CCASE:
LINDIA SUE FRYE V. PITTSTON COAL GROUP/CLINCHFIELD COAL
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

LINDIA SUE FRYE, COMPLAINANT	DISCRIMINATION PROCEEDING
	Docket No. VA 88-55-D
v.	
	NORT CD 88-01
PITTSTON COAL GROUP/ CLINCHFIELD COAL COMPANY, RESPONDENT	Moss No. 3 Prep Plant

DECISION

Appearances: Jerry O. Talton, II, Esq., United Mine Workers', District 28, Castlewood, Virginia, for Complainant; W. Challen Walling, Penn, Stuart, Eskridge & Jones, Bristol, Virginia, for Respondent.

Before: Judge Weisberger

Statement of the Case

On July 11, 1988, a Complaint was filed alleging violations of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c)(1). An Answer was filed on August 9, 1988. On August 19, 1988, Respondent filed a Motion for Summary Decision, and a Response to the Motion for Summary Decision was filed by Complainant on September 6, 1988. On September 14, 1988, an Order was entered denying the Motion for Summary Decision.

Pursuant to notice, a hearing was held on October 19 - 20, 1988, in Lebanon and Abington, Virginia, respectively. T. R. Dino, MD, Joseph Pendergast, Samuel G. Sanders, James W. Hicks, Darnis Salyer, William McCoy, Billy Lee Bise, Kenneth Robert Holbrook, and Lindia Sue Frye testified for Complainant. Michael Ray Hendrickson, Sam Sanders, Roy F. Castle, Donald W. Hughes, and James W. Rhoton testified for Respondent. Proposed Findings of Fact and Memorandum of Law were filed by the Parties on December 27, 1988. Reply Briefs were filed by Complainant and Respondent on January 10, and January 12, respectively.

Issues

1. Whether the Complainant has established that she 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 she entitled.

Discussion and Findings of Fact

Lindia Sue Frye, who worked for Respondent as a mechanic from July 1978 to September 1987, has predicated her complaint of discrimination against Respondent under section 105(c) of the Act, upon assertions that she was discharged in retaliation against her complaints with regard to Respondent's policy of holding safety meetings adjacent to male bathroom and against her refusal to work.

In evaluating the evidence presented herein, I have been guided by the Commission's recent decision of Goff v. Youghiogheny & Ohio Coal Company, 8 FMSHRC 1860 (December 1986), which 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).

It has been further held by the Commission that, a miner's refusal to perform work is protected under section 105(c) of the Mine Act if it is based on a reasonable, good faith belief that the work involves a hazard. Pasula, supra, Robinette, 3 FMSHRC, 803 at 812; Secretary v. Metric Constructors, Inc., 6 FMSHRC 226, 229-31 (February 1984), Aff'd sub nom. Brock v. Metric Constructors, Inc., 766 F.2d 469, 471-72 (11th Cir. 1985). Perando v. Mettiki Coal Corp., 4 FMSHRC 491 (1988). As stated by the Commission in Secretary on behalf of Sedgmer, et al v. Consolidation Coal Company, 8 FMSHRC 303, at 307 (March 1986), "The case law addressing work refusals contemplates some form of contact or communication manifesting an actual refusal to work."

In this connection the Commission, in the recent decision of Secretary on behalf of Keene v. S and M Coal Company, Inc., 10 FMSHRC 1145, 1150 (1988), noted as follows:

> A miner has the right under section 105(c) of the Mine Act to refuse to work if the miner has a good faith, reasonable belief that continued work involves a hazardous condition. Pasula, supra, 2 FMSHRC at 2789-96; Robinette, supra, 3 FMSHRC at 807-12. See also, e.g., Metric Constructors, supra. Where reasonably possible, a miner refusing to work ordinarily must communicate or attempt to communicate to some representative of the operator his belief that a hazardous condition exist. Reco, supra, 9 FMSHRC at 995; Dunmire & Estle, supra, 4 FMSHRC at 133-35. See also Miller v. Consolidation Coal Co., 687 F.2d 194, (7th Cir. 1982) (approving Dunmire & Estle communication requirement).

Protected Activities

I.

According to Frye, in September 1987, she had episodes of vomiting, and had complained of this condition to her physician Dr. T. R. Dino. Darnis Salyer testified in this connection that in August or September 1987, Frye had complained of being sick and went to the nurse at Respondent's plant where she worked. William McCoy, a coworker of Frye's, indicated that he saw her vomit at the work site, and he could tell that she was sick. Michael Ray Hendrickson, who was Respondent's foreman, indicated that Frye had complained of being sick, and Donald W. Hughes, who was Frye's evening shift foreman from early 1984 through the middle of the year in 1985, indicated that at times he was informed that Frye was sick. Doctor T. R. Dino, a physician with a general practice, testified that he had been treating Frye since September 1981, and that she has a history of an ulcer for which he had prescribed medication. He said that on September 16, 1987, she complained of epigastric pain which she described as burning, and which he attributed to the possible ulcer that she had in the past. He indicated that if the epigastric pain which she had been complaining about from September 16 - 21, 1987, would have included nausea and vomiting he would not have let her work. However, he indicated that his notes did not indicate she had nausea and vomiting. He further indicated that the notes do not indicate that he advised Frye not to work, but on cross-examination indicated that he recalled advising her not to work, but that he did not discuss the specific tasks that she should not do. According to Frye, however, after she saw Dr. Dino on September 16, 1987, she was provided with a slip to allow her to work the following day. Significantly, Frye indicated, upon cross-examination, that prior

to September 22, 1987, she did not feel that it was too dangerous for her to work. Considering this statement, along with the lack of any contemporaneous notation by Dr. Dino with regard to her inability to work, I conclude that prior to September 21, 1987, the evidence fails to establish that there was any work refusal on Frye's part due to any good faith, reasonable belief that her continuing to work involved a hazardous condition. (c. f. Pasula, supra, at 2789-96).

In essence, according to Frye, while driving to work on September 21, 1987, she suffered a dizzy spell, blacked out, and got involved in an automobile accident. The following day Frye saw Dr. Dino, who, according to Frye, advised her not to work as it would be too dangerous for her and for her coworkers. Frye also said that Dr. Dino advised her not to drive. Frye indicated that Dr. Dino told her not to return to work until she was evaluated by Dr. Morgan a neurologist. In essence, she testified that she did not work subsequent to September 22, 1987, as she was afraid to drive, and to work at her job which required her at times to work at heights and in proximity to equipment. Dr. Dino indicated that, assuming Frye had to work as a mechanic in a preparation plant, which required her to tear down and repair pumps, work in an area with water tanks, work in high places and climb stairs, and be around machinery and welding, he would not recommend her to work at this job or drive.

It appears from Frye's testimony that she was motivated not to work subsequent to September 23, 1987, in part based upon her fear of driving. Clearly this concern relates solely to Frye's ability to travel to the work site rather than to any hazard at the site. She also indicated, in essence, that her job entailed working at heights, welding, and being exposed to various equipment, and that due to her dizziness she was afraid to work. There is no evidence of any objective data, either clinical signs or laboratory findings to provide a medical basis for Frye's complaints of dizziness. Also, the record does not present significant evidence as to the frequency, density, and duration of Frye's dizziness. As such, the hazard of any injury is based solely upon Frye's subjective complaints, and is not based upon a condition or practice under Respondent's control. As such, I find that section 105(c) of the Act did not cover Frye's not working subsequent to September 22, 1987, based upon her dizziness.

In making this decision, I agree with the following statement of the law as set forth in Bryant v. Clinchfield Coal Co. 4 FMSHRC 1380, 1421 (1982), "Any claim of protected activity that is not grounded on an alleged violation of a health or safety standard or which does not result from some hazardous condition

or practice existing in the mine environment for which the operator is responsible falls without the penumbra of the statute." (See also, Mastings v. Cotter Corp. 5 FMSHRC 1047 (1983)).

I do not find Eldridge v. Sunfire Coal Co. 5 FMSHRC 408 (1983), relied on by Complainant, to be applicable to the case at bar. In Eldridge, supra, Judge Koutras held that a miner's refusal to work an extra shift due to fear of exhaustion, was a protected activity within the scope of section 105(c) of the Act. Thus the physical disability of fatigue in Eldridge, which led to a miner's refusal to work, was as a result of having already worked a shift and thus was clearly job related. In contrast, in the case at bar, Frye's dizziness has not been established to have been job related.

II.

Assuming arguendo that Frye's dizziness provided a basis for her not to work subsequent to September 22, 1987, her Complaint under section 105(c) of the Act, must fail, as she has not established that she refused to work, and communicated this refusal to Respondent. Not only did Frye fail to communicate to Respondent the reasons for her not working subsequent to September 22, but she did not notify Respondent of any refusal to work subsequent to that date. According to Frye, after Dr. Deno advised her not to work, she attempted to telephone Respondent on two occasions, but did not receive any answer. According to the uncontradicted testimony of Sam Sanders, Respondent's superintendent, Respondent did not hear from Frye from the time she last worked on September 22, until she come in to see Sanders on October 5, in response to Sanders' communication to her that she had violated the Last Chance Agreement. Indeed, according to the uncontradicted testimony of Sanders, on October 5, 1987, Frye did not indicate that she felt it was unsafe to work or that it would be hazardous to others, but merely said she some "dizziness problems," and stated that she was afraid to drive to work (Tr. Vol. II, 286).

Frye indicated that Dr. Dino told her that Respondent was advised of her illness. Respondent admitted that on or about October 3, 1987, a nurse, at the Moss No. 3 Nurses Station had a conversation with Dr. Dino's office, and was informed that Frye had been treated for dizzy spells and was seen on September 16, 21, 23, and October 5, 1987. However, the only communication from Dr. Dino to Respondent bearing on Frye's ability to work subsequent to September 16, 1987, is a letter dated October 20, 1987, more than 1 month after Frye last worked. In the same fashion, the only written statement from Dr. Steven W. Morgan, a neurologist who examined Frye in October 1987, with regard to her ability to work, is dated October 28, 1987, again more than a

month after Frye last worked. Based upon the above, I conclude that Frye has not established that she communicated to Respondent her work refusal, and as such, her complaint must fail (See Sedgmer, supra, Keene, supra.

III.

In addition to safety training, which is mandated, Respondent provides its employees, on a voluntary bases, with a weekly safety meeting. These meetings, which last approximately 15 minutes, and for which the employees are paid time and a half, allow the latter to ask safety questions and provide safety suggestions. When weather permits, these meeting are held out of doors, and in inclement weather they are held in a hot water heater room which is adjacent to, but separated by a doorway, from the men's bathroom. It was the testimony of Frye, as corroborated by William McCoy, that with the door open, it is possible to observe male nudity and men urinating in the bathroom.(FOOTNOTE 1) However, it is possible, while attending a safety meeting, to stand in a position where it would not be possible to see through the doorway to the men's bathroom. Frye also testified that during the safety meetings she observed men in the meeting room wearing only their long underwear, and her testimony was corroborated by Darnis Salyer. According to Frye she attended "a lot" of safety meetings (Tr. Vol. II, 110), but that in the fall of 1986, she first encountered male nudity at a meeting. This was the last meeting she attended, and she asked Billy Lee Bise, the Union Mine Committeeman, to ask Sanders to change the location of the meetings. She said that Bise informed her that Sanders had informed him that he would provide a different meeting place, but that she was never approached by any of Respondent's personnel to come to another site. She said that she talked to Bise again about this matter 1 week prior to her discharge in September 1987, but that no alternate sites were provided to her. In this connection, Bise indicated that in approximately February 1987, and again "a while" before Frye was discharged (Tr. Vol. II, 45), he told Sanders that different arrangements should be made for a facility for the safety meetings as it was not proper to have females exposed to men changing clothes. Bise indicated that Sanders told him that he would arrange for one of the foremen to give Frye safety meetings by herself. Thus, the only evidence of any activity on Frye's part, that has any relevance with regard to activities protected by the Act, was her request of Bise to ask Sanders to change the safety meeting site. Frye thus was not

seeking the right to attend a safety meeting, but rather was seeking a change in its situs to a location that would not be offensive, and an embarrassment to her. I conclude that Frye's request is beyond the purview of the Act, and as such is not protected thereunder.

Motivation

Assuming arguendo that Frye's request to have the location of the safety meetings changed was a protected activity, Frye's case must fail, as she has not established that her discharge was motivated "in any part by this activity." To the contrary, the evidence establishes that Frye's dismissal was based solely on her excessive absenteeism.

On January 1, 1985, Respondent instituted a Chronic and Excessive Absentee Control Program in order to address chronic absenteeism. In December 1985, Sanders met with Frye and informed her that he was going to be the superintendent as of January 1986, and that he was aware of her absenteeism. He also indicated that they should help one another so that the absenteeism would not be a problem. In September 1986, Sanders met with Union Officials, James Hicks and Bise, to ask them to counsel Frye with regard to her absenteeism. In February 1987, Frye missed 16 percent of scheduled working days, and in March and April of 1987 missed 42 percent and 90 percent respectively of scheduled working days.

In May 1987, Frye was absent for 96 percent of the scheduled working days, and in June her absentee rate was 44 percent. Frye was orally counseled with regard to her absentee rate by Sanders on April 30, June 8, and July 20, 1987. On that last date Frye was suspended, with intent to discharge, due to excessive absenteeism. Subsequently, pursuant to a 24 - 48 hour meeting on July 25, 1987, Frye entered into a Last Chance Agreement in which she agreed that she would not exceed the mine absentee rate of four percent in any month in the next 12 months commencing August 1, 1987.

In August 1987, Frye's absentee rate did not exceed the mine average, however, in September 1987, her absentee rate was 39 percent. On October 1, 1987, Sanders informed Frye that inasmuch as her absentee rate in September 1987, exceeded the provisions of the Last Chance Agreement she was to contact the superintendent within 48 hours. Sanders subsequently met with Frye on October 5, 1987, and explained to her that she was to be suspended as she had violated the Last Chance Agreement. On October 16, 1987, Sanders sent a notification to Frye informing her that she was being suspended with intent to discharge because her absenteeism was in violation of the Last Chance Agreement. A 24 - 48 hour meeting ensued, and subsequently Frye was discharged.

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Based upon the above facts, I conclude that the sole reason for the discharge of Frye was her excessive absenteeism. This clearly is a prerogative of management, and I do not find sufficient evidence to establish that the discharge was motivated in any part by any protected activities. Accordingly, the Complaint herein must be dismissed. (See Goff, supra).

ORDER

Based on the above, it is ORDERED that this proceeding be DISMISSED.

Avram Weisberger
Administrative Law Judge

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FOOTNOTES START HERE
~FOOTNOTE_ONE

1. There is some conflict in the record as to whether or not on the dates in issue there was a door in this doorway. The weight of the evidence tends to establish that there was a door although it was usually kept open.