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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
ON BEHALF OF
JOSEPH GABOSSO,
COMPLAINANT

DISCRIMINATION PROCEEDING

Docket No. WEST 86-24-D

Deserado Mine

v.

WESTERN FUELSÄUTAH, INC.,
RESPONDENT

DECISION AFTER REMAND

Before: Judge Morris

On August 15, 1988 the Commission ruled that Joseph Gabossi's complaints to mine management concerning the company's reporting structure constituted an activity protected under the Act and, accordingly, the Secretary may have established a case of unlawful discrimination. Further, the Commission noted that "(i)t remains to be determined whether, on the basis of this record, Western Fuels successfully rebutted the Secretary's case or affirmatively defended against it." Slip op. at 6, 7.

The Commission order of remand basically restates its established precedent. Specifically, an operator may rebut the prima facie case by showing that the adverse action was in no part motivated by protected activity. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797 Ä 2800, rev'd on other grounds sub. nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 81), Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817Ä818 (April 1981). See also Eastern Assoc. Coal Corp. v. FMSHRC 813 F.2d 639, 642 (4th Cir.1987), Donovan v. Stafford Constr. Co., 732 F.2d 954, 958Ä59 (D.C.Cir.1984); Boich v. FMSHRC, 719 F.2d 194, 195Ä96 (6th Cir.1983) (Specifically approving Commission's PasulaÄRobinette test). Cf. NLRB v. Transportation Management Corp., 462 U.S. 393, 397Ä413 (1983) (approving nearly identical test under National Labor Relations Act).

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In its order of remand the Commission directed the Judge to make additional findings of fact and to analyze such findings in accordance with applicable case law. In particular, the Commission directed the Judge to consider the incident of November 9, 1985 involving Gabossi and Mine Manager Upadhyay as well as the events surrounding Gabossi's discharge on January 30, 1985.

The Judge took the issues as submitted on the basis of the present record and briefs (Order, August 18, 1988).

Based on the evidence and the record as a whole, I find that a preponderance of the substantial, reliable and probative evidence establishes the following and I make these:

Findings of Fact

Incident of November 9, 1984

1. On November 9, 1984, a Friday, Upadhyay and Gabossi were discussing an increase in Gabossi's duties. This increase involved a computer technician and all of the belts from the mine to the silos (Tr. 30).

2. Gabossi felt the time was opportune so he brought up the issue of the separation of the company's departments as well as their [lack of] coordination. Gabossi showed Upadhyay Emmons' letter (relating to Gabossi's mine foreman duties under Colorado law) (Tr. 31, Ex. C5).

3. As soon as he read the letter Upadhyay got "instantly" mad and he told Gabossi that if he didn't like it he should quit; that when Western Fuel makes a decision they're going to run it the way they want no matter who else doesn't like it. It was a heated discussion (Tr. 30, 31).

4. On November 11th (Footnote 1) Gabossi was called to Upadhyay's office. Upadhyay was very mad that he (Gabossi) had called the State of Colorado. Upadhyay put Gabossi on probation for not getting along with senior staff members. A heated discussion followed (Tr. 32, 33).

Upadhyay stated the probation would be for an indefinite length of time (Tr. 35).

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5. The Upadhyay written reprimand to Gabossi was given to him on November 16th (Tr. 35, Ex C3).

6. The first paragraph of the reprimand discusses Gabossi's lack of willingness to work harmoniously (Tr. 36, Ex. C3).

Respondent's evidence casts the "big blowup" in a different light. Specifically, Upadhyay had gone to Gabossi's office in the change house to discuss a monitoring system, an on-site research student and duties concerning all of the silos. These were to be Gabossi's new responsibilities (Tr. 198, 199, 472, 473).

As he started to discuss it Gabossi brought up a question concerning his house and the company's failure to purchase it. Upadhyay said the company wasn't going to buy Gabossi's house. Gabossi then "blew up" and the meeting became a name calling contest with Gabossi referring to Upadhyay as a "worst mine manager" and also to "caste systems" (Tr. 198, 199, 473, 474). Immediately after the "blowup" Gabossi gave Upadhyay the State of Colorado letter (Tr. 474, Ex. C5). Upadhyay said the letter didn't mean anything. While Upadhyay said he didn't think much of Gabossi he didn't raise his voice. Upadhyay left the room and took the letter with him (Tr. 474).

Over the weekend Upadhyay contacted his supervisor seeking his authority to terminate Gabossi. But the counter suggestion was that Gabossi be put on probation. The probation ensued.

Discussion and Evaluation

I credit Gabossi's version of the incident of November 9th. The two men were discussing a computer technician and the silos, both involving additional duties for Gabossi. These subjects would, by then, be an almost automatic entry to Gabossi's arguments with management over the company's failure to coordinate underground mining activities. Such safety-related complaints with management were continuing, extensive and frequent. Further, they involved Gabossi's concern for the possible revocation of his mine foreman's papers.

In addition, I reject Upadhyay's evidence. His version is less than unequivocal (Transcript at 475). Further, the house repurchase agreement in the total record was relatively insignificant when compared with the safety related complaints focusing on the company reporting structure.

Respondent argues (Footnote 2) that Gabossi was not motivated by

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safety concerns but by the house repurchase hassle. I am not persuaded. As stated above, the house repurchase agreement and its apparent breach was relatively insignificant in the overall facts. I agree that certain facts are clearly confirmed by Gabossi. Specifically, Emmons did advise him that he must file a complaint in writing before Emmons would act and, further, Gabossi had originally applied for the position of mine manager. However, these factors do not cause me to conclude that Gabossi's complaints as to the reporting structure were other than safety related.

Incident involving Gabossi's probation and discharge

Based on the credible record I make the following:

Findings of Fact

1. Gabossi was placed on probation on November 12. A formal letter dated November 16, 1984, recites that Gabossi's performance had not been satisfactory. In detail, it recites as follows:

Your willingness to work harmoniously under the organization structure put into effect by Western Fuels has been negative. You have repeatedly objected to the idea of Maintenance Superintendent being responsible for underground maintenance.

You have demonstrated your inability to work harmoniously with other division heads and employees at the Deserado Mine.

Your attitude towards other division heads, work ability and habits have always been negative. I have noticed this personally and also have heard from other people from other companies.

Your attitude towards Western Fuels, its management and policies has been less than desirable.

You getting into arguments with me over matters in which you should not be even involved with.

I also would like to make it clear to you that once the decision is made by me on any matter that becomes a policy at the Deserado Mine, you are expected to abide by them irrespective of what your opinion was on that matter.

(Exhibit C3)

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2. After November 12, 1985 Upadhyay was cool but civil to Gabossi (Tr. 42).

3. On January 21, 1985 Gabossi brought to Upadhyay's attention the fact that a mechanic was falsifying MSHA electrical inspection books. Gabossi wanted the electrician fired (Tr. 42).

4. After January 21, 1985 Upadhyay wouldn't talk to Gabossi (Tr. 42, 43).

5. There were no further heated discussions, except for the underground safety problem (Tr. 43).

6. There were no further heated discussions between Gabossi and any other supervisors or department heads (Tr. 43).

7. After he was put on probation Gabossi became more quiet at staff meetings (Tr. 44).

8. On January 30th Gabossi went to Upadhyay's office. Upadhyay requested his resignation. When the company refused to repurchase his home, Gabossi refused to resign. At that point Upadhyay fired Gabossi. This meeting generated a heated discussion (Tr. 45).

At the same time Gabossi received a termination letter. It read as follows:

Western Fuels Utah, Inc. at the Deserado Mine needs to have employees who can act together as a team, especially now in view of our small workforce. Your efforts have not been directed towards that end. For this reason, your employment shall be terminated at Western Fuels Utah, Inc. effective immediately.

In an effort to be fair and equitable, you shall receive your normal compensation through February 15, 1985. Your current health insurance shall be terminated March 1, 1985 and if you desire to convert to a private policy it will be incumbent on you to investigate this privilege.

(Tr. 45, Ex. C2)

9. Gabossi told Upadhyay it was pretty bad that he "got run off" for showing him a letter from the State of Colorado and for his concern for the safety and health in the coordination between departments (Tr. 46).

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Respondent's evidence casts the events of Gabossi's termination along different lines. It indicates that on January 29, 1985, A.B. Beasley gave his letter of resignation to Upadhyay (Tr. 484, 485). Beasley stated to Upadhyay that he was resigning because he couldn't work with Gabossi (Tr. 485).

When Beasley left (after the conference), Upadhyay concluded people were leaving because of Gabossi's inability to work with them. So Upadhyay talked to the company's top officer. Permission was then granted to terminate Gabossi (Tr. 486, 487).

Upadhyay called Gabossi to his office and gave him the option of resigning. When Gabossi refused to resign Upadhyay fired him (Tr. 488).

Gabossi said "Bullshit, you cannot get away with it, you are the worst mine manager I've ever worked for." Upadhyay said he didn't want to hear anything further so he opened the door and Gabossi left (Tr. 488).

Discussion and Evaluation

A conflict exists in the two versions of the evidence concerning the events at the time Gabossi was fired.

Basically, Gabossi contends he was fired because he was not a "team player." That is, his long and continuing conflict with management over its inadequate reporting structure finally removed him from "the team."

On the other hand, respondent's position is that the company fired Gabossi because of Beasley's conflict with Gabossi which caused Beasley to resign. In sum, Upadhyay did not look forward to obtaining a new maintenance supervisor and later losing his services due to Gabossi's conflicts with management and whoever might be the maintenance supervisor.

On these credibility issues I credit Gabossi's version. The termination letter recites the company needs employees "who can work together as a team." Further, Gabossi's efforts have not been directed "towards that end." Gabossi was not a "team member" because he refused to go along with the company's organizational plan. This issue, a safety related complaint, predominates in the evidence. The complaint was made ten to fifteen times. As Gabossi indicated, it got to be a "headache." But Upadhyay did not seem to be willing to work on the problem (Tr. 26, 126).

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I reject respondent's claim that Gabossi was fired because Beasley resigned due to his conflicts with Gabossi. It is true there were conflicts between Beasley and Gabossi, but such conflicts did not cause Beasley's resignation (Tr. 430, 435). Beasley's resignation occurred for the reasons stated in his letter of resignation; namely, higher salary, larger community and more resources with which to meet the challenges of a maintenance superintendent (Ex. R4). If the Gabossi conflicts with Beasley were the "primary reason" (Footnote 3) for Beasley's resignation there should have been in the very least a vague reference to it in Beasley's resignation letter. In sum, I find Beasley's letter of resignation to be much more persuasive than Beasley's and Upadhyay's contrary oral testimony at the hearing.

The Commission has ruled that Gabossi's safety related complaints concerning the company's reporting structure may have been an activity protected under the Act. Slip op. at 2. For the reasons stated herein I conclude such complaints were, in fact, safety related.

Respondent asserts 4 that the Judge in his initial decision specifically found that respondent would have discharged Gabossi in any event for his unprotected activity. Respondent sets forth a portion of the Judge's decision. Slip op. at 25. (August 21, 1988).

Respondent has misconstrued the Judge's initial decision. In that decision I ruled that Gabossi's unprotected activity "was his continued clash with management over the reporting structure." The trial Judge's narrow view of the Act's protective umbrella of the anti-discrimination provisions of section 105(c)(1) was held to be erroneous in the order of remand. Slip op. at 1, 2 (August 15, 1988).

On the facts stated above, I conclude that Gabossi was discharged because of his protected activity.

Further, the operator's defense had not prevailed. The operator was not motivated by an unprotected activity when it fired Gabossi.

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Even if I were to credit respondent's version that Beasley triggered Gabossi's firing (which I do not), I would nevertheless hold that the operator's discharge of Gabossi was motivated in part by his protected activity; namely, his prolonged complaints over the company's reporting structure.

The complaint of discrimination should be affirmed.

Damages

The Senate Report, with respect to relief in section 105 cases, states as follows:

It is the Committee's intention that the Secretary propose, and the Commission require, all relief that is necessary to make the complaining party whole and to remove the deleterious effects of the discriminatory conduct including, but not limited to reinstatement with full seniority rights, back-pay with interest, and recompense for any special damages sustained as a result of the discrimination. The specified relief is only illustrative.

S.REP. NO. 95Ä181, 95th Cong., 1st Sess. 37 (1977), reprinted in LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, 95th Cong., 2d Sess., at 625 (1978).

Gabossi does not seek reinstatement. The claim for damages here focuses on salary, medical and dental expenses, the failure of the respondent to repurchase Gabossi's home and incidental costs related to refinancing and selling the house.

Salary

When Gabossi was fired his annual salary was \$52,000. His termination notice indicates his normal compensation was paid through February 15, 1985. (Ex. C2). The uncontroverted evidence further shows the employees on the payroll received a 5.8 % pay raise on January 21, 1985 (Tr. 50, 167Ä169, Ex. C11). Gabossi did not receive the increase because he was on probation. On the uncontroverted evidence I conclude Gabossi's lost wages are:

Six months without employment (February 15 to August 15) @ \$4,584.66 per month, or \$27,507.96.

The monthly salary includes the 5.8 % increase given other employees on January 21, 1985.

Other Appropriate Relief

It must be determined whether the additional special damages which Complainant seeks may be awarded as "other appropriate relief" under section 105(c)(2). In the words of the Senate Report quoted, supra; such damages are awarded when they are sustained "as a result of" the discrimination. It has been held that in order to be recoverable, damages must be proved to be the proximate result of the complained wrong. Classic Bowl, Inc. v. AMF Pinspotter, Inc. 403 F.2d 463 (7th Cir.1968). The legal concept of proximity is applicable to ascertain and measure damages. The necessary and appropriate limits of judicial inquiry are served by disregarding remote effects. Commonwealth Edison Company v. Allis-Chalmers Manufacturing Company, 225 F.Supp. 332 (N.D.Ill.1963). UMWA on behalf of Moore, et al v. Peabody Coal Company, 6 FMSHRC 1920 (1984).

Medical and Dental Expenses

The medical and dental expenses claimed here are in the amount of \$1,313. The evidence shows Gabossi apparently did not present any claims to the insurance carrier within 30 days after his discharge (during the period when his policy remained in effect). However, if Gabossi had not been terminated his insurance coverage would have been in effect. Accordingly, I believe it is appropriate that these additional special damages of \$1,313 be awarded as "other appropriate relief" under section 105(c)(2) of the Act.

Repurchase of Gabossi's House

The evidence shows that respondent agreed to repurchase Gabossi's house in Rangely (Colorado) if he left the company within three years. The repurchase price was to be for the amount Gabossi had paid for it (Tr. 55, 56, 169-171).

The original house loan had been guaranteed by respondent. The loan was immediately due when he was terminated. In order to prevent foreclosure Gabossi secured a new loan. I calculate Gabossi's damages as follows:

Purchase Price 2/17/83	\$119,000
Actual Resale Price	114,000
Loss due to respondent's failure to repurchase house	\$ 5,000

