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BOBBY HOLT V. SOUTHERN STONE
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

BOBBY J. HOLT,
COMPLAINANT

v.

SOUTHERN STONE COMPANY,
RESPONDENT

DISCRIMINATION PROCEEDING

Docket No. SE 83-49-DM

MSHA Case No. 83-33

DECISION

Appearances: Margaret Y. Brown, Esq., Auburn, Alabama, for Complainant;
Hoyt W. Hill, Esq., Walker, Hill, Adams, Umbach, Herndon, & Dean, Opelika, Alabama, for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

Complainant contends that he was discharged from his job as repairman for Respondent because of activity protected under the Federal Mine Safety and Health Act (Act). Respondent contends that he was fired for reasons unconnected with occupational safety. Pursuant to notice, the case was heard in Opelika, Alabama, on January 17 and 18, 1984. A.L. Lazemby, Jr., Dennis Lamar Lazemby, Bill Harris, Lisa Walsh Shivers, Henry Lee Peoples, Ocie Thomas Chamblee, Lawrence W. McRae, Eunice Marshall, Janette Holt, Samuel B. Holt and Bobby Holt testified on behalf of Complainant; Cary Torbert, Kenneth E. Roberson, Jack McAnally and George Cooper testified on behalf of Respondent. Both parties have filed posthearing briefs. Based upon the entire record and considering the contentions of the parties, I make the following decision.

FINDINGS OF FACT

Complainant has worked for Respondent Southern Stone and its predecessor, with some breaks in employment, beginning in 1969. He quit in 1974 while working in the hopper because of the absence of any effective means to prevent trucks from rolling back into the hopper and endangering the workers. He returned to work for Respondent in 1979.

Sometime in 1980, Complainant and his wife assisted a co-worker, Willie Calloway, in contacting MSHA after Calloway had been fired, allegedly for refusing to work on the roof during a rainstorm.

In approximately November, 1982, Complainant discussed with some of his co-workers the company policy concerning wearing hard toed shoes on the job. The Plant Superintendent, Mr. Cooper, had informed Complainant that hard toed shoes were required. Complainant noticed, however, that some men, including supervisors, did not always wear them. He called the Birmingham Office of MSHA and asked what the law required concerning safety shoes. The MSHA spokesman informed him that all employees except truck drivers were supposed to wear hard toed shoes.

Thereafter Cooper called Complainant into his office and asked whether Complainant called MSHA about hard toed shoes. Complainant admitted that he had. Cooper told Complainant not to call MSHA again, "that [he] worked for Southern Stone, [and not] for Mining Safety and Health." MSHA did not investigate nor did it contact Respondent regarding this call by Complainant.

On June 1, 1980, Complainant broke his right hand in a fight unconnected with his work. He underwent three operations on the hand and missed considerable time from work. On one occasion he was "written up" by Cooper for taking time off to see a doctor. When he heard that Cooper threatened to fire him, he saw a lawyer concerning his job rights.

On May 4, 1981, Complainant suffered an occupational injury when a chute door fell on him. He continued on the job the remainder of the shift. The next day he was examined by a physician at a hospital emergency room, and stayed off work for one shift. After he returned, Cooper asked him to have the record changed so that the injury would not be shown as coming under Workers' Compensation. In return, Complainant was to receive "pay in hours." Subsequently Complainant filed a Workers' Compensation claim which is still pending.

On September 3, 1982, Complainant injured his finger while loading scrap at work. The resultant medical bills and lost time were paid under Workers' Compensation.

Complainant and his wife both complained to Mr. Cooper about employees "riding the clock," that is being clocked in, but not being at work. After the complaints, the practice "sort of slacked off." Complainant also testified that at some unspecified time, some employees engaged in drinking, horseplay, stealing and gambling on the job. He stated that the foreman participated in these activities.

In the latter part of 1982, Respondent was negotiating with a firm in Southern Alabama to supply it with a large order of construction stone. In an effort to cut delivery costs, it requested the County Commissioners of Lee and Macon counties to designate the route from Respondent's Plant as a truck route, thus reducing the haulage distance to the customer. The requests were granted, and the contract entered into. Certain residents of the two counties, whose property abutted the highway, protested the decision and sought a reversal of it. Among the protesters were Complainant and his wife. Complainant's wife had been run off the road on one occasion by one of the trucks hauling Respondent's stone. Complainant believed the use of the road by the trucks was dangerous, and there is evidence that the trucks caused considerable damage to the road. Superintendent Cooper was aware that Complainant was involved in the protest. He called a meeting and explained to Complainant and other employees that the truck route was of great importance to the company.

The leader of the protest movement was A.L. Lazemby, a farmer whose land was close to the road in question, and who used the road in connection with the operation of his farm. On February 24, 1983, Lazemby blocked the highway with his truck until requested to remove it by the sheriff's office. On the following day, February 25, Lazemby again blocked the road. Complainant knew of the protest and was at the scene when the road was blocked on February 25. He did not participate in the blocking of the road. The news media were present, and pictures of the protest appeared in the newspapers and on television. Complainant's picture was included since he was present. Cooper observed Complainant's presence, and assumed that he was part of the protest movement. When Cooper returned to the plant he called Mr. Kenneth Roberson, Vice President of Respondent, and told him about the roadblock, and that Complainant was seen among the protesters. Cooper asked what should be done about Complainant. Roberson, after discussing the matter with the Legal Department, decided to terminate Complainant. He dictated a memorandum to Cooper to deliver to Complainant.

On February 25, 1983, Complainant was given a notice of termination for "conduct unbecoming a Southern Stone Employee." The conduct was described as being seen "in a group of people that were blocking an approved route for trucks leaving Southern Stone Plant."

Roberson was not aware of Complainant's employment history prior to February 24 and 25, 1983, which are recited herein.

ISSUES

1. Was Complainant's discharge motivated in any part by conduct protected under the Act?

2. If so, did Respondent establish that he would have discharged Complainant for unprotected activities alone?

3. If Complainant's discharge was in violation of the Act, what relief is he entitled to?

CONCLUSIONS OF LAW

To establish a prima facie case of discrimination under the Act, Complainant must show that he was engaged in activity protected by the Act, and that his discharge was motivated in any part by the protected activity. Secretary/Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980), rev'd on other grounds sub nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3rd Cir.1981); Secretary/Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981); Secretary/Bush v. Union Carbide Corporation, 5 FMSHRC 993 (1983).

PROTECTED ACTIVITY

Complainant's call to MSHA asking about hard toe shoe requirements was activity protected under the Act. Respondent was clearly unhappy about the call and in effect directed Complainant not to make such calls thereafter. Assisting a fellow worker in making a complaint to MSHA is protected activity, but there is no evidence that Respondent was aware of Complainant's efforts on behalf of Willie Calloway.

Complaints to management about other employees "riding the clock" could be protected insofar as they allege that this practice jeopardized the safety of Complainant or the other workers. Although the evidence does not directly show that the complaints were related to safety, I can infer that they were, and conclude that they constituted protected activity. The testimony concerning drinking and horseplay on the job does not show that any complaints or work refusal grew out of these activities. Therefore, activity protected under the Act was not shown in connection therewith. Complainant's allegations that he was disciplined for taking time off following his non work connected hand injury, and that Respondent threatened to fire him, do not allege activity protected under the Act. No contention that this discipline or threat were related to work safety was made by Complainant.

The allegations concerning Complainant's job related injuries in May, 1981, and September, 1982, do not contain any contention that occupational safety was involved. The alleged direction to change the hospital records to falsely show a non-job related injury may allege a violation of the State Workers' Compensation Law. It does not describe activity protected under the Mine Safety Act.

A considerable part of the evidence in this case, and of Respondent's posthearing brief is devoted to Complainant's participation in the citizens protest against the use of a road as a truck route. The relationship of this protest to safety goes only to the matter of highway safety, and there is no contention and no evidence that it related in any way to occupational safety at Respondent's Plant. Whatever the nature and extent of Complainant's involvement in the protest, it did not constitute activity protected under the Act.

MOTIVATION FOR DISCHARGE

The precipitating factor in the decision to discharge Complainant was his participation in the truck route protest, or rather Respondent's perception of his participation in the protest. I have previously concluded that this was not protected activity. The present status of the employment at will doctrine in American law is an interesting question, but not one that I am called upon to answer in this proceeding. Whether the discharge of an employee for exercising First Amendment rights of free speech and political protest is against public policy is also a question not before me. See Note, Protecting at Will Employees Against Wrongful Discharge: The Duty To Terminate Only In Good Faith, 93 Harv.L.Rev. 1816 (1980).

The decision to discharge Complainant was made by Kenneth E. Roberson, after he was informed by Cooper of Complainant's truck route protest activities. Roberson was not aware of Complainant's call to MSHA concerning the hard toe shoe incident in November, 1982. Although Cooper was aware of that incident, the evidence does not establish that it was a factor in the decision to discharge Complainant. Nor is there any evidence that the complaints' of employees riding the clock played any part in the discharge. For these reasons, I conclude that Complainant has failed to make a prima facie case of discrimination under the Act. Further, even if it were shown that protected activity was a motivating factor, the evidence is overwhelming that Respondent would have discharged Complainant for unprotected activity (the truck route protest) alone. Therefore, no violation of section 105(c) of the Act has been established.

ORDER

Based upon the above findings of fact and conclusions of law, the complaint and this proceeding are DISMISSED for failure to establish a violation of section 105(c) of the Act.

James A. Broderick
Administrative Law Judge