

CCASE:  
LONNIE JONES V. MINGO COAL  
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Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

LONNIE JONES,  
COMPLAINANT

v.

MINGO COAL COMPANY, INC.,  
RESPONDENT

DISCRIMINATION PROCEEDING

Docket No. KENT 83-257-D

BARB CD 83-19

DECISION

Appearances: Jeffrey A. Armstrong, Esq., Appalachian Research and Defense Fund of Kentucky, Inc., Barboursville, Kentucky, for Complainant;  
David W. Burton, Esq., Leick, Hammons & Burton, Corbin, Kentucky, for Respondent Mingo Coal Company, Inc. ;  
Larry Conley, Esq., Williamsburg, Kentucky, for D & R Contractors.

Before: Judge Melick

This case is before me upon the complaint of Lonnie Jones 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 he was discharged as an employee of Mingo Coal Company, Inc. (Mingo) on April 25, 1983, in violation of Section 105(c)(1) of the Act.1 As subsequently amended, his complaint charges alternatively that if he was not an employee of Mingo then he was unlawfully discharged on that date from the partnership known as D & R Contractors. On August 18, 1983, Mingo filed a Motion to Dismiss and Motion for Summary Decision alleging inter alia that Jones had never been its employee and that it had nothing to do with his discharge or removal from D & R Contractors, an alleged independent contractor. For the reasons set forth below, the Motions are granted.(FOOTNOTE 1)

As a preliminary matter, it is necessary to review the legal and factual basis for Mr. Jones' complaint herein. In order to establish a prima facie violation of Section 105(c)(1) of the Act, he must prove by a preponderance of the evidence that he engaged in an activity protected by that section and that his discharge or removal was motivated in any part by that protected activity. *Secretary, ex rel David Pasula v. Consolidation Coal Company*, 2 FMSHRC 2786 (1980), rev'd on other grounds, sub nom, *Consolidation Coal Company v. Secretary*, 663 Fed.2d 1211 (3d Cir.1981). See also *NLRB v. Transportation Management Corporation* 76 L.Ed.2d 667 (1983), affirming burden-of-proof allocations similar to those in the Pasula case.

In this case, Mr. Jones asserts that he was discharged on the afternoon of April 25, 1983, because he refused to work a double shift of sixteen hours. At hearing, Jones alleged that he arrived at the Mingo coal mine for work at about 7:15 on the morning of the 25th and worked until approximately 5:00 p.m. with only one-half hour break for lunch. He further alleged that he had a headache and the flu that day and was therefore not feeling well. He thus claims that when the "foreman", Ron Perkins, approached him that afternoon about working additional overtime, he declined, believing it would be hazardous. Jones claims that when he was discharged later that afternoon by Perkins, that action was based upon his refusal to work overtime, a work refusal protected by the Act. A miner's exercise of the right to refuse work is a protected activity under the Act so long as the miner entertains a good faith, reasonable belief that to work under the conditions presented would be hazardous. *Robinette v. United Castle Coal Company*, 3 FMSHRC 803 (1981). See also *Eldridge v. Sunfire Coal Company*, 5 FMSHRC 408 (1983), pet. for review granted July 11, 1983.

As noted, Mingo argues in its motions that whether or not Ron Perkins violated Jones' rights under the Act is irrelevant because Perkins and Jones were not its employees or agents but were operating as partners in a completely separate business venture known as D & R Contractors, an independent contractor with which Mingo had contracted to produce coal from its mine.<sup>2</sup> Mingo further asserts that it had nothing to do with Jones' "discharge" from D & R Contractors.

It is not disputed that Mingo is a corporation under Kentucky law and is wholly owned by Roger Daniel. Daniel and his wife are the only officers of the corporation which owns the coal mine involved in this proceeding. It is further undisputed (FOOTNOTE 2)

that Ron Perkins formed a "partnership" known as D & R Contractors which contracted with Mingo to produce coal from the Mingo mine and to put it "outside" at a specified price per ton. Daniel testified that he never hired, fired, or disciplined any persons affiliated with D & R Contractors and never directed any of its work. It is indeed clear that Daniel did not direct any of the underground mining operations but left that to Ron Perkins and D & R Contractors. There is, moreover, insufficient evidence in this case that Perkins was an employee or agent of Mingo.

Lonnie Jones admits that in connection with his work at the Mingo mine he signed a partnership agreement, was told that he "worked for" D & R Contractors, was paid by D & R Contractors, was directed in his work by one of the partners, Ron Perkins, and was "discharged" by Perkins. In addition, except for the first few paychecks, Jones was paid based on a share of the coal produced by the partnership and when he was "discharged" was paid based on a share of the coal then piled outside the mine. Jones also admitted at hearing that after he began receiving his pay on checks from D & R Contractors, he assumed he was working for D & R Contractors. While it appears from this evidence that under Kentucky law Jones may very well have been a partner of D & R Contractors, Jones maintains that if he was not an employee of Mingo Coal Company, he was an employee (and not a partner) of D & R Contractors. See Ky.Rev.Stat. 362.180. For purposes of this decision, however, it is not necessary to determine whether Jones was an employee or partner of D & R Contractors. In any event, it is clear that Jones was not an employee of Mingo and therefore Jones could not have been discharged from Mingo.

It is nevertheless arguable that Mingo through one of its agents caused Jones' expulsion or discharge from D & R Contractors. While there is insufficient evidence in this case to indicate that Perkins was an employee or agent of Mingo, the argument is advanced that Roger Daniel, acting on behalf of Mingo, participated in Jones' discharge from D & R Contractors. In this regard, however, Jones admits that when he was "fired" by Perkins, Roger Daniel was merely standing nearby and said nothing. Jones also testified that when he later asked Daniel if he would help (presumably to intervene on his behalf), Daniel responded, "Don't look at me, I run the outside." Perkins and Daniel testified that Daniel was not present when Jones was discharged by Perkins, that Daniel had not previously been consulted about Jones' discharge, and that Daniel had no advance knowledge of the discharge. I cannot find from either version of events that Daniel had any part in the discharge of Jones. Accordingly, I do not find that Mingo was responsible in any way for Jones' discharge from the partnership, D & R Contractors. Since Mingo was not responsible for the discharge, it makes no difference for purposes of Mingo's liability under the Act whether that discharge was in violation <<PCITE, 6 FMSHRC 635>>of the Act. Accordingly, the Motions for Dismissal and Summary Decision filed by Mingo are granted and the complaint against Mingo is dismissed.3

