repairing pumps, repairing cyclones, rebuilding precipitators, and maintaining machinery in the crusher plant. During 1979, Complainant worked in the tailings pond under a foreman whose name he cannot recall. Beginning in 1980 and until June, 1982, he worked under foreman John Murphy. In September, 1981, however, he was detailed to foreman Ben Dorris for about 6 weeks, to help rebuild a precipitator. Subsequently, on another occasion he worked under Dorris rebuilding another precipitator. From June 21, 1982 until he was discharged effective October 7, 1982, he again worked under Ben Dorris.

In December, 1980, at a time when Complainant was working under John Murphy, an employee was killed by a crane. Although Complainant did not witness the accident because he was not working that day, he was interviewed by an MSHA investigator concerning the accident. In Complainant's opinion, the crane was unsafe because of the absence of a "limit switch" to stop the hook from going all the way up. Complainant does not recall whether he talked to his foreman about the absence of a limit switch. He did, however, tell the MSHA investigator "about how the limit switches didn't work and all that." (Tr. 15). About 2 weeks later, Complainant was given a "safety letter" by Murphy because he was not wearing ear plugs. Subsequently, after Murphy found him in a supply room waiting to get a welding rod, Complainant was given a verbal warning for not doing his job.

A few weeks after the crane fatality, an employee was injured by a ram on the crusher machine. Complainant witnessed the injury but did not say anything about it to management.

Dorris was aware of the fatal injury in December 1980 involving the crane, and knew that Complainant was involved in the MSHA investigation. Dorris was not involved in the matter, however, and does not know what Complainant told MSHA.

In approximately August, 1982, Complainant witnessed an incident in which crane operator Lindanar was instructed by his supervisor to raise the crane with the dust bowl attached and it caught under the crusher mantel. Complainant hollered to the foreman to have the crane lowered. Lindanar was suspended for 3 days, but after Complainant told the Labor Relations Department what he saw, the suspension was lifted and Lindanar was paid for his lost time.

Dorris considered Complainant an average worker. Prior to September, 1982, Complainant was never disciplined by Dorris. Company records, however, show that Complainant received a warning because of an unexcused absence from work on February 4, 1982. Complainant received a letter of commendation for a particular job in March, 1982.

On September 13, 1982, Complainant told Dorris that he had just learned that his sister-in-law died and inquired about his entitlement to "funeral leave." Dorris informed him that he was not entitled to paid leave time under the contract. On September 14, Complainant told Dorris that he had changed his mind and was not going to the funeral. Dorris later rechecked the contract provision and determined that an employee was in fact entitled to funeral leave for attending the funeral of a sister-in-law, and he so informed Complainant. Complainant worked September 15, 1982, but was off September 16 and 17; his niece called in and said he was attending a funeral. When Complainant returned to work on Monday, September 20, Dorris asked him for verification that he had attended the funeral.

On October 5, 1982, Complainant submitted a letter dated September 16, 1982, from the Eaton Funeral Home in Franklin, Ohio. The letter requested that Complainant be excused for worked because he attended the funeral of Bernice Gabbard on September 16, 1982. The typed date of the funeral had apparently been altered in ink from September 15 to September 16. The words "RELATIONSHIP: sister-in-law" were typed in, apparently with a different typewriter. Dorris was suspicious of the letter and called the company Labor Relations Department.

Linda Trice, Respondent's Labor Relations Administrator, called the funeral home and learned that the funeral had taken place on September 15, 1982, and the words "RELATIONSHIP: sister-in-law" were not placed on the letter by the funeral home. Trice prepared a series of questions for Dorris to ask Complainant. Complainant maintained that he had attended the funeral of his sister-in-law in Ohio. Complainant was suspended October 7, 1982, pending final determination on disciplinary action, for falsifying records. Pursuant to the collective bargaining agreement between Respondent and the labor unions representing the employees, a hearing was held on October 8, 1982. The hearing was chaired by Linda Trice and was attended by Complainant, Ben Dorris and union representatives. Following the hearing, Respondent decided to discharge Complainant. The decision was made by Williams, Bodde and Trice of the Labor Relations Department and communicated to Complainant by Ben Dorris. The Labor Relations Department is ordinarily not involved in safety matters. Trice was unaware of Complainant's participation in the MSHA investigation referred to earlier herein. The union did not file a grievance on Complainant's discharge. At the hearing herein, Complainant stated that he did not attend the funeral and that the deceased was his wife's aunt. He admitted that the letter from the funeral home was altered at his direction.

On two prior instances employees were dischargedf by Respondent for falsifying records submitted to the company.

ISSUE

Whether the evidence establishes thatd Complainant's discharge was related to any activity protected under the Mine Safety Act.

CONCLUSIONS OF LAW

The burden of proof is on the Complainant to establish that he was engaged in activity protected under the Act, and that the adverse action (here, the discharge) was motivated at least in part by the protected activity. Secretary/Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980), rev'd on other grounds, 663 F.2d 1211 (3rd Cir. 1981); Secretary/Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981).

It is clear that Complainant's participation in the MSHA investigation of the fatal crane accident in December, 1980, was activity protected under the Mine Act. However, the long time interval between this activity and the adverse action itself argues against a relationship between the two. There is not positive evidence of such a relationship. It might be inferred that the action of foreman Murphy about two weeks following the MSHA investigation - the safety letter and the verbal warning--were caused by irrigation over Complainant's involvement in the investiagtion. But such an inference could not be made that the discharge of Complainant almost 2 years later was related to the investigation. Complainant expressed his belief that there was such a relationship, but has not offered any evidence to support it. There is no evidence, direct or indirect, that the disharge of Complainant was in any way related to the jury to the employee involving the crusher ram or to the incident involving the crane operator who was suspended.

The stated reason for the adverse action - Complainant's alleged submitting of false documents to obtain funeral leave pay - is entirely unrelated to the matters of health or safety. It is not part of my responsibility to consider whether the penalty was warranted or was too harsh. In any event, it was not safety related. Furthermore, it is clear that the persons who made the decision to discharge Complainant were entirely unaware of the activity he relies on here so there could not have been a relationship between the protected activity and the discharge. I conclude that Complainant's discharge did not result from activity protected under the Act.

ORDER

Based upon the above findings of fact and conclusions of law, the above proceeding is DISMISSED.

James A. Broderick
Adminstrative Law Judge