CCASE:
BRYAN EVERSON V. ONEIDA SAND & GRAVEL
DDATE:
19860312
TTEXT:

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

BRYAN P. EVERSON, COMPLAINANT	DISCRIMINATION PROCEEDING
	Docket No. LAKE 85-13-DM
v.	MSHA Case No. MD 84-32
ONEIDA SAND & GRAVEL, INC., RESPONDENT	Oneida Sand & Gravel

DECISION

Appearances: Roy Batista, Esq., Andrews, Greg, Batista & Andrews, Canton, Ohio, for Complainant
James B. Lindsey, Esq., Boggins, Centrone & Bixler, Canton, Ohio, for Respondent

Before: Judge Melick

This case is before me upon the complaint by Bryan P. Everson alleging that he was discharged from Oneida Sand & Gravel, Inc. (Oneida) on March 23, 1984, in violation of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act." (FOOTNOTE 1)

In order for Mr. Everson 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 from Oneida was motivated in any part by that 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. Marshall, 663 F.2d 1211 (3rd Cir.1981). See also Boitch v. FMSHRC, 719 F.2d 194 (6th Cir.1983) and NLRB v. Transportation Management Corp, 462 U.S. 393 (1983),

affirming burden of proof allocations similar to those in the Pasula case.

In this case Mr. Everson maintains that he refused to show up for work at the Onieda sand and gravel plant on March 21, 1984, because of hazardous conditions caused by freezing rain. According to the evidence the Complainant had several years experience at various sand and gravel operations and knew most of the jobs in the business. He had previously worked for Oneida beginning in 1983 but, because of the seasonal nature of the business, was laid-off and began receiving unemployment benefits in December 1983. In early March 1984, Oneida vice president Rodney Smitley wished to resume operations and tried to locate Everson. Everson was then continuing to collect unemployment benefits and was in Florida for the Daytona races. Smitley was finally able to contact Everson on March 14, 1984, and asked him to return to work immediately. Everson, who was continuing to receive unemployment benefits, requested a delay until Monday March 19 and Smitley agreed.

It is not disputed that Everson thereafter worked at the Oneida Plant on March 19 and 20 but called in on March 21, telling Smitley that because of the freezing rain "we can't work" and "the best thing to do was to wait for the weather to clear up". Everson also informed Smitley in this phone call that since the weather for the next 3 days was forecast to be similar he would not appear for work for the remainder of the week. Smitley then offered Everson work inside the garage but Everson declined because the heaters were not vented outside and claimed that the fumes would bother him. Everson concedes that he did not inquire as to the conditions at the job site nor did he visit the job site either that day or the following 2 days. He does not contend, moreover, that his refusal to show up for work was based on any inability to drive to work because of hazardous road conditions.

Rodney Smitley acknowledged that Everson called on the morning of March 21, and said that he was taking the rest of the week off. According to Smitley he told Everson during this phone call that it was important for him to appear for work that day because he already had trucks waiting to be loaded. Smitley anticipated that Everson would operate the front end loader, loading trucks with sand and gravel when they appeared, and while waiting for empty trucks, would work inside the heated garage disassembling spare parts for the dragline.

It is not disputed that the front-end loader was equipped with a heated cab and windshield wipers. Moreover, according to Smitley, conditions at the plant were not unsafe that

morning. Smitley himself loaded the trucks that day without any particular difficulty. According to Smitley the area in which the front-end loader operated was flat and paved with gravel. There was little snow accumulation and there was no hazard.

Smitley was obligated by contract to continue to provide sand and gravel so he found it necessary to hire a replacement for Everson. Commencing on March 22nd, the new employee performed the jobs that Everson would have performed including work in the garage disassembling parts and loading trucks with the front-end loader. On March 23rd Everson called Smitley asking if he could return to work the following Monday. Smitley told him that he had already been replaced.

In order for Everson's work refusal in this case to be considered protected under the Act he must prove that he then entertained a good faith, reasonable belief that to work under the conditions presented would have been hazardous. Miller v. FMSHRC, 687 F.2d 194 (7th Cir.1982); Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981). In this regard Everson testified that as he was driving to work on the morning of March 21st his car window started freezing up and there was ice and snow on the trees, ground and sidewalks. After driving about 2 1/2 miles he stopped and called the plant, advising Smitley that the weather was so bad it would be hazardous to work. It is not disputed that during this phone call Smitley told Everson that he was needed that day to load trucks already waiting and that he could also work inside the heated garage.

The only evidence regarding conditions at the Onieda plant on that day comes from Rodney Smitley. He operated the front-end loader in Eversons absence and did not find the conditions to be hazardous. The loader was operated from a heated cab on a flat gravel surface. Thus, as a factual matter, the conditions have not been shown to have been hazardous. Moreover Everson never inquired about nor checked the conditions at the plant himself and refused to show up for work for the rest of the week based upon a long range weather forecast. Under the circumstances I cannot find that Everson entertained a reasonable or good faith belief that the conditions at the plant were hazardous in regard to the contemplated work.

In reaching this conclusion I have not disregarded Everson's testimony that he suffered a concussion several years before at another plant when he fell some 12 feet from a screen and struck his head on frozen ground. However Everson was never asked to work on the screen at the Oneida plant on the day at issue and there is no evidence that

Everson would have been asked to perform such work. Everson has accordingly failed to establish a prima facie violation of section 105(c)(1) of the Act and this complaint must therefore be dismissed. Pasula, supra.(FOOTNOTE 2)

Gary Melick
Administrative Law Judge

1 Section 105(c)(1) reads in part as follows:

"No person shall discharge . . . or cause to be discharged . . . or otherwise interfere with the exercise of the statutory rights of any miner, . . . in any . . . mine subject to this Act because such miner, . . . has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, . . . of an alleged danger or safety or health violation in any . . . mine or because of the exercise by such miner, . . . on behalf of himself or others of any statutory right afforded by this Act."

2 In his complaint filed with this Commission on November 16, 1984, Mr. Everson also made vague allegations of subsequent discriminatory activity and clarified at hearing that "probably in May 1984" he had been offered a job by Rod Smitley conditioned on his "unemployment" getting "straightened out" but that Smitley later said that his father would not allow it because of complaints Everson made to OSHA and MSHA. The record at hearing shows that Everson in fact did file complaints to MSHA and OSHA in April 1984 and that, as a result, Oneida was issued several MSHA citations. These allegations of unlawful discrimination are separate and distinct from the allegations before me and have not been presented to the Secretary of Labor as required by section 105(c)(2) of the Act. Accordingly, I found at hearing that these complaints were premature and that I was without jurisdiction at that time to entertain them.