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FORRIE EVERETT V. INDUSTRIAL EXTRACTIVES  
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Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

FORRIE W. EVERETT, COMPLAINANT	DISCRIMINATION PROCEEDING
v.	Docket No. YORK 83-7-DM
INDUSTRIAL GARNET EXTRACTIVES, RESPONDENT	MSHA Case No. MD 83-59

DECISION

Appearances: Forrie W. Everett, South Paris, Maine, pro se;  
Carol A. Guckert, Esq., Portland, Maine, for  
Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

Complainant contends that he was discharged on July 1, 1983, from the position he had with Respondent because of activity protected under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. Respondent denied that Complainant's discharge was related to protected activity. Interrogatories were served on Complainant by Respondent which Complainant failed to answer. Respondent filed a motion to Dismiss on March 12, 1984, because of this failure. I reserved my ruling on the motion. Pursuant to notice the case was heard in Auburn, Maine, on March 22, 1984. The case was consolidated for hearing with the case of Lawrence Everett v. Industrial Garnet Extractives, Docket No. YORK 83-6-DM, but since the cases involve separate alleged discriminatory discharges, they will be decided separately. Forrie Everett testified on his own behalf; Scott Andrews, Bruce Sturdevant, Scott Hartness and Richard Kusheba testified on behalf of Respondent. The parties were given the opportunity to file posthearing briefs, but neither party has done so. Based on the entire record, and considering the contentions of the parties, I make the following decision.

FINDINGS OF FACT

Complainant was hired as a maintenance worker by Respondent in April, 1982. Respondent began operating the subject plant in 1979, taking over an existing facility built in about 1925. Ore

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is delivered from a mine site to the plant where it is crushed and separated. It is then dried and screened into different sizes.

Prior to his employment with Respondent, Complainant had been employed in a construction company, operating heavy equipment, driving and working with heavy steel. He did maintenance on the machinery, on steel frames and on trucks. His job at Respondent required him to do maintenance on various kinds of machinery, such as rock dryers, elevators, small motors, vehicles and heavy equipment. It also included welding. When he was hired he earned about \$4.25 per hour and worked from 40 to 55 hours per week.

When he was first hired, he was regarded as a good worker and received early pay raises. Beginning in about January, 1983, the foremen began complaining that he did not complete assigned work. Machine operators complained that the repair work he did on their machines was not done properly. In March, 1983 and in June, 1983, two different foremen recommended that Complainant be discharged.

There was considerable confusion at Respondent's plant as to supervisory authority. Complainant was hired by Scott Hartness, Respondent's Vice President in charge of production. On many occasions, perhaps "most of the time" (Tr. 11), Hartness assigned jobs to Complainant and discussed maintenance problems with him. Scott Andrews was second shift foreman beginning in January or March, 1983, and became "foreman for new construction" in June 1983. While he was second shift foreman, Complainant, who worked days, was not under his supervision "unless his shift overlapped" (Tr. 71). When Andrews became foreman for new construction he did not have any employees assigned to him directly, but had to get employees working under other foremen after clearing it with them. Bruce Sturdevant was plant foreman beginning in August, 1982. He was in charge of the machine operators, bagging operators and, "at times, the maintenance staff" (Tr. 81). In about May, 1983, Wally Hinch was maintenance foreman in charge of all maintenance personnel. He quit after about 1 month in this position. Complainant expressed uncertainty about the identity of his immediate supervisors during his employment, and the record before me makes his uncertainty understandable.

On about June 21, 1983, Complainant's brother Lawrence Everett, an electrician working at Respondent's plant, was discharged. Lawrence Everett filed a discrimination complaint with the Federal Mine Safety and Health Administration and Complainant talked to the MSHA investigator about his brother's complaint. This interview, however, occurred after Complainant himself had been discharged.

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Complainant sustained three work related injuries at Respondent's plant. In September, 1982, he sustained an eye injury when the band attached to his safety glasses was caught on a piece of steel and the glasses cut his eye. He lost 2 or 3 days from work. In early, 1983, while grinding, a piece of steel entered his eye beneath the safety glasses. He did not lose time from work. In June 1983, he injured his thumb when he was working on a machine on top of an elevator and the operator started the machine. Complainant did not lose time from work.

After the second eye injury, Complainant complained to Scott Hartness about the inadequate glasses. Hartness replied that they were cheap.

In April or May, 1983, Complainant was directed by Hartness and Sturdevant to perform welding on a fuel tank which had fuel spilled on the outside of the tank. A fire occurred, and Complainant complained to Sturdevant.

On about June 29, 1983, Complainant was directed by Scott Andrews to weld a steel leg while standing in the bucket of a front-end loader 12 feet in the air. He refused to do it, because he believed it was unsafe. However, he did begin to get the equipment ready to weld the legs on using a contractor's crane to lift the tank. At about 4:15 p.m., Complainant and another employee began to weld the first leg on the tank. The proposed legs were different sizes, however, and before they completed welding the first leg, it was the end of the shift and they went home. On June 30, 1983, Complainant began working about 7:00 a.m. He was using a rented portable welder. The job proved complicated and was not finished when Scott Andrews approached Complainant about 4:30 p.m. He told Complainant that the rented welder would have to be returned by 5:00 o'clock and suggested they use the company's small AC welder. Both Complainant and the crane operator told him the job could not be done with the small welder. Andrews took the rented welder, the tank was put back down, the one leg was cut off, and Complainant went home. Andrews told Complainant not to cut off the leg, but Complainant did so, because he thought it would be bent otherwise. There was a heated discussion between Complainant and Andrews before Complainant went home. Andrews was upset and when he returned to the office he told Sturdevant what happened, and that he was going to discharge Complainant. Hartness was home sick at the time.

When Andrews came to work the following day, he "pulled Forrie Everett's time card" and told Everett that he had fired him. He states that he fired Complainant for loafing on the job and not following his supervisor's instructions.

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On about June 21, 1983, Complainant signed a statement prepared by his brother concerning alleged unsafe practices at the subject plant. Andrews was not aware of this statement at the time Complainant was discharged.

After his discharge, Complainant was off work about 1 week during which he received unemployment compensation. Since then, he has worked for the J.P. Cullinan Oil Company and has been earning about the same wages as he made while with Respondent. He does not seek reinstatement.

#### ISSUES

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

2. If so, did Respondent establish that it would have discharged him in any event for unprotected activities alone?

3. If Complainant's discharge was in violation of the Act, what remedies 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).

If the Complainant establishes a prima facie case, the burden is on the employer to show that the discharge was also motivated by unprotected activity and that he would have discharged Complainant for the unprotected activity alone. Pasula, supra.

#### PROTECTED ACTIVITY

Complainant's discussion with the MSHA investigator concerning his brother's discrimination case would have been protected, but it took place after Complainant was discharged. His signing the affidavit prepared by his brother concerning alleged safety violations was protected activity. There is no evidence that Scott Andrews who discharged Complainant was aware of it. Therefore, I conclude that his discharge was not motivated in any part because of this activity.

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Complainant's complaint to Scott Hartness about the inadequate safety glasses, his complaint to Sturdevant about being required to weld a tank with fuel oil spilled on it, and his refusal to perform a welding task while standing in the bucket of a raised front-end loader were all protected activities.

#### UNPROTECTED ACTIVITY

Respondent has alleged that Complainant shirked his duties; that he did poor quality work, much of which had to be done over; that he avoided work and worked slowly; that he refused to follow directions. If these acts occurred, none of them can be treated as protected activities under the Act.

#### COMPLAINANT'S DISCHARGE

Andrews stated that he discharged Complainant "mostly for loafing on the job and not following supervisor's instructions" (Tr. 63). He also stated that after his heated discussion with Complainant on June 30, he (Andrews) "was pretty riled up," and that he "didn't think there was any reason for any foreman having to put up with the stuff that I'd just went through . . ." (Tr. 75).

There is no evidence that Complainant's complaint to Hartness about inadequate safety glasses, his complaint to Sturdevant about welding on an oily fuel tank, or his signing the affidavit on his brother's behalf were motivating factors in the discharge. However, Complainant's refusal to weld from the bucket of the loader occurred during the task which preceded the discharge. I conclude that it was part of the motivation for the discharge. There were obviously other motivating factors, however. Complainant had a long history of doing work which was deemed unsatisfactory by management. He resented authority, and refused to follow orders. He berated Andrews when the portable welder was taken from him. I conclude on the basis of all the evidence that he would have been discharged for unprotected activity alone, namely for refusing to follow orders and for berating his supervisor. 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