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DANIEL ALEXANDER V. FREPORT GOLD
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

DANIEL S. ALEXANDER, COMPLAINANT	DISCRIMINATION PROCEEDING
	Docket No. WEST 85-106-DM
v.	MD 84-60
FREEPORT GOLD COMPANY, RESPONDENT	Jerrett Canyon Project

DECISION

Appearances: Thomas L. Stringfield, Esq., Elko, Nevada, for Complainant; R. Blain Andrus, Esq., Steven, G. Holloway, Reno, Nevada, for Respondent.

Before: Judge Lasher

This proceeding arises under Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., (1982) (herein "the Act"). Complainant's initial complaint with the Labor Department's Mine Safety and Health Administration (MSHA) was dismissed. Both parties were well represented at the hearing. (FOOTNOTE 1)

Complainant contends that he was discharged by Respondent on January 3, 1984, from his position as a permanent mill employee because of his engagement in activities protected under the Federal Mine Safety and Health Act of 1977 (the Act). Respondent contends that Complainant was discharged for his excessive absenteeism and, secondarily, because of his accident rate.

FINDINGS

General

The correct name of Respondent is FreeportÄMcMoran Gold Company. It is a subsidiary of Freeport McMoran, Inc., a Delaware corporation authorized to do business in the State of

Nevada (IÄT 43Ä44). Respondent owns and operates the subject open pit gold mine which is located 52 miles northwest of Elko, Nevada. At the time the events pertinent herein occurred its payroll was approximately 320 and its current payroll is approximately 420. Ore tonnage figures for the two periods (then and now) are 3,200 tons and 4,000 tons, respectively (IÄT. 43, 48). During 1983, the ore was brought from the mine, which was 7Ä9 miles from the mill at which Complainant worked, in haul trucks and placed in a dump; from the dump a loader would carry the ore from the dump and deposit it in an area where it was placed on belts and carried into the mill where it was crushed (IÄT. 49). During the pertinent period (1983Ä1984) the mine operated 24Ähours per day (3 8Ähour shifts) seven days a week (IÄT. 45) and the employees were not represented by a union (IÄT. 51).

The Complainant, Daniel S. Alexander, commenced employment with Respondent on December 20, 1982, as a temporary employee. On February 14, 1983, he became a regular employee in the mill (where approximately 100 employees worked at the time) and on April 2, 1983, he was advanced to "Technician D" which was the first step in a five-step progression to becoming a Mill Operator Specialist (IÄT. 47). He was still in the Technician D position at the time of his discharge some eight months later on January 3, 1984.

Complainant's immediate supervisor for most of 1983 was R.T. Albright, shift foreman. (IÄT. 50). His immediate supervisor for the last two months of his employment and when he was discharged was Mill Foreman Thomas E. Watkins (IÄT. 65). During most of 1983, the next-level supervisor above Albright was Edward G. Walker, General Mill Foreman, and above Walker was the Mill Superintendent, Richard Johnson (IÄT. 50, 51). Above Mr. Johnson in management echelon in most of 1983, but not at the time of Complainant's discharge was the Mill Manager, David J. Collins.

Protected Activities

Complainant engaged in various activities which are protected by the Act prior to his discharge. Thus he had complained that a radial stacker needed to be repaired (IÄT. 91Ä92, 114Ä120). Complainant also testified, in very general terms, that he had filed two written safety complaints, at unspecified times. The first complaint was a suggestion to modify a carbon transfer line so that it would not "blow off" and scald an operator. Complainant was unable to recall the nature of the second written complaint. Complainant also testified he made verbal complaints about the radial stacker and about putting up guards around the feeders (IÄT. 118Ä120); he was but one of several (IÄT. 88) who made such complaints about the stacker. Complainant was not shown to be a leader or vanguard of safety militancy at the mine or even that he was the most vocal, or particularly vocal, spokesman in safety matters.

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While Complainant engaged in some protected activities, it is also noted that the quality of such were not heated, controversial or the type which ordinarily would be provocative or invitatory of retaliation. Nor does this record reveal any immediate or spontaneous reaction on the part of any of Respondent's foremen or management personnel to Complainant's actions demonstrating hostility or anti-safety animus.

Respondent's Absenteeism Policy

Respondent's "Employee Handbook" (Exhibit CÄ2) is issued to new employees. Title III, Benefits, Section I, "Salary Continuation for Disability" thereof states inter alia:

> "All permanent full-time employees upon the completion of 30 consecutive days of Company recognized service become eligible to receive continuing income during periods of short term disability from illness or off-the-job injuries under the Company's wage and salary continuation plan."
>
> **********
>
> If you are unable to report for work as scheduled, you are expected to notify your supervisor promptly. Except for extenuating circumstances, failure to notify your supervisor will result in loss of benefits.
>
> **********
>
> "Excessive use or abuse of this program for minor illness may result in a review by management to determine whether or not the employee may continue employment. Two (2) day's absence for minor illness each three months will be considered as excessive absence and will result in a review."

Title VII, Personnel Procedures, Section E "Attendance and Absenteeism" states:

> "Employees are expected to be at work on all working days except in the case of illness or other excused absences. If you need to be absent from work, you are required to obtain authorization from your immediate supervisor. Excessive absenteeism for any reason will not be tolerated and you will be subject to appropriate disciplinary action. You will be notified whenever your attendance is unacceptable," (emphasis added).

Title V, Problem Solving System, Section B, "Basic Areas Requiring Discipline" of the Employee Handbook states in pertinent part:

> "1. Definitions of Minor Rule Violations. These are violations which in themselves, are not reason for discharge. However, repetitive violation of these rules will result in progressively more severe discipline and may end in discharge. The following is illustrative of minor violations: a) Tardiness or absenteeism (page 27, T.E. C2)."

The Employee Handbook is but a "guide" to Respondent's policy (IÄT. 51, IIIÄT. 38, 40, 49, 99).

Summary of Complainant's Absences

February 6, 1983. Reason: Sick. This absence occurred while Complainant was a temporary and eight days before be became a permanent employee.

April 15, 1983. Reason: SickÄFlu.

April 20, 1983. Reason: Fixing broken windows.

April 23, 1983. Reason: Sick.

April 24, 1983. Reason: Sick.

May 7, 1983. Reason: Complainant's father-in-law died.

June 2, 1983. Reason: Flu.

June 25, 1983. Reason: To repair windows.

November 17, 1983. Reason: Sick.

November 18, 1983. Reason: Still sick.

All 10 of these absences were "excused" absences (IÄT. 7Ä8). Complainant, however, was absent on January 1, 1984 as a result of a "Driving Under the Influence" incarceration; this absence was not excused (IIIÄT. 49) and was a "major" rule violation (IIIÄT. 75, 76, 100). In his testimony (IIIÄT. 107), Complainant conceded the existence of alcohol and marital problems and such, as hereinafter noted, were of some concern to Respondent's management who took various actions to assist Complainant therewith. The record demonstrates that the alcohol problem at least extended up to the time of his discharge.

Complainant's Absence on January 1, 1984.

Complainant was arrested by the Elko County Sheriff's Department for DUI (Driving Under the Influence) at approximately 12:30 a.m. on January 1, 1984, and booked at 1:05 a.m. for DUI (Ex. CÄ4).

The booking sheet (Ex. CÄ4) reflects that he called his foreman, Tom Watkins at 1:20 a.m. (FOOTNOTE 2)

Complainant's version of the events following his arrest follows:

Q. What did you do after you were arrested?

A. I made a phone call to my supervisor Tom Watkins.

Q. How was that phone call made?

A. It was made in jail, the jailer dialed the number and handed the phone to me.

Q. Describe the conversation with Mr. Watkins?

A. I told him that I had been arrested for D.U.I. I was trying to make bail to be to work on time in the morning and I asked him if I should go ahead and call Freeport and tell them I wasn't going to be there or to wait and see if I could make bail and get there on time or get there at all. And he said if you are not there I'll know where you are at and so I just told Tom I would get there as soon as I could.

Q. At that point, did you think you were going to be absent that day?

A. I wasn't for sure, I was hoping I wold get out in time.

Q. Did you make any other phone calls to Tom Watkins that morning?

A. After I was arrested, I went home and I called Tom and it was already after the shift had started and I told him that I had made bail and that I wanted to report to work, I would have a tardy, butÄ

Q. You hadÄhad you ever gotten a tardy before?

A. No, I felt it would be better to have a tardy than an absentee and I would get there as soon as I could and Tom said, well, don't worry about it, just come in tomorrow on your regular scheduled shift, so I did.

Q. Did you come in the next day on your regular shift?

A. Yes, I did. I worked full shift on January second.

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Q. What happened after the shift?

A. Directly at the end of the shift, I believe it was Tom Watkins who handed me a slip (FOOTNOTE 3) saying that I was on suspension and not to return to the mill site until January fourth.

Q. You heard Tom Watkins say you never called him that day at all. Did you hear him testify to that effect?

A. Yes, I heard him say that.

Q. Is there any question in your mind you talked to him that day?

A. No, there is not. (IIÄT. 116Ä117).

Complainant's Accident Record

March 13, 1983. While using his 992 loader, Complainant accidentally tore the ladder off the loader (Ex. CÄ3ÄVI).

April 6, 1983. Complainant's knee was bruised and injured when a cable snapped while he was helping put a feed chute in place.

May 1, 1983. Complainant sustained minor (small) cyanide burns on both arms while taking cyanide flow meters apart to clean them.

June 21, 1983. While not wearing a face shield, Complainant had cyanide sprayed in his face.

July 17, 1983. The tip of Complainant's little finger was smashed while he was placing a piece of rebar under the wheels of a radial stacker.

December 21, 1983. Complainant bruised his back when he slipped and fell on ice while climbing out of a bridge feeder. (FOOTNOTE 4)

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Complainant's Counseling and Disciplinary Record

On May 13, 1983, Complainant's performance was reviewed with him by his immediate supervisor, shift foreman R.T. Albright, and the mill general foreman, E.G. Walker, and Complainant was counseled concerning his excessive absenteeism (IIÄT. 204Ä207, 219Ä221, 227).

On June 13, 1983, the Complainant was given a letter of reprimand for excessive absenteeism by the mill general foreman, E.G. Walker. The Complainant was advised therein that it was his responsibility to attend work regularly, he was notified that it would be necessary for him to provide a doctor's certification verifying any future illness, and he was warned that if he failed to fulfill his responsibilities further disciplinary action up to and including discharge would be taken (IIÄT. 80, 209Ä210, 221Ä225). (FOOTNOTE 5)

On June 27, 1983, the Complainant was referred by Respondent to the Community Mental Health Center for counseling. The Complainant was referred by a counselor, (R.D. Herman, Ph.D. Cand, M.F.C.) but refused to enter an alcohol and drug rehabilitation program at Truckee Meadows Hospital in Reno, Nevada (IIÄT. 211Ä212, 226Ä227).

Complainant was counseled by the mill manager, D.J. Collins, on September 26, 1983, about his excessive accident rate. It appeared at that time that Complainant had had a number of personal problems and that such were probably the cause of his accidents (IIÄT. 210, 211, 227Ä232).

By memo dated November 23, 1983 (Ex. R. 16; IIIÄT. 16Ä18), Complainant was given the following warning by George D. Harris, the general mill foreman at the time, concerning the subject of absenteeism:

> It is the responsibility of every employee to maintain his/her personal health in such a manner as to provide for regular attendance at work. Your absence of November 18, 1983 was the seventh (7th) separate absence since April 15, 1983. You have been absent with pay for a total of seven (7) days since that date. The company is not questioning whether you were in fact sick or disabled on the above occasions; however, your absenteeism is disruptive to your fellow workers and to the efficient operation of your work group.

> This letter is being given to you in order that you will be aware of your attendance record and to impress upon you that excessive absenteeism reduces the value of an employee to the company, and in addition, to notify you at this time that it will be necessary for you to bring a doctor's certification verifying any future illness to insure pay for any such absence. I hope that it will help you to correct your absenteeism problem and that further discipline will not be necessary.
>
> If you fail to fulfill your responsibility as an employee to maintain your personal health in such a manner as to provide for your regular attendance at work, then further disciplinary measures will be taken up to and including discharge."

Respondent's Termination Report dated 1/4/84 and signed by D.S. Barr (then Mill Operations Manager) pertinent to Complainant reflects that the "Reason for Separation" was "Absenteeism/Lateness," that the effective date of Complainant's dismissal was January 3, 1984, that Complainant's Attendance and Cooperation were "unsatisfactory," that his initiative was "fair," and that his Job Knowledge and Quality of Work were "satisfactory". Under the heading "Additional Comments" the following notation appeared: "Recommended Mental Health Counseling & Alcohol & Drug Abuse Counseling, general negative response. Dismissed for unexcused absence, DUI, after written warning for absenteeism. Also a safety problem." (Ex. RÄ18(a)).

While Complainant had never been disciplined for engaging in unsafe practices, he was seen as being a "safety problem" on the basis of the various accidents he had been involved in during the year of his employment (IIÄT. 37). Prior to the discharge of Complainant, Respondent had not discharged any other employee solely for "excused absences." However, absenteeism can be excessive, whether or not excused (Employee Handbook, Ex. CÄ2, Sections E and I; IÄT. 61Ä64; IIIÄT. 73).

Douglas Scott Barr, Respondent's mill operations manager at the time, who effectively recommended Complainant's discharge (IIÄT. 86; IIIÄT. 65, 66, 80, 93), credibly and effectively gave his reasons for this decision:

> "Q. Let me go back. You said you took into account the number of incidences. Did you also take into account the type of absences that were reflected in the file?
>
> A. We did. Primarily they were minor infractions, each one. It is just that there was a repetitve series, substantial number of them, there were several that were at best questionable. But, yet they were excused and minor in their own right. The situation that called it to our attention, there was a major violation we were considering an unexcused absence, he hadn't any unexcused absences there before."

Q. What unexcused absences are you referring to?

A. The one on the first of January.

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Q. Why did you consider the D.U.I. in this case particularly grievous?

A. Well, first off, it's unreported, it'sÄit's in a situation where it's a common problem, not saying common, but one in which we take a very great care to see if we can get people out on the first of January and its's a difficult time of the year for us so we need all the people we can get. So, a person's absence, unexcused, unscheduled and just unexcused, gives us gret difficulty at that point. The subject had just went through a warning period in November, which I was aware of and concerning his absenteeism, and a later time it was apparent under the continuation of the type of absences, that we had a problem before, an individual had been recommended for counseling, considering alcoholism, I'm going to say substance abuse, that's a better term.

Q. Did you consider that thereÄthat the fact is that you had stated in your additional comments, there was negative, general negative response to the recommendation for mental health counseling and alcohol and drug abuse counseling, particularly significant in relationship to the D.U.I. on January 1?

A. Yes, I think it is. The alcohol abuse, substance abuse, was an underlying issue in quite a few of the items that were discussed. (IIIÄT. 49Ä51).

CONCLUSIONS AND DISCUSSION

In order to establish a prima facie case of discrimination under Section 105(c) of the Act, a complaining miner bears the burden of production and proof to establish (1) that he engaged in protected activity and (2) that 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 (3d Cir., 1981); and 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 in no part motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it may nevertheless affirmatively defend 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. FSMHRC, 719 F.2d 194, 195Ä96 (6th Cir.1983); Donovan v. Stafford Constr., Co., 732 F.2d 954, 958Ä59 (D.C.Cir.1984) (specifically approving the Commission's PasulaÄRobinette test); and Goff v. Youghiogheny & Ohio Coal Company, 8 FMSHRC 1860 (December 1986).

It goes without saying that the concept of discrimination to be dealt with here is relatively narrow, i.e., that contemplated by the 1977 Mine Safety. Matters-or allegations-of general unfairness, failures, or inequities in the employee-employer relationship are not subject to remedy under this Act. While I have found that Complainant marginally engaged in protected activities, there is no nexus between such activities and the adverse action (discharge) taken by Respondent.

There is little, if any, direct or indirect evidence of discriminatory motivation in the record, bearing either on (1) Respondent's purposes in discharging Complainant, or (2) Respondent's attitude and approach to the safety activities of its employees. The great weight of the probative, substantial evidence supports Respondent's position that it discharged Complainant because of excessive absenteeism primarily, and his accident record secondarily, with some documented and sincere attendant concern for what it perceived to be alcohol/marital problems in Complainant's life (IIIÄT. 107). Although Complainant attempted to establish that Respondent discouraged safety reporting or accident reporting by giving awards and dinners to employee groups having the best accident-free record, Complainant himself testified:

> "It was Freeport's policy, as far as anytime you so much as got a scratch you were to report it as an accident to keep similar accidents from happening, if possible and point out hazards and just also to cover yourself in caseÄthey give you an example, somebody got a scratch and got blood poison and the guy didn't turn it in and ended up paying for it out of his own pocket." (T. 118).

Another Complainant's witness, when asked whether he had observed an atmosphere "discouraging the reporting of minor accident or complaining about safety" (IÄT. 107), replied:

> "In a sense, it was more of an implied discouragement, if people reported too many minor accidents, scraped fingers, if they got up to a certain amount, they were considered unsafe and had to go to special training or had to go to counseling with being an unsafe worker."

Respondent established that its practices were intended to encourage and reward good safety practices and that its activities in this respect were common throughout the industry (IIÄT. 189).

Complainant's contention that Respondent was engaged in conduct calculated to discourage safety reporting is rejected. Establishment of discriminatory motivation is difficult and seldom accomplished through direct proof. Secretary of Labor on behalf of Johnny N. Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508 (1981), reconsideration den. 3 FMSHRC 2765 (1981); Brazell v. Island Creek Coal Company, 4 FMSHRC 1455 (1982). Here, Complainant did not establish through any probative or convincing evidence that Respondent had a pattern or policy, formal or otherwise, of retaliating against miners for making safety complaints. Again, although the contention was raised, there was no probative substantial evidence that Respondent had ever retaliated or taken adverse action against safety complainants in other matters which might indicate a general pattern or background of discriminatory conduct. A history of management hostility to safety complaints, while argued, was not to any degree of persuasion established on this record. The record is devoid of admissions or statements by Respondent's management personnel indicating an anti-safety reporting animus. Nor are there writings, accounts of conversations, or oral statements made by Respondent's foremen, or other officers, from which the existence of a discriminatory animus can be inferred. There is no evidence of resentment or antagonism on Respondent's part traceable to any of Complainant's activities protected under the Act. Complainant's evidence, apparently of necessity, was general and unpersuasive in these regards. Further belying the existence of discriminatory motivation were Respondent's various efforts to assist Complainant with his background difficulties. In short, I find no probative evidence from which it can be determined or inferred that Respondent's motivation, solely or in part, was discriminatory toward Complainant for his engagement in any protected activity. It is concluded that Complainant failed to establish a prima facie case of discrimination recognizable under the Act.

Even assuming arguendo, and such is not the situation here, that Complainant did establish that part of Respondent's motivation was his engagement in protected activities, based on Complainant's absence and accident record and its own impressive record of prior counseling and warnings to Complainant in 1983, Respondent established a clear and strong justification for discharging Complainant for his unprotected activites and that such action was taken and would have been taken for such unprotected activities alone. See Gravely v. Ranger Fuel Corp., 6 FMSHRC 799 (1984).

ULTIMATE CONCLUSIONS

Complainant failed to establish by substantial probative evidence that his discharge was motivated in any part by his

engagement in protected activities. Thus, Complainant failed to establish a prima facie case of discrimination under Section 105(c) of the Act.

Even assuming arguendo that Complainant did establish by a preponderance of the reliable, probative and substantial evidence that his discharge was motivated in some part by his protected activities, Respondent clearly showed by a strong preponderance of the evidence that it was motivated by Complainant's unprotected activities, i.e., his absenteeism and accident record, and that it would have taken the adverse action (discharge of Complainant) in any event for such unprotected activities.

ORDER

Complainant having failed to establish Mine Act discrimination on the part of Respondent, his complaint is DISMISSED.

Michael A. Lasher, Jr.
Administrative Law Judge

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~FOOTNOTE_ONE
1 The hearing was held during a 3Äday period, October 27, 28 and 29, 1986. For each day of hearing there is a separate transcript beginning with page one. Accordingly, transcript citations will be prefaced with "I" "II" and "III", respectively, in this manner: "IÄT.", "IIÄT." and "IIIÄT."

~FOOTNOTE_TWO
2 While Watkins denied receiving such telephone call (IÄT. 53Ä54), such denial is not credited in view of the testimony of the arresting officer, Carl L. Marr, and the booking officer, James L. Black, to the contrary (IÄT. 74, 77Ä79). Complainant's account of this conversation (IIÄT. 116) is accepted.

~FOOTNOTE_THREE
3 Ex. RÄ17.

~FOOTNOTE_FOUR
4 While Complainant contends that the reports of the six accidents he was involved in in 1983 were safety complaints, these reports were completed by Respondent's management personnel on standard forms and in the course of Respondent's normal procedure for documenting accidents. The strong preponderance of the evidence is that the accident reports are not safety complaints. If Complainant's logic were carried out to its normal conclusion the more accidents a miner were involved in the more protected safety activities he would be seen to have engaged in. The concept of this argument has no credible foundation in the record and is rejected. Respondent is found justified in considering Complainant's overall accident record as part of its determination to discharge Complainant following the DUI absence on January 1, 1984.

~FOOTNOTE_FIVE
5 As above noted, Title V, Problem Solving System, Section B, "Basic Areas Requiring Discipline" of the Employee Handbook (Ex. CÄ2 at p. 27) provides that minor rule violations, if repetitive, can result in progressively more severe discipline and may end in discharge. "Absenteeism" was specifically listed as an illustration of this principle.