CCASE:
LARRY ANDERSON V. CONSOL COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

LARRY BRIAN ANDERSON, COMPLAINANT
v.
CONSOL PENNSYLVANIA COAL COMPANY, RESPONDENT

DISCRIMINATION PROCEEDING

Docket No. PENN 86-221-D

DECISION

Appearances: Michael J. Healey, Esq., Healey & Davidson, Pittsburgh, Pennsylvania, for Complainant; Michael R. Peelish, Esq., Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

On July 14 and September 17, 1986, Complainant filed a complaint with the Commission alleging that he was denied employment by Respondent because of allegations that he "turned in" a foreman of a mine operated by a related company for a safety violation. Complainant stated that these allegations are not true.

On September 18, 1986, Respondent filed a Motion to Dismiss on the grounds that it was not properly served and that Complainant failed to state a claim under section 105(c) of the Act. By order issued October 2, 1986, I denied the Motion.

Pursuant to notice, the case was heard in Pittsburgh, Pennsylvania, on December 16, 1986. Larry Anderson, Kerry Anderson and James Miller testified on behalf of Complainant. Victor J. Columbus, Richard E. Kidd, Louis Barletta and Ed Dudzinsky testified on behalf of Respondent. Both parties have filed post hearing briefs. Based on the entire record and the contentions of the parties, I make the following decision.

FINDINGS OF FACT

At all times pertinent to this proceeding, Respondent was the owner and operator of an underground coal mine in Greene

County, Pennsylvania, known as the Bailey Mine. Respondent is affiliated with Consolidation Coal Company.

Complainant worked as a miner for Consolidation Coal Company at its McElroy Mine from January 1976 to 1979, as a shuttle car operator and loader operator. He worked as a shuttle car operator at a U.S. Steel Mine for about a year beginning in February 1980. In March 1981, he was recalled by Consol at the Loveridge Mine and worked until he was laid off in December 1984. He worked as a continuous miner operator and bolter operator.

In January 1985, Complainant submitted an application for employment at Respondent's subject mine. He underwent a mechanical aptitude test and psychological test and was interviewed March 26, 1985 by the mine's industrial relations supervisor Ed Dudzinsky. Following the interview, Dudzinski "was impressed" with Complainant and stated he would recommend him as a face equipment operator. Complainant was then interviewed April 10, 1985, by Louis Barletta, mine foreman at the subject mine. At that time Barletta was seeking maintenance and general personnel rather than face equipment operators. Because Complainant's experience was as an equipment operator, his application was placed "in the active file for further consideration." (Tr. 95). No applicants have been hired for work at the face since April 1985.

Several weeks after Barletta interviewed Complainant, Dudzinsky called the personnel representative Wayne McArdle at the Consol McElroy mine and talked to him about claimant and other applicants who had worked at McElroy. McCardle told him that better people than Complainant were available from McElroy and that Complainant had had problems with a supervisor. Bailey Mine personnel assistant Richard Kidd was asked to do a "reference check" on Complainant. McCardle told Kidd that Complainant was an average employee at best. His attendance was average. He also told Kidd of an incident in which Complainant "was involved in trying to set up foreman Nicely for some type of roof control violation." (CX3; Tr. 116). Four others at McElroy stated that Complainant was a good worker and they would recommend him. Al Polis of the Loveridge mine stated that Complainant "had been nothing but trouble . . . all types of illness." (CX3).

On October 4, 1985, Complainant wrote to B.R. Brown, Chief Executive Officer of Consolidation Coal Company complaining that he was not hired because of his religious convictions. Brown referred the letter to the subject mine where the current Supervisor of Industrial Relations Victor Columbus (Dudzinsky's successor) began an investigation. Dudzinsky told Columbus that "he felt uncomfortable with [complainant] because he felt

[complainant] had not been straightforward with him in the interview . . . " (Tr. 56). Columbus obtained Complainant's attendance record when he worked at the Loveridge Mine in 1983 and 1984. These show three unexcused absences in 1983 and six unexcused absences in 1984. Further evidence shows that Complainant was under a doctor's care and received substantial treatment in 1983 and 1984 for a back condition. Based on this investigation, Columbus in early 1986 decided that he would no longer consider Complainant for employment at the subject mine.

In the summer of 1985, Complainant filed a complaint with the Pennsylvania Human Relations Commission charging Respondent with discrimination on the basis of religion and handicap. A hearing was held on April 3, 1986. At the hearing on the complaint, Columbus stated on behalf of Respondent that Complainant along with other "had turned in a boss for a safety violation, going under an unsupported roof." (Tr. 21). This was given as a reason for not hiring Complainant. In fact, Complainant had never complained to State or Federal authorities of safety violations or alleged safety violations by his supervisors.

With respect to Complainant's attendance, the record shows that at McElroy Mine his "attendance was average, did miss some days." (Tr. 116). It further shows that his attendance was "very good, travels a long way . . . always on time . . . willingness to work overtime as needed . . . " (CX 3, Tr. 117Ä118). These remarks were based on discussions with McElroy personnel and with Bailey Mine personnel who knew Complainant. Since he filed his application with Respondent, Complainant received training in electrical work at the TriÄState Training Services. He took an examination and has been certified by MSHA in low, medium and high voltage electrical work. He notified Columbus of this by telephone.

ISSUES

1. Did Respondent discriminate against Complainant in violation of section 105(c) of the Act when it refused to hire him or when it refused to consider him for future employment?
2. If it did, to what remedy is Complainant entitled?

CONCLUSIONS OF LAW

JURISDICTION

Complainant and Respondent are protected by and subject to the provisions of section 105(c) of the Act, Complainant as an applicant for employment in a mine, and Respondent as the

operator of the subject mine. I have jurisdiction over the parties and subject matter of this proceeding.

PROTECTED ACTIVITY

Ordinarily a Complainant alleging discrimination must show that he engaged in protected activity and the adverse action complained of resulted from that activity. Secretary/Pasula v. Consolidation Coal KCo., 2 FMSHRC 2786 (1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir.1981). In this case Complainant states that he did not engage in safety-related protected activity, but that Respondent believed he did and discriminated against him because of that belief. In Moses v. Whitley Development Corporation, 4 FMSHRC 1475 (1982), the Commission faced a similar issue and held that a Complainant may establish a prima facie case by proving that (1) the operator suspected that he had engaged in protected activity, and (2) the adverse action was motivated in any part by such suspicion.

I conclude that Respondent believed or suspected that Complainant reported safety violations committed by his supervisor, which would have clearly been protected activity.

ADVERSE ACTION

Following Complainant's interview by Louis Barletta on April 10, 1985, he was not hired for the openings at the subject mine and his application was put back "in the active file." This was adverse action. In "early 1986," Respondent decided that it would no longer consider Complainant for employment and his application was removed from the active file. This was further adverse action.

MOTIVATION

Respondent advances three reasons for the adverse action described above: (1) Complainant's absentee record at other Consol mines; (2) The lack of openings at the subject mine for a miner with Complainant's experience and skills; (3) Complainant's lack of candor in failing to inform Respondent that he complained of safety violations committed by a supervisor at a Consol mine. With respect to the third reason, I have found as a fact that he did not make such complaints. Nevertheless, Respondent believed that he did and its refusal to consider him for any position at the subject mine was motivated in part by that belief. Therefore, Complainant has established a prima facie case of discrimination under section 105(c).

I conclude that Respondent's reliance on Complainant's absentee record was pretextual and not a genuine motive for either of the instances of adverse action referred to above. I base this conclusion on a consideration of Complainant's employment record at Consol mines, as disclosed by exhibits, and the tetimony of Respondents witnesses Columbus, Kidd and Dudzinsky. I am persuaded that the ultimate reason for rejecting Complainant's application was the belief that he accused a supervisor of a safety violation and failed to disclose this incident.

However, the evidence also establishes that the rejection of Complainant for employment in April 1985 was because he was not sufficiently qualified for the openings them available at the subject mine. This decision was made by Barletta and the evidence does not indicate that he was aware of the alleged incident involving a safety complaint at McElroy. I conclude that Respondent would have taken this adverse action (refusal to hire) for unprotected activity alone. See Pasula, supra; Moses, supra.

However, the action in 1986 in removing Complainant from consideration for any job was not motivated by his work experience and skill, but rather by Respondent's conclusion that he was a troublemaker, i.e., that he "was involved in trying to set up" a foreman for some type of safety violation. This motivation is proscribed by section 105(c). Therefore, I conclude that Respondent's removal of Complainant from consideration for employment in "early 1986" was a violation of section 105(c) of the Act.

REMEDY

Fashioning an effective remedy for the discriminatory conduct I have found is difficult. Barletta testified that no miners have been hired to work at the face between April 1985 and December 16, 1986. Complainant's qualifications are primarily though not exclusively for face work. In an attempt to remedy the misconduct, Respondent will be ordered to reinstate Complainant's application and consider it in good faith for openings at the subject mine without regard to his alleged absentee record, and without regard to his alleged reporting of supervisor's safety violations. This shall include all work for which Complainant is qualified, considering his experience and his recent electrical training. Respondent will be ordered to notify me within 30 days of the date of this decision of what steps it has taken to comply with this order. Finally, Respondent will be ordered to reimburse Complainant for reasonable attorneys fees and costs of litigation.

ORDER

Based on the above findings of fact and conclusions of law, Respondent is ORDERED:

(1) To reinstate Complainant's application for employment at the subject mine and consider it in good faith for openings for which he is qualified, without regard to his alleged absentee record at Consol mines and without regard to his alleged reporting of supervisor's safety violations;

(2) To cease and desist from considering prior protected safety activity in denying employment applications at the subject mine;

(3) To notify me within 30 days of the date of this decision what steps it has taken to comply with the above orders;

(4) To reimburse Complainant for his reasonable attorney fees and costs of litigation. If counsel can agree on the amount of such fees and expenses they shall so notify me within 20 days of the date of this decision. If they cannot agree, counsel for Complainant shall submit his statement of fees and expenses within 20 days and counsel for Respondent shall have 20 days thereafter to reply.

(5) This decision is not final until the matters in Order (3) and (4) are submitted, and I have issued a supplementary decision concerning such matters.

James A. Broderick
Administrative Law Judge