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TONY WILEY V. SAMOYED ENERGY
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

TONY WILEY, COMPLAINANT	DISCRIMINATION PROCEEDING
	Docket No. KENT 86-99-D
v.	
	PIKE CD 86-11
SAMOYED ENERGY COMPANY, INC., RESPONDENT	

DECISION

Appearances: JoAnn Harvey, Esq., Appalachian Research and Defense Fund of Kentucky, Inc., Prestonsburg, Kentucky, for Complainant;
James P. Pruitt, Jr., Esq., Pruitt and de Bourbon, Pikeville, Kentucky, for Respondent.

Before: Judge Melick

This case is before me upon the complaint by Tony Wiley under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," alleging that he was discharged from Samoyed Energy Company, Inc. (Samoyed) on December 31, 1985, in violation of section 105(c)(1) of the Act.(FOOTNOTE 1)

In order for the complainant 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 was motivated in any part by that protected activity. Secretary on behalf of 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 (3d Cir.1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was not motivated in any part 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 Company, 4 FMSHRC 1935 (1982). The ultimate burden of persuasion does not shift from the complainant. Donovan v. Stafford Construction Company, 732 F.2d 954 (D.C.Cir.1984); Boich v. FMSHRC, 719 F.2d 194 (6th Cir.1983). 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., 462 U.S. 393 (1983).

In this case Mr. Wiley alleges that he made periodic complaints notifying the operator's agent, Preparation Plant Supervisor Don Burgraff, of alleged dangers at its mine. In particular he alleges as protected activity the reporting of: (1) the tramming of a DÄ6 bulldozer on a low-boy trailer in such a way that the blade of the bulldozer obstructed his view in the rear view mirrors creating a danger in making turns without a flagman or escort; (2) the operation of the bulldozer in the refuse area during particularly muddy conditions and supporting the truck beds with the bulldozer blade to keep the trucks from turning over while dumping; (3) operating the dump trucks and bulldozer over a gas line without sufficient fill material to protect the gas line; and (4) the absence of a heat tube or other heating device in the bulldozer cab during cold weather.

With respect to the first allegation, Wiley maintains that he began complaining about those conditions in early November and then "every day" thereafter. With respect to the second allegation, Wiley maintains that he complained to Burgraff about the mud every time it rained and every evening after "it would happen." His last complaint in this regard was allegedly made to Burgraff the Friday before his discharge when Burgraff was at the refuse site as they were supporting a truck with two bulldozers. Wiley also testified that he complained "every day" to Burgraff that "something would have to be done about the gas line." Wiley maintains that he sent his complaints by way of the truck drivers to Burgraff throughout the day. With respect to the fourth allegation Wiley maintains that he complained to Burgraff "every day it was cold" about the inadequate heat in the bulldozer.

Truck driver Greg Pack worked with Wiley during relevant times. Pack confirmed that he had talked to Burgraff several

times on behalf of both Wiley and himself concerning the need for fill material to cover the gas line and about the unsafe conditions on the access road to the refuse site. He also conveyed Wiley's complaints about the lack of heat in the bulldozer and the need for a heat tube.

Burgraff acknowledged in his testimony that Wiley had complained to him about road conditions at the refuse site and, in particular, about the need for fill to cover the gas line. Wiley had also complained to him about the lack of heat on the bulldozer. Burgraff denied however that Wiley had ever complained to him about the operation of the low-boy. In the absence of corroboration of the latter alleged complaint and of Burgraff's denial (in contrast to his unqualified acknowledgement of the other complaints) that such a complaint about the operation of the low-boy was made to him I do not find sufficient evidence that the complaint was in fact communicated to Burgraff as alleged.

It is clear however that the remaining complaints by Mr. Wiley concerning allegedly dangerous conditions were communicated at some point in time to Burgraff. Wiley's testimony in this regard is corroborated in essential respects by both Greg Pack and Burgraff himself. Accordingly I find that the complainant has met the first element of a prima facie case and that indeed he was engaged in a protected reporting of alleged dangers at the mine site to an agent of the mine operator.

The Complainant also maintains that his discharge was motivated by that protected activity. In support of this causal relation he cites evidence that he made repeated safety complaints and that the reason given to him by mine management for his discharge i.e., absence without calling in, was inconsistent with what he was told was company policy.

It is not disputed that Wiley was absent from work on December 30, 1985 and that he failed to notify his employer of this anticipated absence. Wiley says that he was ill that day with arthritis and therefore went to see his doctor. When he showed up for work on December 31, he presented a doctor's excuse to Burgraff. Wiley maintains that his first supervisor at Samoyed, Frank Price, told him only that if he missed a day of work and did not call in he "had better bring in a doctor's excuse" the first day back. Price testified at hearing and fully corroborated Wiley's testimony in this regard.

Clifford Marenko, Samoyed's president testified that it was Samoyed policy that if an employee expected to be absent from work because of illness he was required to call in or have someone call on his behalf to notify the mine. Marenko admits that he never told Wiley of this policy. Marenko

testified that after Wiley failed to show up on December 30, and had not called in, he met with Don Burgraff and William Higginbotham to discuss the situtation. Greg Pack who car-pooled with Wiley was also absent that day and at the time of the meeting it was thought that he too had not called in. Pack was also therefore discharged at that meeting.

Marenko felt that Wiley's absence without calling in was "the last thing that I could tolerate". In deciding to discharge Wiley, Marenko also considered however that Wiley had previously been tardy on several occasions and had failed to obtain hard toe safety shoes. Marenko had previously warned Wiley that he could be fired for not wearing safety shoes. Marenko testified that he had discharged approximately 10 other employees over a period of 2 to 3 years for failing to call in when sick.

Don Burgraff also participated in the decision to discharge Wiley and Pack. He too believed that it was company policy to call in when sick. He decided that Wiley should be discharged based on the fact that he failed to call in sick that day, that he had not obtained safety shoes as he had been told to do, that he had been tardy on a number occasions and that there was "some question" about his work ability. Wiley's absence on December 30th was a particular problem because it necessitated the shut down of the preparation plant until a substitute bulldozer operator could be transferred to the refuse site. Burgraff denied that this discharge was the result of safety complaints.

According to Marenko and Burgraff, Greg Pack was subsequently reinstated when it was discovered that someone had in fact called the security guard on his behalf early on the morning of December 30, to advise that he would not report to work that day because of illness. When Pack was rehired he was warned by Burgraff that it was necessary for him to call in if he was sick to give advance notice.

In finding that Wiley did not suffer an unlawful discharge in this case I have considered that other employees of Samoyed (including the complainant's witnesses Greg Pack and Joe Alston) had complained of two of the three allegedly dangerous conditions that Wiley himself had complained of and suffered no apparent retaliation. I have also considered that other employees (10 or 11 employees over the previous 2 or 3 years according to the undisputed testimony of Marenko) had also been discharged for the same reason given to Wiley i.e. for failing to call in and notify the mine operator of absence because of illness. Other employees similarly situated were thus treated in the same manner as Wiley. Indeed I therefore conclude that the mine operator has rebutted the complainant's case by showing that the adverse action was not motivated in any part by the protected

activity. In any event the evidence is sufficient to show that Samoyed would have discharged Mr. Wiley for his unprotected activities alone. Haro, supra.

In reaching these conclusions I have not disregarded the evidence that Wiley had not been specifically told of the company policy requiring employees to call in when sick. Such a policy is, however, one that the ordinary working man would be expected to know without the necessity of being told. This is particularily true where the employee is working in a critical job (as was Wiley) and where his absence would cause considerable disruption of his employer's business. The credible evidence is that it is also the accepted industry practice for employees to call in when anticipating an absence due to illness.

In any event there is no evidence that the officials responsible for discharging Wiley were even aware that he had not been informed of that policy. Thus I cannot ascribe any animus from the fact that Wiley was discharged at least in part based on a policy about which he had not been specifically informed.

Under the circumstances the complaint of unlawful discharge herein must be denied and this case dismissed.

Gary Melick
Administrative Law Judge

1 Section 105(c)(1) of the Act provides in part as follows:

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, . . . in any coal or other 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, . . . at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine . . . or because of the exercise by such miner, . . . on behalf of himself or others of any statutory right afforded by this Act.