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

LAWRENCE L. EVERETT, COMPLAINANT	DISCRIMINATION PROCEEDING
v.	Docket No. YORK 83-6-DM
INDUSTRIAL GARNET EXTRACTIVES, RESPONDENT	MSHA Case No. CD 83-58

DECISION

Appearances: Lawrence L. Everett, West Paris, Maine, pro se;
Carol A. Guckert, Esq., Portland, Maine,
for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

Complainant filed this case, contending that he was discharged on June 21, 1983, from the position of electrician which 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. Respondent filed certain interrogatories on Complainant, some of which were answered and some of which Complainant refused to answer. Respondent moved to dismiss the complaint on March 12, 1984, because of Complainant's failure or refusal to answer the interrogatories. I withheld my ruling on the motion. At this time, I Deny the motion because Respondent failed to establish any prejudice resulting from the refusal to answer the interrogatories in question.

Pursuant to notice, the case was heard in Auburn, Maine, on March 22, 1984. The case was consolidated for hearing with the case of Forrie W. Everett v. Industrial Garnet Extractives, Docket No. YORK 83-7-DM, but since the cases involve separate alleged discriminatory discharges, they are being decided separately. Complainant and Forrie W. Everett testified on Complainant's behalf; George B. Robinson, Deborah Hartness, Bruce Sturdevant, Thomas Scott Hartness, Donald Berry, Daniel Abbott and Richard Kusheba testified on behalf of Respondent. The parties were afforded the opportunity of filing posthearing briefs. Complainant filed such a brief; Respondent did not.

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Based on the entire record, and considering the contentions of the parties, I make the following decision.

FINDINGS OF FACT

Complainant was employed by Respondent beginning in February, 1982, as a plant electrician. He had been an electrician for 12 to 14 years, and his most recent previous position was as an electrician for a mobile home manufacturer. When he began with Respondent, he was paid \$5.00 per hour.

Complainant found the Respondent's plant to be in "a total shambles;" he had no material to work with and told Scott Hartness, the Vice President for production who had hired him, that he could not work under the conditions. Hartness assured him that he would see that whatever Complainant needed would be made available to him. An account was opened at an electric supply company and a hardware store and Complainant was authorized to buy materials and supplies.

Complainant understood that he was responsible to Hartness alone. However, for about 1 month in the Spring of 1983, Wally Hinch was made maintenance foreman, and at other times Bruce Sturdevant was given authority over both production and maintenance employees. Sturdevant never told Complainant that he was his supervisor and Scott Hartness did not specifically inform Complainant that Sturdevant was his boss. Complainant regarded Hartness as his supervisor and continued to discuss maintenance problems directly with him.

Complainant discussed safety problems in the plant with Hartness regularly, and on several occasions submitted written reports of unsafe conditions. The conditions were discussed but "that was about the end of it."

In July, 1982, an MSHA inspection team visited the facility. Complainant went through the mill with them. A number of electrical problems were pointed out and several citations were issued. Complainant was directed by Hartness to remedy the problems.

On June 20, 1983, a front-end operator, Danny Abbott, was working on a machine when it was started by another employee. Abbott had failed to lock out the machine. He told Complainant about it and Complainant told Sturdevant. Sturdevant "didn't want to talk about it. Just turned around and walked away" (Tr. 19). Complainant then notified Hartness of the incident. Hartness told Sturdevant to "make sure he understands to lock the machinery out" (Tr. 99). Respondent was apparently having

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a problem with employees concerning lockouts and more lockout tags had recently been ordered. Complainant had special responsibility in this connection since he was an electrician, and had given lectures to employees on electrical lockouts.

After the incident involving Danny Abbott, but still about midmorning, Complainant was working on the engine of a fork truck. He found a short circuit, "a wiring mess" (Tr. 20), and in tracing the wires, he blew a number of fuses. He finally ran out of fuses. He worked on the truck past dinner time. Sturdevant told Complainant "look we've got to have that fork truck, it's the only one we've got and I don't care how you get it, but get it between all the other things" (Tr. 21).

Complainant punched out for dinner and drove his truck to the hardware, got the needed fuses and returned to the mill. He had a cup of coffee and sandwich; then he punched in, put the fuse back in the fork truck and had it running before the fork truck operator returned. He finished out the shift at about 5:00 p.m., and went home.

Respondent paid its employees during their lunch time and beginning in the Spring of 1983 notified all employees that they were to remain on the company premises during lunch. Thereafter, a number of employees complained to Sturdevant and Hartness that Complainant continued to leave the premises to eat lunch. Hartness specifically told Complainant that he was not to leave at lunch time. Wally Hinch also told him and Complainant objected with choice expletives to this direction. During the afternoon of June 20, Sturdevant told Hartness that Complainant had left again for lunch and that the other employees thought Complainant was being treated with special favor. At the end of Complainant's shift, Hartness told him "I've had some complaints lodged against you." Hartness then turned to talk to another employee and Complainant left for home.

On June 21, 1983, when Hartness came to work about 20 minutes before 7, Sturdevant told him that he "pulled [Complainant's] time card" (Tr. 102), which meant that he fired him. When Complainant arrived that morning, Hartness told him "Bruce pulled your time card ... for leaving company property during lunch hour" (Tr. 102).

Complainant then handed Hartness a written list of safety complaints alleging that lock out procedures are not being followed or enforced, general housekeeping is "practically nonexistent," safety railings and catwalks are missing, a number of unsafe electrical practices were permitted in the mill, and

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there was excessive dust in the air when the plant was operating. Hartness handed the written statement to Sturdevant. Sturdevant and Hartness wanted to talk about why Complainant left the company property the previous day; Complainant wanted to talk about his written complaint. Finally Complainant said that he did not want to be bothered with this petty bullshit and that Hartness and Sturdevant could take the job and shove it.

When he was discharged, Complainant earned \$6.50 per hour. He remained off work following his discharge until September 17, 1983, when he began working for Cornwall Industries as a maintenance electrician and mechanic. He earns \$5.30 per hour. He does not seek to be reinstated in his position with Respondent.

ISSUES

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

2. If it was, whether Respondent established 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

In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a Complainant bears the burden of production and proof to show (1) that he engaged in protected activity and (2) that an adverse action against him was motivated in any part by the protected activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir.1981), and Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981). In order to rebut a prima facie case, an operator must show either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. If an operator cannot rebut the prima facie case in this manner, it may nevertheless affirmatively defend by proving that (1) it was also motivated by the miner's unprotected activities, and (2) that it would have taken the adverse action in any event for the unprotected activities alone. The operator bears a burden of proof with regard to the affirmative defense. Haro v. Magma Copper Co., 4 FMSHRC 1935, 1937 (November 1982). The ultimate burden of persuasion that illegal discrimination has occurred does not shift from the Complainant. Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC at 818 n. 20. The Supreme Court recently approved the

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National Labor Relations Board's virtually identical analysis for discrimination cases arising under the National Labor Relations Act. *NLRB v. Transportation Management Corp.*, 76 L.Ed.2d 667 (1983). See also *Boich v. FMSHRC*, 719 F.2d 194 (6th Cir.1983) (approving the Commission's Pasula-Robinette test).

It is clear that Complainant was concerned about safety at the mill, particularly electrical safety. It is also clear that there were unsafe conditions and practices at the mill. Complainant's personality was abrasive, particularly toward his supervisors, and they reacted against his abrasiveness. Part of the reaction, particularly that of Sturdevant, seems to have been the result of Complainant's bringing up safety matters. The proximity to the discharge of Complainant's remonstrance to Sturdevant about the Danny Abbott lock-out problem, (a protected activity) "is itself evidence of an illicit motive." *Secretary of Labor v. Stafford Construction Company and FMSHRC*, No. 83-1566, slip op. at 13 (D.C.Cir. April 20, 1984). I conclude, therefore, that Complainant's discharge was motivated in part by activity protected under the Mine Safety Act.

Other factors, however, played a part in the decision to discharge Complainant. The evidence establishes that he frequently violated the company rule that employees remain on the premises during lunch time - this resulted in numerous complaints from other employees who felt that Complainant was given favorable treatment because of personal friendship with Sturdevant. Complainant also had and voiced a negative attitude about the company: He expressed the hope that the company would go bankrupt or that it would be shut down by the State environmental authority. At a supervisors meeting on June 17, 1983, a number of supervisors complained that Complainant "had become a source of trouble with the other men ... [and] has been causing moral (sic) problems by telling everyone that Central Maine Power was going to shut us down; the DEP was going to shut us down he was constantly telling the other men that IGE [Respondent] was never going to make it and other disparaging remarks" (Respondent's Exh. 2). I conclude, therefore, that in discharging Complainant, Respondent was also motivated by his unprotected activities.

Did Respondent establish by a preponderance of the evidence that it would have discharged Complainant regardless of his protected activity? The stated reason for the discharge was Complainant's leaving the company premises during lunch time. In fact, he did and had done so in the past and was reprimanded for it a number of times. He obviously believed the rule was petty and flouted it. Whether the rule was petty or not, the

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the flouting of it was causing dissention among the employees and undermining the authority of Sturdevant and Hartness. A complicating factor, however, is the fact that Complainant was authorized to leave the property to purchase supplies and he did so regularly. It is clearly established that he both purchased supplies and took lunch time when he left on June 20. The supervision in the plant was lax and erratic. Scott Hartness was "at times vague" (Tr. 80) according to Sturdevant. Complainant contends that his discharge was unfair and unreasonable. The fairness and reasonableness of discharging Complainant under the circumstances is not an issue which I have authority to resolve, however. However unfair or unreasonable discharging Complainant may have been, I conclude that the preponderance of the evidence establishes that Complainant would have been discharged for unprotected activity alone, namely violating the company rule concerning the lunch hour and undermining employee morale. 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