CCASE:
BRIAN T. VEAL V. KERR-MCGEE
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

BRIAN T. VEAL,
COMPLAINANT

DISCRIMINATION PROCEEDING

Docket No. LAKE 86-29-D

v.

KERRÄMCGEE COAL CORP.,
RESPONDENT

ORDER DENYING MOTION TO DISMISS
PREHEARING ORDER

On December 19, 1985, Complainant filed a complaint alleging that he was discharged by Respondent in violation of section 105(c) of the Federal Mine Safety and Health Act of 1977 (the Act). On January 14, and February 18, 1986, Respondent filed a Motion to Dismiss on the grounds that the complaint fails to state a cause of action and is frivolous. The motion does not attempt to analyze or discuss the documents filed pro se by Complainant, but merely states the conclusion that they do not state a cause of action under the Act.

The Complaint, in the form of a letter to the Commission dated December 16, 1985, alleges:

1) The MSHA District Manager wrote a complimentary letter to Respondent.

2) Complainant was denied the right to representation during the MSHA investigation of his complaint.

3) MSHA did not notify Complainant of the basis for its denial of his complaint.

I conclude that none of these allegations state a cause of action under section 105(c) since they do not involve adverse action by Respondent against Complainant for activities protected under the Act.

The Complaint goes on to list 9 "specifications" in support of Complainant's claim:

> 1. The vehicle involved, called a "gopher," was an experimental one and was undergoing testing and evaluation. (It appears elsewhere that claimant

contends he was discharged following an accident while he was operating the vehicle.) A brake caliper bolt was broken on the vehicle. The vehicle did not have an independent emergency brake. The vehicles at Respondent's mine were modified for third and fourth gear operation, which could be hazardous. This fact was known to the Respondent and to MSHA, but the vehicle operators were not warned of the hazard.

2. Operator and passenger training for personnel driving and riding in the gophers was brief, informal and inadequate. Safety devices were not installed.

3. The terrain in the mine was hazardous for the vehicles. The company or MSHA closed off a section following the accident.

4. Job performance competition imposed mental pressures on personnel which affected safety.

5. Complainant worked under a supervisor who was not properly certified or trained.

6. Respondent provided false information to the MSHA investigator concerning Complainant's safety records.

7. Respondent failed to provide prompt and proper emergency medical treatment following Complainant's accident and performed blood analysis testing without reasonable cause.

8. The investigation failed to recognize a deficiency in the training and qualifications of instructors.

9. The Respondent prompted and coaxed witnesses during the investigation and attempted to force Complainant to sign an accident report which was false.

The claim filed with MSHA on October 8, 1985 asserted that Complainant had been dismissed because he had an accident because of bad brakes on a vehicle that had been red tagged. "The PV was given to me to use by my supervisor who had been driving it and there was no red tag on it." The complaint further stated that Complainant was discharged because he is taking medication for an injury due to a previous accident.

The file contains a copy of a handwritten statement taken by an MSHA Investigator on November 6, 1985, which copy was sent to the Commission by Complainant.

The statement indicates that Complainant was injured in a roof fall accident in January 1985 and was off work for some time. It states that he is still receiving treatment. After returning to work he was "worked hard" and "harrassed." The company "used my injury as an example and told all the employees that they were beat out of a safety award because of my accident . .

The statement describes the accident of September 30, 1985 when Complainant was driving a PV and collided with a coal pillar because he had no brakes. The following day he was asked to sign an accident report, but refused "because it did not state the cause of accident properly." " . . . they got angry and . . . harrassed me and told me to fill out another accident report." The following day he was told he was being terminated because he "neglected to turn in the weak brakes on the P.V." He was not given a written explanation of his termination.

Complainant requests reinstatement and back pay.

In order to establish a prima facie case of discrimiantion under section 105(c) of the Mine Act, a complaining miner bears the burden of production and proof to establish that (1) he engaged in protected activity, and (2) 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, 2797Ä2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir.1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817Ä18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was not in any part motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it nevertheless may defend affirmatively 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, 1936Ä38 (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 954, 958Ä59 (D.C.Cir.1984) (specifically approving the Commission's PasulaÄRobinette test). The Supreme Court has approved the National Labor Relations Boards's virtually identical analysis for discrimination cases arising under the National Labor Relations Act. NLRB v. Transportation Management Corp., 462 U.S. 393, 397Ä403 (1983).

The question presented by the Motion to Dismiss is whether Complainant has stated a cause of action under section 105(c), that is, whether he has alleged that the adverse action visited upon him (his dismissal) was motivated in any part by protected activity. In deciding this question without having heard any evidence, I am mindful that Complainant is not represented by counsel, and that his "pleadings" are rambling documents. They do, however, allege (1) safety related complaints, (2) an animus on the the part of Respondent apparently related to those complaints.

Under the circumstances, I conclude that the documents in the file allege facts which, if true, are sufficient to establish a prima facie case. Therefore, the Motion to Dismiss is DENIED. Respondent is ORDERED to file an answer to the complaint within 15 days of the date of this order.

PREHEARING ORDER

In accordance with the provisions of section 105(c) of the Act, this case will be called for hearing at a time and place to be designated in a subsequent notice.

The parties are directed to exchange lists of witnesses who may be called to testify at such a hearing and copies of exhibits which may be offered in evidence. Copies of witness lists and exhibits shall be exchanged and furnished me on or before March 28, 1986. The parties shall by the same date indicate the preferred hearing site, and inform me of any dates in May 1986 which would pose scheduling difficulties were I to select them for hearing.

James A. Broderick
Administrative Law Judge