CCASE:
M.L. ADAMS V. J.L. OWENS III
DDATE:
19850228
TTEXT:

Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

MARION L. ADAMS, COMPLAINANT	DISCRIMINATION PROCEEDING
	Docket No. YORK 84-15-DM
v.	
	MD 84-23
J.L. OWENS III, CONTRACTING A/K/A J.L. OWENS III, A/K/A EASTERN AGGREGATES, INC., RESPONDENT	Eastern Aggregate Mine

Appearances: Timothy D. Murnane, Esq., Davidsonville, Maryland, for Complainant;
William E. Kirk, Esq., Annapolis, Maryland for Respondent.

DECISION

Before: Judge Merlin

This case is a complaint filed under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c)(3) by Marion L. Adams against J.L. Owens III Contracting, Inc., (also known as Eastern Aggregates, Inc., and J.L. Owens III) alleging that the discharge of Mr. Adams on April 27, 1984 was a discriminatory act in violation of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c)(1) (hereinafter called "the Act").

Sections 105(c)(1) and (3) of the Act, 30 U.S.C. 815(c)(1) and (3), provide in pertinent part as follows:

> (c)(1) No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's

agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, orbecause of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

* * * * *

(3) Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner, applicant for employment, or representative of miners of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph (1). The Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section), and thereafter shall issue an order, based upon findings of fact, dismissing or sustaining the complainant's charges and, if the charges are sustained, granting such relief as it deems appropriate, including, but not limited to, an order requiring the rehiring or reinstatement

> of the miner to his former position with back pay and interest or such remedy as may be appropriate. Such order shall become final 30 days after its issuance. Whenever an order is issued sustaining the complainant's charges under this subsection, a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as determined by the Commission to have been reasonably incurred by the miner, applicant for employment or representative of miners for, or in connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such violation. Proceedings under this section shall be expedited by the Secretary and the Commission. Any order issued by the Commission under this paragraph shall be subject to judicial review in accordance with section 106. Violations by any person of paragraph (1) shall be subject to the provisions of sections 108 and 110(a).

There is now a well defined body of law setting forth the principles which govern discrimination cases under the Act. In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of production and proof to establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir.1981); and Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no way 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) it would have taken the adverse action in any event for the unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Co., 4 FMSHRC 1935, 1936-1938 (November 1982). The ultimate burden of persuasion does not shift from the complainant. Robinette, 3 FMSHRC at 818 n. 20. See also

Boich v. FMSHRC, 719 F.2d 194, 195-196, (6th Cir.1983); and Donovan v. Stafford Constr. Co., 732 F.2d 954, 958-959 (D.C.Cir.1984) (specifically approving the Commission's Pasula-Robinette test). The Supreme Court has approved the National Labor Relations Board's virtually identical analysis for discrimination cases arising under the National Labor Relations Act. NLRB v. Transportation Management Corp., --- U.S. ----, 76 L.Ed.2d 667 (1983).

The plant in this case is an outdoor plant where raw materials are dug out of the ground and sent over a series of belts and conveyors where they are separated into different types of products such as two-inch gravel, peat gravel, Class A concrete sand and wash mason sand. The materials move through the different processes until smaller and smaller pieces are obtained (Vol. I, p. 76). The complainant was hired by the operator in November 1977 as a truck driver for this sand and gravel processing operation (Vol. II, p. 10). He was involved in 3 motor vehicle accidents in 1979 and 1980 (Vol. II, pp. 11-16). He was not reprimanded or otherwise disciplined for these incidents but because of them was transferred to the plant on March 11, 1981, where he became the plant operator (Vol. I, p. 53; II, pp. 16-17). His duties were to regulate the flow of raw material onto the main feed belt from the hopper, to maintain the plant and its components, to control the shut down switch, to start the plant, to clean up spilled materials, and assist in repairs (Vol. II, pp. 16-17; Exhibit L).

After becoming the plant operator, complainant was involved in a number of safety-related incidents. The complainant admitted that in March 1983 he turned the belt on while another worker was on it, throwing the worker off (Vol. I, pp. 174, 235; II, pp. 19-20). However, the shed where the switch was located had no windows and complainant could not see the belt when he turned on the switch (Vol. II, p. 19). On December 15, 1983, it is undisputed that he again turned the belt on while another employee was working on the belt (Vol. I, pp. 203, 207, 234; II, pp. 25-26). Here too, the lack of visibility is relevant. The operator's witnesses testified that on December 21, 1983 he flooded a ditch where the electrician was working but complainant said he could not remember this incident (Vol. I, pp. 135-136, 223, 225; II, p. 25). I accept the operator's evidence as more probative and find this last event occurred. However, I also accept complainant's uncontradicted testimony that no one reprimanded or reproved him about any of these incidents and that on December 23, 1983 he received a $300 Christmas bonus (Vol. II, pp. 25-27).

There is no dispute that on February 6, 1984 complainant ran the backhoe into the electric box of the plant causing a shutdown (Vol. I, pp. 177, 261-262; II, pp. 28, 31-32). No one in authority spoke to him on this occasion nor was any action taken (Vol. II, p. 32). Although there is some confusion in the testimony as to dates, it appears that on March 29, 1984 complainant mistakenly turned the power on or twisted up some wires (Vol. I, pp. 137-139; II, pp. 33-36). No one said anything to him at the time about this incident (Vol. II, pp. 33-36).

The operator's witnesses explained that complainant was not spoken to about the foregoing incidents until the middle of April 1984 because his wife was ill (Vol. I, pp. 77-78). The record does not indicate how long complainant's wife had been ill but apparently she was very sick on December 5, 1983 and died some time thereafter (Vol. II, pp. 49-50). The operator's failure to reprimand or otherwise take action against complainant also was undoubtedly due to the fact that by all accounts he was otherwise a very good employee who was on time, never absent and worked hard (Vol. I, pp. 58, 71, 236-237, 256). Sometime around the middle of April 1984 the owner and the superintendent spoke to complainant about safety. Although it is nowhere expressly stated, it is clear from the record that by this time complainant's wife had died (Vol. I, pp. 243-244). The complainant testified that the only specific incident brought up was the one in March 1983 when another worker was thrown off the belt (Vol. II, p. 32). The owner did not specify exactly what was talked about but stated that when the conversation was over he patted complainant on the back and left him with the idea that things would straighten out (Vol. I, p. 83).

The superintendent testified that on April 23, 1984 complainant backed a truck into a wash rack (Vol. I, p. 223). Since this testimony is uncontradicted, I accept it. There is also testimony on behalf of the operator that complainant started up the plant and a rock came out of the chute almost hitting another worker (Vol. I, pp. 88-90, 244-245). The complainant testified this could have happened but he did not remember (Vol. II, pp. 37-38). I find more definite and more probative evidence which indicates that this event occurred. There is however, a dispute between the operator's witnesses over when this last event occurred since the owner testified it happened a few months before complainant's discharge and before his conversation with complainant whereas the superintendent stated it happened on April 24 after the conversation but a few days before the discharge (Vol. I, pp. 89-90, 244). I credit the owner's testimony and find this incident happened sometime before the conversation and discharge.

The findings set forth above with respect to the foregoing safety incidents are based upon the testimony given at the hearing. The operator submitted a series of notes written by the superintendent relating to these events (Exhibits C-J). I do not find these notes probative. The safety director testified that he told the superintendent in December 1982 or early 1983 to document complainant's bad acts and that beginning at that time the superintendent gave him slips of paper to put in complainant's personnel file (Vol. I, pp. 192, 195-198; Exhibits C-J). However, the superintendent testified that the safety director did not tell him until December 1983 to start keeping records on complainant (Vol. II, pp. 220-221). He said that before late 1983 he went by his calendar book (Vol. I, p. 241). According to the superintendent the slips of paper regarding each of complainant's alleged accidents (Exhibits C-J) were based upon his daily records (Court Exhibit 1). But only the daily record book for 1984 was submitted to support the notes. Nothing was introduced to support the notes allegedly relating to incidents in 1983. Exhibit F is a note relating to an alleged accident on June 8, 1983 with respect to the sand classifier. The complainant denied this happened and none of the operator's witnesses testified about it. The note is therefore rejected as evidence of the event which I find did not happen. Indeed, this note's existence in the same form as the others casts additional doubt upon the probity of all the notes. The complainant's credibility is enhanced by his candid admissions regarding the occurrence of most of the events. Finally, the contemporaneous keeping of these notes is wholly inconsistent with the operator's admitted failure to speak to complainant about any of the incidents described therein. The notes constitute nothing more than an after the fact attempt to justify the dismissal.

In addition, the superintendent's 1984 daily record book itself is suspect in many respects (Court Exhibit 1). For example, the entry on April 24, 1984 regarding complainant's starting up of the plant is obviously a subsequent addition squeezed in between entries already on the page and made with a different pen. This suspect entry is the basis for the superintendent's note regarding April 24, 1984 (Exhibit J). But the note contains information about a falling rock that the supposedly supporting day-book entry does not have. I find both the note and the entry unpersuasive. Moreover, the plant manager who is complainant's immediate supervisor, testified that he had never seen the superintendent's records and did not even know the superintendent was keeping them, whereas the superintendent said exactly the opposite. I believe the plant manager on this point (Vol. I, pp. 167-168, 226). Finally, the entries before April 1 are very sketchy and become detailed only a few weeks before complainant's discharge.

In sum therefore, I conclude that the notes (Exhibits C-J) were not prepared at or about the time of the events described therein, but rather were constructed after the fact in an attempt to provide a basis upon which the discharge could be defended. The safety director's report (Exhibit L) based upon the notes is therefore, worthless. I further find that the superintendent did keep a contemporaneous daily record book for 1984 (Court Exhibit 1) but that the entries only became detailed shortly before the discharge, that there are few entries regarding safety and that the book was never seen by complainant's immediate supervisor. Clearly, therefore, the book is not entitled to the significance regarding safety incidents that the operator would ascribe to it.

We now turn to the temporary wiring incident. On April 24, 1984, a wire had burned out and temporary wiring was installed until the electrician could make a permanent repair. The route of the temporary wire is undisputed. The wire ran from a power box inside the powerhouse through a hole in the trough which held wires, out through a hole between the wall and roof of the powerhouse to a steel support on the main hopper, then into the steel framework of the conveyor belt between the carrier rollers and the turn rollers, and then to a steel pipe around which it was wrapped, and finally down to an open connection box which was next to a water ditch in an area that was subject to flooding (Vol. I, pp. 128-130; II, pp. 44-46). The operator's safety director admitted that the plant manager and plant superintendent told him that the wire was strung as shown by pictures taken by complainant and admitted into the record (Vol. I, p. 129, Exhibit 11 pp. 1-3). The superintendent said he wound black tape around the wire where it passed through metal but complainant said there was no such tape (Vol. I, pp. 270-272; II, pp. 42-43, 93). The pictures do not show black tape (Exhibit 11 pp. 1-3). I find there was no black tape.

It is undisputed that complainant immediately complained to his immediate supervisor, the plant manager, about the temporary wiring because it was unsafe (Vol. I, pp. 49, 51, 179, 183, 186-187, 250, II; pp. 46, 63-64). The complainant threatened to call the Mine Safety and Health Administration (Vol. I, pp. 49, 51, 179, 183, 186-187, 250; II, pp. 46, 63-64). He testified that he was afraid debris from the belt might hit the wire and cause it to fall on the wet ground, creating a danger of electrocution (Vol. II, pp. 54-56). The plant manager told the superintendent and the owner about complainant's dissatisfaction with the wiring and his threat to call MSHA (Vol. I, pp. 51, 179).

The owner and complainant are in agreement about what happened next. When the owner asked complainant if he threatened to call MSHA about the temporary wiring, complainant admitted he had and the operator then said "That's it. You're fired" (Vol. I, pp. 51-52; II, pp. 46-47). The owner and the superintendent testified that complainant's complaint and threat to call MSHA was further evidence of his bad attitude (Vol. I, pp. 55-56, 258-259, 287).

The complainant's fears about the temporary wiring and his expressed desire to call MSHA fall squarely within the terms of the Act. Section 105(c)(1), quoted supra. Consolidation Coal Co. v. Marshall, supra. In addition, it is clear that the complainant had a reasonable good faith belief that a hazard existed. Robinette v. United Castle Coal Co., supra. After observing the complainant's demeanor when testifying, there can be no doubt about the sincerity of his belief that the temporary wiring was dangerous. Also, his perception of the danger was reasonable under the circumstances. Indeed, the overwhelming weight of the evidence demonstrates that the temporary wiring was very hazardous. An electrical expert who testified on behalf of complainant, analyzed the danger from the temporary wiring at length. He explained how the wire could become chafed from vibration or be hit by a rock, wearing away the insulation so that the live wire touching the steel frame of the conveyor, could electrify the entire frame and electrocute anyone who came in contact with it (Vol. II, pp. 78-79). As the expert pointed out, the structure was not grounded because it was set in concrete which is an insulator, not a ground (Vol. II, p. 85). The electrical current was one hundred times more than enough to kill someone and was very unsafe and tremendously dangerous (Vol. II, pp. 84, 86, 88). According to the expert it most certainly was enough to worry anyone who saw it (Vol. II, pp. 88-89). I recognize that the expert did not actually see the plant but he heard all the testimony describing how the temporary wire was hung and he saw the pictures which the operator's safety director agreed accurately represented the wiring. This provided more than enough foundation for his expert opinion. The MSHA inspector also expressed the view there was a danger of electrocution (Vol. I, pp. 114-115). The testimony of the operator's electrician attempting to deny the wiring was dangerous is unpersuasive (Vol. I, pp. 144-148). And even he finally admitted that "in due time" vibration would pop the insulation so that the superstructure (if it was not grounded, which it was not) would become hot (Vol. I, p. 151). In light of the foregoing, I find the

testimony of complainant's electrical expert persuasive and I accept it. Accordingly, I conclude that the complainant's fear of danger from the temporary wiring was not only reasonable, but right. His complaint and expressed desire to call MSHA constituted protected activity under the Act.

In addition, it is uncontroverted that the safety complaint and threat to call MSHA played a part in the discharge. As set forth above, both the owner and complainant testified that the temporary wiring incident was the precipitating factor in the discharge (Vol. I, pp. 55-57; II, pp. 46-47). Indeed, this circumstance permeates the record so pervasively, it needs no elaboration. I conclude therefore, that the complainant has made out a prima facie case.

In accordance with applicable Commission precedent, cited above, the operator may still prevail if it can show that it was also motivated by complainant's unprotected activities and would have discharged him in any event for these activities alone. As already set forth, I have found that a number of safety incidents in which the complainant was involved, did occur. However, I conclude that they played no part in the discharge. By his own account, the owner refused to do anything when his supervisory staff allegedly recommended adverse action against complainant because of the accidents (Vol. I, p. 55).(FOOTNOTE.1) Moreover, no one even spoke to the complainant about these incidents until the middle of April 1984, shortly before the discharge. The operator explained that it did not speak to the complainant until then because his wife was ill. This is accepted to the extent that the illness was one reason of several for not talking to him about the incidents. The fact that complainant was a very good employee also accounted for the operator's failure to act on the incidents. Moreover, the owner testified that at the end of the April 1984 conversation he patted complainant on the back and left him with the idea things would straighten out (Vol. I, p. 83). If the owner knowingly left complainant with this impression, presumably the owner sincerely felt that way himself, as shown by his pat on the back. Except for the temporary wiring, the only incident which occurred between the conversation and the discharge was when complainant backed the loader into

the washstand. Here again, no one even spoke to complainant about it. In light of all of these factors I conclude that after the temporary wiring dispute, the operator sought to attribute to the safety incidents an importance they did not have when they happened.

Only when complainant expressed dissatisfaction with the wiring and threatened to call MSHA was the harshest of actions, discharge, taken against him. The operator's repeated leniency with respect to safety lapses, in stark contrast to what was done about the wiring complaint demonstrates that the complaint and threat to call MSHA constituted the sole reason for discharge. One only had to hear the indignation in the owner's recital of events to realize that the complaint and threat were viewed as an unforgiveable betrayal by an employee the operator believed it had treated well. For this perceived betrayal the complainant was fired.

The operator's argument that the complaint about the wiring was further evidence of complainant's "bad attitude" is without merit. First, the complaint and threat to call MSHA about the temporary wiring are entirely different from the safety accidents. The accidents show some carelessness by complainant although, as already noted, lack of visibility which was the operator's responsibility was partly to blame in some instances. The temporary wiring complaint on the other hand demonstrates that in a very serious situation complainant was safety conscious. In any event, the operator cannot treat a good faith and reasonable safety complaint as evidence of a "bad attitude", justifying adverse action. The operator well may have been lenient and understanding towards complainant in prior situations. But in firing him for complaining and threatening to call MSHA about the temporary wiring the operator did exactly what the Mine Safety Act forbids.

In light of the foregoing, I conclude that the operator has failed to rebut the complainant's prima facie case.

I therefore, conclude the operator discriminated against the complainant in violation of the Act.

I have reviewed the briefs submitted by both parties. To the extent that they are inconsistent with this decision, they are rejected.

Accordingly, it is Ordered that the complaint filed herein be Allowed.

It is further Ordered that complainant is entitled to back pay beginning April 27, 1984 together with interest thereon in accordance with the Commission-approved formula set forth in Secretary on behalf of Bailey v. Arkansas-Carbona Co., 5 FMSHRC 2042 (December 1983).

~309

It is further Ordered that on or before March 14, 1985 the parties confer and reach an agreement with respect to damages and that on or before March 15, 1985 complainant submit a written statement of damages including all the necessary computations of interest and that complainant's counsel submit a petition for attorneys' fees.

It is further Ordered that the parties appear on March 21, 1985 at 10:00 a.m. so that an Order with respect to damages may be entered.

Paul Merlin
Chief Administrative Law Judge

ÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄ
Footnote starts here:-

~Footnote_one

1 The operator's witnesses alleged that this recommendation was made about six months prior to the discharge (Vol. I, pp. 55, 208, 242). However at the time, i.e., October 1983, there had only been one recorded safety lapse by the complainant at the plant. I find this recommendation was made shortly before the discharge.