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GERARD SAPUNARICH V. LEHIGH PORTLAND CEMENT
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

GERARD SAPUNARICH,
COMPLAINANT
v.

DISCRIMINATION PROCEEDING

Docket No. YORK 88-29-DM

LEHIGH PORTLAND CEMENT, CO.,
RESPONDENT

MD 87-56

Cementon Plant and Quarry

DECISION

Before: Judge Melick

This case is before me upon the Complaint by Gerard Sapunarich 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 suspended from his job without pay by Lehigh Portland Cement, Co., (Lehigh) in violation of section 105(c)(1) of the Act. (Footnote 1)

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In particular Mr. Sapunarich alleges that he was the Miner Safety Representative during relevant times and that in that capacity reported various health and safety violations from February 3, 1983, through September 11, 1987, to both officials of the Federal Mine Safety and Health Administration (MSHA) and of the mine operator. He alleges in his initial complaint that "on Friday, September 11, 1987, John Jones [plant manager] and I had a very heated discussion in the Control Room about the dust problem in the dust building that was still going on from the previous day. As a result I have been written up for insubordination and it was put in my file, also I have been suspended without pay."

In a combined Answer and Motion for Summary Decision Lehigh maintained as follows:

... Mr. Sapunarich's suspension was in no way motivated by his complaints about the dust situation. The action was taken in response to the threats and use of abusive language by Mr. Sapunarich.

The situation about which Mr. Sapunarich was complaining on the morning of September 10, 1987, was already being addressed by the Company at the time the complaint was made. The action which Mr. Sapunarich "threatened" - D.E.C. - had already been taken by the Company. Clearly, there was no reason to discipline Mr. Sapunarich for proposing to take action which the Company had already taken. The disciplinary action was directed at the threatening and abusive language used by Mr. Sapunarich. Such threats and abusive language are not protected activity. Thus, the action was lawful and non-discriminatory.

Under Commission Rule 64, 29 C.F.R. 2700.64, a Motion for Summary Decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions and affidavits shows: (1) that there is no genuine issue as to any material facts; and (2) that the moving party is entitled to summary decision as a matter of law.

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In establishing a prima facie case of discrimination under section 105(c)(1) of the Act the complainant must prove that (1) he engaged in a 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, 2797-2800, (1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir.1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18, (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 Co., 4 FMSHRC 1935, 1936-38, (1982).

In support of its Motion for Summary Decision, Lehigh asserts that the alleged disciplinary action taken against Mr. Sapunarich was motivated solely by his non-protected activities. Mr. Sapunarich, on the other hand, maintains that the alleged disciplinary action was indeed motivated by his protected activities. There clearly remains then a genuine issue concerning a material fact in this case (i.e. the motivation for the alleged disciplinary action) and, accordingly, the Motion for Summary Decision cannot be granted. 29 C.F.R. 2700.64.

ORDER

The Motion for Summary Decision filed by Lehigh Portland Cement Company is denied. The hearings scheduled in this case to commence on August 31, 1988, will accordingly proceed as scheduled. The parties are advised that these hearings are de novo and that any evidence to be considered by the undersigned, both testimonial and documentary, must be proffered during those proceedings.

Gary Melick
Administrative Law Judge
(703) 756-6261

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1 Section 105(c)(1) of the Act provides 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, representative of miners or applicant for employment in any coal or other mine subject to this Act because

such miner, representative of miners or applicant for employment, has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such representative of miners or applicant for employment has instituted or caused to be instituted any proceedings under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.