

CCASE:
ROBERT BUELKE V. THUNDER BASIN COAL
DDATE:
19890216
TTEXT:

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

ROBERT BUELKE,
COMPLAINANT

DISCRIMINATION PROCEEDING

v.

Docket No. WEST 86-192-D
DENV-CD 86-8

THUNDER BASIN COAL COMPANY,
RESPONDENT

Black Thunder Mine

DECISION

Appearances: Mr. Robert W. Buelke, Gillette, Wyoming,
pro se.;
Charles W. Newcom, Esq., Sherman and Howard,
Denver, Colorado,
for Respondent.

Before: Judge Cetti

This case is before me upon the complaint by Robert Buelke 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 his layoff on January 31, 1986, by Thunder Basin Coal Company, (Thunder Basin), was in violation of section 105(c)(1) of the Act.(FOOTNOTE 1)

On January 31, 1986, Thunder Basin Coal Company conducted a layoff at its Black Thunder Basin mine near Wright, Wyoming. In that layoff, the workforce was reduced by approximately 140 employees. Approximately 100 of those employees were hourly employees, and approximately 40 of those employees were management employees. Eight of the miners laid off were electricians who fell within the reduction in workforce criteria established and used by the company in conducting a layoff at its mine. One of the eight electricians laid off was Mr. Buelke, complainant in this action.

Complainant contends that he fell within the reduction in workforce criteria established by the Company because he engaged in activities protected under the Act. Thunder Basin denies that it in any way discriminated against Mr. Buelke in violation of Section 105(c) of the Act. Thunder Basin states that Mr. Buelke was one of approximately 140 employees, including 40 management employees, laid off on January 31, 1986 because of lack of work and that the lay off occurred under reduction in force criteria, which was established in 1983.

Thunder Basin also contends that Mr. Buelke's claim is not timely and should be dismissed for failure to comply with the applicable statute of limitations.

ISSUES

1. Is complainant's complaint barred by time limitations?
2. Was complainant selected for layoff or otherwise discriminated against because of activity protected under the Act?

TIME LIMITATIONS

The threshold issues which must be addressed is whether Mr. Buelke's claim is timely. Mr. Buelke layoff occurred on January 31, 1986. On March 31, 1986 Mr. Buelke filed a discrimination complaint with the Mine Safety and Health Administration (MSHA). MSHA investigated Mr. Buelke's complaint and based upon that investigation determined that a violation of section 105(c) of the Act had not occurred. MSHA so advised Mr. Buelke by letter dated May 13, 1986. The May 13, 1986 letter also advised Mr. Buelke that if he disagreed with MSHA's determination, he had 30 days after the receipt of that "notice" to file his own action with the Commission.

Mr. Buelke's pro se complaint was received and stamp-dated in the Commission office on June 24, 1986. This was his initial contact with the Commission. He dated the letter (complaint) June 16, 1986. Exhibits R-21, R-22, and R-23. The envelope which enclosed Mr. Buelke's letter was postmarked June 19, 1986. It is noted that June 16, 1986 was a Monday and June 19, 1986, the date

~240

the letter was postmarked was a Thursday. Mr. Buelke's appeal to the Commission was not filed within 30 days of the date of MSHA's May 13, 1986 notice. MSHA's May 13, 1986 letter was signed for on May 16, 1986 by a friend of Mr. Buelke who he was having pick up his mail for him. Mr. Buelke also testified regarding various personal problems and circumstances which occurred in May and June of 1986 to explain the delay in filing his action with the Commission such as stress due to the illness of a friend and the death of his aunt.

Mr. Buelke states that he has had approximately 225 hours of college credit; that he understood he needed to file with the Commission within 30 days of the May 13, 1986 notice from MSHA if he should disagree with MSHA's determination.

Section 105(c)(2) of the Act provides that a miner who believes that he has been discriminated against may, within 60 days after such violation occurs, file a complaint with the Secretary. The Act further provides that upon receipt of a complaint by a miner, the Secretary shall commence an investigation within 15 days, and if he determines that discrimination has occurred, he shall immediately file a complaint with the Commission. It directs the Secretary to notify the miner in writing within 90 days of the receipt of a complaint of his determination whether a violation has occurred. The Act further provides that if the Secretary, upon investigation, determines that the provisions of 105(c) have not been violated, the "complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination . . .".

On review of the legislative history of the Federal Mine Safety and Health Act of 1977 and Commission cases involving section 105(c), I am satisfied that the time limitations of section 105(c) were not intended to be jurisdictional. See S. Rep. No. 181, 95th Cong., 1st Sess. 36 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 at 624 (1978).

The Commission has indicated that dismissal of a complaint for late filing is justified only if the respondent shows material, legal prejudice attributable to the delay. Cf. Secretary/Hale v. 4-A Coal Company, Inc., 8 FMSHRC 905 (1986). No such showing has been made here. Although respondent alleges prejudice and some of the potential witnesses are no longer employed by Thunder Basin, I find that respondent has not shown material legal prejudice attributable to the delay. Respondent's contention that Mr. Buelke's claim must be dismissed for failure to comply with the statute of limitations contained in section 105(c) of the Act is rejected.

ADVERSE ACTION - THE LAYOFF

Due to lack of work Thunder Basin on January 31, 1986 laid off approximately 140 employees including 40 management employees. Mr. Buelke was one of the 8 electricians in the electric department that fell within the reduction in work force criteria used by Thunder Basin in conducting a layoff at its mine. This reduction in work force criteria consisted primarily of the same criteria previously established and used by Thunder Basin in an earlier, 1983, reduction in work force. The basic relevant criteria under which Mr. Buelke was laid off is set forth in Exhibit 1 as follows:

THUNDER BASIN COAL COMPANY

REDUCTION IN WORKFORCE, 1986

1. ANY THUNDER BASIN COAL COMPANY EMPLOYEE THAT FALLS UNDER THE FOLLOWING 1983 CRITERIA WILL BE SEPARATED REGARDLESS OF SENIORITY STATUS:

5 PERFORMANCE RATING,

3RD STEP CORRECTIVE ACTION,

4 PERFORMANCE RATING,

3- PERFORMANCE RATING AND TWO CORRECTIVE ACTIONS,

TWO CORRECTIVE ACTIONS.

There was no evidence that the criteria used in the reduction in force layoff on January 31, 1986, was improper or unfair criteria for Thunder Basin to use in conducting the layoff and Mr. Buelke clearly fell within the reduction in work force criteria. At the time of January 31, 1986 layoff Mr. Buelke had two third step corrective actions in his personnel file. Exhibit R-7 and R-12. The most recent performance review in his file was a 3- rating. (Exhibit R-17). In addition Mr. Buelke had a total of four corrective actions in his file (Ex. R-2, R-3, R-7, and R-12). Thus, Mr. Buelke fell within three of the five performance criteria which were the first factors looked to in selecting employees for the 1986 layoff (Exhibit R-1). Under the established criteria Mr. Buelke would have been selected for layoff if he fell within only one of the five performance criteria.

With regard to the four corrective actions Mr. Buelke was initially disciplined for using code 33 to record three different absences during 1984. Thunder Basin contends that this was contrary to company policy set forth in Exhibit R-36. It is

~242

clear from the record that Mr. Buelke used the code 33 designation on his absences even though he had been specifically instructed by his supervisor "O. W. Wendell" Johnson that he should not do that.

Next Mr. Buelke received a step II corrective action for leaving his work area without permission. (Exhibit R-3). He then received two step III corrective actions, one for failure to remove company property from his locker, (Exhibit R-7) and a second for unsafe conduct when he was involved in a serious accident. (Exhibit R-12%9B).

Mr. Buelke also had a 3- evaluation in his file at the time of the layoff. (Exhibit R-17) Mr. Stanforth testified that in making his evaluation of Mr. Buelke, he was concerned with Mr. Buelke's short attention span and concentration, inattention to safety, and lack of urgency in repairing equipment.

Evidence was also presented that Mr. Buelke had received a 3 evaluation in December of 1985 while Mr. Buelke was working for Mr. Munn at the Coal Creek Mine of Thunder Basin, a mine approximately 25 miles from Black Thunder Mine where Mr. Buelke usually worked. This evaluation never reached Mr. Buelke's personnel file which was left at the Black Thunder Mine. Nothing in the record suggest that the loss of this evaluation was in any way tied to any protected activity by Mr. Buelke. However, even if the evaluation had been in Mr. Buelke's file, he still would have been laid off under the reduction in work force criteria because of the corrective actions he had received. Mr. Buelke had a total of four corrective actions and needed only two corrective actions to be laid off. He also had two 3rd-step corrective actions and needed only one 3rd-step corrective actions to be laid off under the established reduction in work force criteria.

DISCRIMINATION

It is well settled that 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 in establishing that (1) he engaged in protected activity and (2) the adverse action complained of was motivated in any part by that protected activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 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 in no part motivated by protected activity. If an operator cannot rebut the prima facie case in this manner, it nevertheless

may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. Pasula, supra; Robinette, supra. See also Eastern Assoc. Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987); Donovan v. Stafford Construction 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). Cf. NLRB v. Transportation Management Corp., 462 U.S. 393, 397-413 (1983) (approving nearly identical test under National Labor Relations Act).

PROTECTIVE ACTIVITY

Mr. Buelke fully established that he engaged in protective activity. At the safety meetings he and his fellow electricians would voice safety concerns. He often took the lead in voicing those concerns. One of the major items with which he became concerned early in 1983 was a high voltage underground feeder wire buried directly into the earth (no conduit, no concrete). He testified that he was concerned about the risk of a fatality from this underground buried cable. Mr. Buelke states that Thunder Basin "seem to be dragging their feet for over two years" and that "after about two years of trying to get the company to correct the condition, I and two other electricians hired a private attorney to confront the company". A meeting was held in June 1984 but there was no immediate correction. He states that early in 1984 he had a job that involved this underground service feeder. He refused to work on these lines. He disconnected them, grounded them and tagged them out with a "do not operate tag". Mr. Buelke testified that thereafter Bob Bassett, electrical supervisor, ordered two other electricians to remove the tag and put this underground feeder back into service. Early in January 1985 Mr. Buelke complained to MSHA about the underground cable. He met with MSHA in conjunction with his complaint. This led to the January 31, 1985 MSHA inspection and investigation. As the result of the investigation and inspection MSHA did not issue any citation because the company was in process of replacing these underground feeder cables. (Exhibit R-10).

MOTIVATION

It is Mr. Buelke's contention that his poor performance evaluations and corrective actions were based upon misinter-preted, misunderstood, or nonexistent company policies which were applied against him without using proper facts or investigation.

It is recognized that direct evidence of motivation is rarely encountered and that reasonable inferences of motivation may be drawn from circumstantial evidence showing such factors as

knowledge of protective activity, coincidence in time between the protective activity and the adverse action, and disparate treatment. See Secretary on Behalf of Chacon v. Phillips Dodge Corp., 3 FMSHRC 2508 (November 1981), rev'd on other grounds, 709 F.2d 86 (D.C. Cir. 1983). Nevertheless it has been held that an employee's "mere conjecture that the employer's explanation is a pretext for intentional discrimination is an insufficient basis for denial of summary judgment." Branson v. Price River Coal Co., 853 F.2d 768, 46 FEP Cases (BNA) 1003 (10th Cir. 1988). There must be evidence of discriminatory intent or evidence from which a reasonable inference of discriminatory intent can be drawn.

The essential question is not whether Thunder Basin has treated Mr. Buelke in a reasonable, fair, and nondiscriminatory manner, but whether any adverse action was taken against him in any part because of his protected activity. I find no persuasive evidence, direct or circumstantial, from which to draw a reasonable inference of discriminatory intent because of Mr. Buelke's protective activity. I find no bases on this record for inferring that any adverse actions taken against Mr. Buelke were taken in some part because of his protective activity. No evidence was presented indicating that Thunder Basin's actions in disciplining him and in selecting him for a layoff were in any part related to any of his protected activity. Thus, Mr. Buelke has failed to present a prima facie case of discrimination.

Accordingly, I find that while Mr. Buelke did engage in protected activity and suffered adverse action, the preponderance of the evidence presented fails to establish that the adverse action was motivated in any part by the protected activity. The case is therefore dismissed.

August F. Cetti
Administrative Law Judge

AAAAAAAAAAAAAAAAAAAAAAAAAAAAAAAAAAAA

FOOTNOTES START HERE

~FOOTNOTE_ONE

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.