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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

DISCRIMINATION PROCEEDING

Docket No. YORK 88-29-DM

v.

MD 87-56

LEHIGH PORTLAND CEMENT COMPANY,  
RESPONDENT

Cementon Plant and Quarry

DECISION

Appearances: Robert G. Rothstein, Esq., Meranze and Katz,  
Philadelphia, Pennsylvania for Complainant;  
Thomas Connolly, Esq., McNamee, Lochner, Titus  
& Williams, P.C., Albany, New York for  
Respondent.

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 Company, (Lehigh) in violation of section 105(c)(1) of the Act.(FOOTNOTE 1)

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 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."

Lehigh admits that Sapunarich was suspended for three days without pay but maintains that the suspension was not in any way motivated by his complaints about the dust situation but rather was based solely upon threatening and abusive language directed to Plant Manager John Jones during the confrontation on September 11, 1987, in the control room.

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 Respondent mine 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).

It is undisputed in this case that the Complainant had been an active and effective miner safety representative at the Cementon Plant for many years preceding the incident in question. He was and is highly regarded by both wage and salaried workers. Indeed Donald Reid the Cementon Plant Safety and Training Supervisor testified that Sapunarich had a genuine concern for miner safety and did an excellent job as safety representative.

It is further undisputed that shortly before the critical September 11, 1987, confrontation at issue herein, Sapunarich made several specific complaints involving health and safety. On at least one occasion he complained to Plant Manager John Jones about foreign cement bags that were exploding. Moreover, only two days before the confrontation he complained to Company Supervisor Ron Dumond about excessive dust emanating from the precipitator building. On the following day he complained about the dust to the New York State Department of Environmental Conservation and to the local office of the Federal Mine Safety and Health Administration (MSHA).

Sapunarich arrived at the plant at around 6:30 a.m. on September 11, 1987, and found that the dust problem had still not been corrected. After checking at the laboratory he proceeded to the control room where he met Jones. The subsequent events were described by Sapunarich in the following colloquy at hearing:

Q. (By Complainant's Counsel) When you got finished covering with Mr. Goff did you have any conversations with Mr. Jones?

A. Yes.

Q. Did you address him, or did he address you?

A. He said good morning to me.

Q. What did you say, if anything?

A. I said, "What is so good about it?" He said, "What is the problem?" I said, "The problem is you got a pretty bad dust condition here and it doesn't seem as if anybody is doing anything about it," and he

~84

said, "Well, I am doing the best I can," and I said, "Evidently the best you can is not good enough because it is still not corrected," and he said, "Well, what do you want me to do, wave a fucking magic wand?"

Q. He said what?

A. He said, "What do you want me to do, wave a fucking magic wand or I don't have a fucking magic wand." I think that was it, "I don't have a fucking magic wand." I slapped the top of the desk and told him, I said, "I would like to choke you. You are the worst plant manager I have ever had to deal with. You don't give a shit about the people that work here at the plant, and you don't care about the people of Cementon," and we were both talking at the same time or rather arguing.

Q. Was that the extent of the conversation?

A. Well, it was more than that. I told him about the men's vehicles out in the parking lot and that there was no consideration for those vehicles out there. Some people had automobiles and trucks out there worth eighteen/nineteen thousand dollars and that nobody seemed to care about them, and that as far as the men go I told him that I requested that nobody be sent into that building under those conditions and nobody seemed to care. They still sent two laborers in there the night before, and it just seemed that no matter what we were complaining about this month that nobody was listening.

Q. How far away from Mr. Jones were you standing -- or were you standing when you had your conversation with Mr. Jones?

A. We were on opposite sides of the control room panel.

Q. Were you standing?

A. It is not just a desk; it is a desk with big wings on it because there is controls

~85

on both sides. So he is standing about in this alleyway over here (indicating), and I am where I am at, and there is a desk between us about that big (indicating), but it has got big wings on it with high panels on it (indicating).

Q. Could you estimate how far away you were?

A. I was from him?

Q. Yes.

A. Straight across?

Q. Yes.

A. Five/six foot.

(Tr. 58-61).

Floyd Falk the control room operator, was also present at the time of this confrontation. He generally supports the Complainant's version except he did not recall hearing the Complainant say that he would like to get his hands around Jones' neck. Robert Hinckley, also testifying on behalf of the Complainant, was also in the control room at the time of the confrontation. He too generally supports the Complainant's version on the confrontation and further noted that "both [Sapunarich and Jones] were loud and neither was holding anything back".

Plant Manager John Jones reported the confrontation somewhat differently. He noted the events leading up to the confrontation and the confrontation itself in a memorandum prepared later the same day. It reads as follows:

We were experiencing problems with the kiln dust handling system on 9/10/87. The elevators and conveying system were dusting and the dust appeared to be difficult to handle. We were not sure of the cause, but proceeded to inspect the precipitator, dust handling system, O<sub>2</sub> analyzer and everything we could associated (sic) with the process. We also called the local DEC (New York State Department of Environmental Conservation) Inspector and informed him of our problem and that we were attempting to resolve the situation.

~86

Late in the day of 9/10/87 we decided that the dust handling system was not at fault and we decided that maybe the slurry thinner we had used was causing the problem. In order to verify that, we decided to switch basins (kiln feed) but had to wait until sufficient quantity was on hand to make the switch. We made the switch at 7:00 AM on 9/11/87.

At approximately 7:30 AM, 9/11/87, G. Sapunarich, Lubricator, came into the Control Room and was discussing the situation with J. Goff, M & E Repairman.

Jones: "Good Morning, Gerry."

Sapunarich: "It isn't a very good morning."

Jones: "Why not?"

Sapunarich: "Because of the Dust Situation."

Jones: "We have been trying to resolve the problem [sic]. We inspected the elevator, precipitator, and screws. We have been checking out the process equipment. We are not sure what the problem is."

Sapunarich: "That's not good enough, 24 hours is long enough to resolve the problem. I intend to call DEC and report this situation."

Jones: "DEC was contacted and informed of the problem. We are now changing slurry basins to see if that resolves the problem. Maybe the slurry thinner is causing the problem. I don't know, we are trying systematically (sic) eliminate the possibilities."

Sapunarich: "DEC doesn't react to these problems and neither do you. I am concerned about the residents of Cementon and all the dust they are exposed to. I am building a home and have a new car that is being ruined. I am not getting any cooperation from you or the local DEC. I intend to call Schenectady to get some action."

NOTE: As Sapunarich is speaking, [sic] he is becoming increasingly agitated and loader [sic].

~87

Jones: "Do what you feel you have to do, but in the meantime, go back to your job and do the work you are getting paid to do."

NOTE: At this point Sapunarich pounded the table and leaning (sic) across the Control Room table with arms extended:

Sapunarich: "I would like to grab you by the neck." You don't give a fuck about the dust situation. I'll get you "off" the plant property."

NOTE: At this point, I explained again the steps we were taking to resolve the problem.

Jones: "I have no magic wand. Do you have any idea what is causing the problem?"

Sapunarich: "You are ruining my house, my car and my windows. I'll get you off the plant property."

NOTE: At this point I became very upset and told Sapunarich very loudly:

Jones: "Don't you ever threaten me. If you don't stop you may lose your job."

Sapunarich: (Very loud and threatening) "I'll get you "off" the plant property. If you're going to fire me, do it."

NOTE: At this point Sapunarich left the Control Room.

(See Exhibit R-13).

David Mower a Process Foreman at the Lehigh Cementon Plant was also in the Control Room during the confrontation. His testimony generally supports Jones' version of the event and in particular corroborates that the Complainant threatened Jones with bodily harm off the plant property. In particular Mower recalled that Sapunarich "pounded the table shouting more threats of bodily harm off company property and it looked very much like he would. . . carry out his threat right there."

(See Exhibit R-2).

In evaluating the evidence concerning the critical events at the confrontation between the Complainant and Plant Manager Jones on September 11, 1987, I give particular weight to the testimony and contemporaneous statements of Jones and



Mower. These witnesses were the only ones to have made notes closely following the event and which fully support their testimony at hearing. It is also significant that the Complainant also admits slapping the desk in front of Jones and threatening that he would like to choke him.

Within this framework I find that Jones' statement most accurately represents what happened at the confrontation. It is therefore clear that the Complainant did in fact use threatening language toward Jones. These actions clearly constituted grounds for disciplinary action, including suspension, set forth in Lehigh's rules of conduct (Exhibit R-8, §578) and therefore provided a legitimate business-related grounds for the Complainant's three day suspension.

While it is clear that both before and during the confrontation the Complainant also made safety and health related complaints concerning the dust and other problems at the plant, activities clearly protected under the Act, the Act does not grant miners immunity from discipline if in conjunction with these protected activities they threaten other miners. Considering the credible evidence in this case I do not find that the disciplinary action taken was in retaliation for any health or safety complaints but was proportionate to and directly related to the threats to the plant manager. In reaching this conclusion I have also considered that while Sapunarich had for years been an active miners safety representative there is no credible evidence of any retaliation by Lehigh for such activities over the years. Indeed I find no credible evidence of any anti-safety animus on the part of Lehigh. I have also not disregarded the evidence of other incidents involving profane and abusive language at the Cementon Plant. None of those incidents however involved direct threats of such a personal, immediate and serious nature as in this case. Accordingly I find that while the Complainant herein did engage in protected activity and suffered adverse action, the Respondent has demonstrated that the adverse action was not motivated in any part by the protected activity. This case must therefore be dismissed.

Gary Melick  
Administrative Law Judge  
(703) 756-6261

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FOOTNOTES START HERE

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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.