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HARLAN THURMAN V. QUEEN COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

HARLAN L. THURMAN, COMPLAINANT	DISCRIMINATION PROCEEDING
v.	Docket No. SE 86-121-D
QUEEN ANNE COAL COMPANY, RESPONDENT	BARB CE 86-51

CORRECTED DECISION

Appearances: James C. Shastid, Esq., Knoxville, Tennessee,
for Complainant;
Charles A. Wagner, Esq., Knoxville, Tennessee,
for Respondent

Before: Judge Weisberger

Statement of the Case

Complainant filed a complaint with the Commission under Section 105(c) of the Federal Mine Safety and Health Act of 1977 30 U.S.C. 815(c) (the Act) alleging that he was illegally discriminated against in that, in essence, he was forced to quit his job with Respondent due to the danger to him as a consequence of harassment from co-workers and his foreman.

Pursuant to notice of September 16, 1986, the case was set for hearing in Knoxville, Tennessee on November 4, 1986. On October 22, 1986, Respondent filed a Motion for Continuance. On October 29, 1986, a Order was issued granting the Motion for Continuance and scheduling the case for hearing on December 2, 1986. On November 24, 1986, Respondent filed a Motion to Dismiss on the ground that (1) the Complaint was not timely filed, and (2) the Complaint failed to state a violation of 30 U.S.C. 815(c)(1). At the hearing on December 2, 1986 an oral argument was presented by the Parties as to Respondent's Motion. After listening to the arguments, I denied the Motion to Dismiss that was based upon the ground that the complaint was not timely filed. I reserved decision on the Motion to Dismiss which was made on the grounds that the complaint failed to state a violation of Section 815(c)(1), supra.

The case was subsequently heard in Knoxville, Tennessee on December 2, 1986. At the hearing Complainant was represented by James C. Shastid, and Respondent was represented by Charles A. Wagner, III. Harlan Thurman and Deborah Thurman testified for Complainant. Robert Swisher, Dempsey Lindsey, Crawford Harness, Jeffrey Mason, and Dewayne Mason testified for Respondent. On December 9, 1986, a letter was received from Complainant in which he advised that Attorney James Shastid was no longer representing him. This was confirmed in a letter from Mr. Shastid received on December 12, 1986. Subsequent to the hearing, the Parties, on February 2, 1987 filed posthearing briefs. On February 17, 1987, a reply brief was filed by Complainant. On the same date a letter was received from Counsel for Respondent who, in essence, waived his right to file a Reply Brief.

Findings of Fact

The Complainant, Harlan L. Thurman, had been employed as a miner by the Respondent, Queen Anne Coal Company, for 3 years prior to March 1986. During that time, he worked the night shift with the same personnel.

The Complainant testified that in the 3 years that he worked for the Respondent there was no outside man. Robert Swisher, the President, and one of the owners of Respondent testified that there has not been any outside man at Respondent's mine for approximately 9 or 10 years. Thurman, in essence, testified that during the 3 years he worked for Respondent, his co-workers and foreman continuously harassed him. He said that they put urine in his tea, that his clothes were tied up, that dishwashing liquid was poured over his clothes, that there was grease placed on the seat of his vehicle, there were logs placed under the vehicle's wheels, and a headlight was broken on his vehicle. He also said that in the summer of 1985 he was sent to work alone by his foreman Crawford Harness. It also was Thurman's testimony that when he started to work for Respondent there was an incident when only four men were on the shift and a miner was being operated. In the summer of 1985 Complainant made a complaint to Dempsey Lindsey, the Respondent's superintendent, that Crawford had cursed him over a mistake in transporting certain supplies. Complainant also made a complaint to Lindsey, in the summer of 1985, that the men had left him alone when he had to get a scoop cart out of the mud.

Complainant's work shift usually commenced at 4:00 p.m. and concluded at 1:30 a.m. On March 6, 1986, the Complainant started to work on the shift at 4:30 p.m. and left early at 10:30 p.m., in essence, because he felt that the harassment from his foreman and co-worker, coupled with the lack of an outside man, created a

dangerous condition to him underground. Prior to March 6, 1986, the Complainant had not made any safety complaints to MSHA Officials, or company management officials.

On March 7, 1986, the Complainant went to see Emroy Haggard, the bookkeeper and part-owner of the Respondent, and told him, in essence, that Respondent's employees were taking coal. He also "explained to him what had been going on and some of the stuff that had been happening". (Tr. 32). Haggard then set up a meeting for the Complainant with Swisher the following Monday. At that meeting Complainant indicated that the men on the shift were harassing him. Thurman had told him that at one time that Crawford stuck his first in his face and threatened to whip him. Swisher also said that Thurman told him that the men on the shift were: stealing company coal, had broken the headlight on his truck while it was on Respondent's site, had urinated in his food, and had locked him inside the gate. Thurman also told Swisher that there was no outside man. He also told Swisher that Harness does not have any education. Thurman had also told him that when he first started to work for Respondent his shift ran a miner with only four people on the shift.

Swisher then convened a meeting the following Thursday with himself, Thurman and the men on the shift along with Foreman Dempsey. At that meeting, in essence, Complainant's complaints were reiterated, then Swisher told the men on the shift that he would not tolerate any horseplay. According to Thurman, Swisher told him then to go back to work. Swisher also asked Lindsey to find Thurman a job on the day shift.

After the meeting Thurman intended to return to work. However, shortly after he left, Thurman returned to the office and told Dempsey and Swisher that, in essence, that he could no longer work underground with the men on the shift. Thurman gave his reason that he feared for his safety because Dempsey and Harness were "like they were a clique". (Tr. 107). Swisher told Lindsey to try to get Thurman a job on the day shift. However, Lindsey has testified that in general it is difficult to get men from the day shift to transfer to the night shift, and that in this case none of the day shift men wanted to trade with Thurman and work on the night shift. Lindsey also talked to the president and manager of another mining company, where Thurman had previously worked, with regard to obtaining a job for Thurman. Thurman did not return to work after he left early on March 6, and subsequently obtained other nonmining employment.

Issues

1. Whether the Complainant has established that he was engaged in an activity protected by the Act.

2. If so, whether the Complainant suffered adverse action as the result of the protected activity.

3. If so, to what relief is he entitled.

Conclusions of Law

Complainant and Respondent are protected by and subject to the provisions of the Act, Complainant as a miner and the Respondent as the operator.

The Commission, in a recent decision, *Goff v. Youghiogheny & Ohio Coal Company*, 8 FMSHRC 1860 (December 1986), reiterated the legal standards to be applied in a case where a miner has alleged acts of discrimination. The Commission, *Goff, supra*, at 1863, stated as follows:

A complaining miner establishes a prima facie case of prohibited discrimination under the Mine Act by proving that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *Pasula*, 2 FMSHRC at 2797-2800; 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 not motivated in any part by protected activity. *Robinette*, 3 FMSHRC at 818 n. 20. See also *Donovan v. Stafford Constr. Co.*, 732 F.2d 954, 958-59 (D.C.Cir.1984); *Boich v. FMSHRC*, 719 F.2d 194, 195-96 (6th Cir.1983) (specifically approving the Commission's *Pasula-Robinette* test).

Protected Activity

Thurman's complaints to Swisher on or about March 10, 1986, with regard to the lack of an outside man, and complaints the following Thursday that there was an incident whereby a miner was operated with only four men in the section, both contained allegations of safety violations and as such are considered protected activities. The balance of the complaints made to Swisher, Haggard, and Lindsey, all had to do with allegations of harassment by Thurman's co-employees, were not protected activities (see *Jimmy Sizemore and David Rife v. Dollar Branch Coal Company*, 5 FMSHRC 1251 (July 1983)). In the same way, complaints to Swisher and Haggard with regard to co-workers taking Respondent's coal, are not safety related and thus are not protected activities.

Adverse Action

Complainant, in essence, complains of four adverse actions by Respondent:

1. Swisher told Thurman to go back to work on about March 13, 1986, after Swisher had heard Thurman's various complaints.

2. The fact that Respondent had not found a job for Thurman on its day shift.

3. The fact that the Respondent had not cured its alleged violation of not having an outside man.

4. Swisher threatened Thurman by telling him about a former employee of Respondent who was killed when a tank that he had put a torch to had blown up.

There is no evidence that Respondent took any adverse action against Thurman which was motivated in any part by safety complaints. Indeed, I find that although Thurman at the hearing complained of unsafe practices such as not having an outside man and operating a miner with only four men, there is no evidence that Thurman made any complaint about these conditions to any government official, or agent of Respondent prior to the date that he left work, i.e., March 6, 1986. Thurman alleges that after he made various complaints to Swisher on or about March 10 and March 13, 1986, Swisher told him to go back to work. I hold that Swisher's comments to Complainant, in indicating on or about March 10, 1986, that Thurman should go back to work, did not constitute any adverse action. Surely, having Thurman return to his usual job can not be found to be an adverse action. Similarly, although Thurman might reasonably have felt that for him to return to his section, where he was subject to harassment, would be a danger to him, this can not constitute any type of constructive discharge. In this connection, it is manifest that the Act does not contemplate protecting a miner from harassment from a co-worker, when that harassment is not motivated by the miner's safety complaints. In this case, there is no evidence that harassments from Thurman's co-workers were motivated in any part by Thurman's complaints about not having an outside man. Indeed, all evidence indicates that Thurman's complaints in this regard occurred subsequent to the date that he left work. Also there is no evidence that the harassment from co-workers were abetted or encouraged by management. Indeed, Swisher's uncontradicted testimony was to the effect that at the meeting with Thurman's co-workers on March 6, 1986, after Thurman had complained of harassment, he (Swisher) told them to stop engaging in horseplay.

Also, it is clear that Respondent did not commit any adverse action in not finding Thurman a job on the day shift. Not only is there no evidence that this was not in any way motivated by Thurman's protected activities but to the contrary, the only evidence in record, testimony by Dempsey, is that none of the day shift wanted to switch shifts with Thurman. To require Respondent to create a position for Thurman on the day shift, would unduely interfere with its business decision in managing its mine.

Thurman might have felt threatened by hearing Swisher telling him of a former miner, who had some type of emotional problem, who was killed in an accident at the mine. However, there was not evidence that Swisher, in telling of this incident, had any intent to threaten Thurman. Nor is there any evidence that his telling of this incident in any way was motivated by Thurman's protected activities. Indeed, Swisher testified that he told of the incident in order to relate his care for his employees.

Complainant appears to be arguing that inasmuch as Respondent continues to operate without an outside man at the mine, that this is an adverse action against him. It is clear that although failure to provide a miner with a safe work place might be a violation under the Act but that "such a failure does not without more consititute discrimination." (Lund v. Anamax Mining Company 4 FMSHRC 249, 251 (February 1982)).

Therefore, based upon the above I conclude that Thurman failed to establish the second element of a prima facie case i.e., that he did not show that there was an adverse action by Respondent motivated by in any part by safety complaints. I conclude that accordingly Complainant has not established that he was discriminated against under Section 105(c) of the Act.

Order

Based upon the above Findings of Fact and Conclusions of Law, it is ORDERED that this proceeding be DISMISSED. As such, Respondent's Motion to Dismiss is GRANTED.

Avram Weisberger
Administrative Law Judge