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ARNOLD SHARP V. BIG ELK CREEK COAL
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

ARNOLD SHARP, COMPLAINANT	DISCRIMINATION PROCEEDING
v.	Docket No. KENT 88-165-D MSHA Case No. PIKE CD 88-10
BIG ELK CREEK COAL COMPANY, RESPONDENT	No. 5 Surface Mine

DECISION

Appearances: Arnold Sharp, Bulan, Kentucky, pro se, for the Complainant;
Edwin S. Hopson, Esq., Wyatt, Tarrant & Combs, Louisville, Kentucky, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a pro se discrimination complaint filed by Mr. Sharp on July 18, 1988, against the respondent pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977. In a statement executed by Mr. Sharp on April 13, 1988, on an MSHA complaint form, he made the following allegation of discrimination:

> On 4-4-88, I told Harlan Couch, Foreman, Night Shift, that I would be off from work on 4-11-88 to be in court in Lexington. I again reminded him on 4-9-88. He said it would be fine. On 4-12-88, an inspector wrote 15 violations on the mine. I was told I would have to prove I was in court on 4-11-88 or I would be fired. I feel I am being harassed. I request that the Foreman stop harassing me.

The Secretary of Labor, Mine Safety and Health Administration (MSHA), conducted an investigation of Mr. Sharp's complaint, and by letter dated July 8, 1988, advised Mr. Sharp that on the basis of the information gathered during the course of its investigation, MSHA concluded that a violation of section 105(c) of the Act had not incurred. Mr. Sharp was

advised of his right to pursue his claim further with the Commission, and his pro se complaint was received and docketed by the Commission on July 18, 1988.

The respondent filed an answer to the complaint denying that it had discriminated against Mr. Sharp, and it takes the position that any personnel actions taken against Mr. Sharp were for reasons unrelated to any protected safety activities on his part. A hearing was convened in Pikeville, Kentucky, on January 4, 1989, and the parties appeared and participated fully therein. The parties filed posthearing briefs, and I have considered their respective arguments in the course of my adjudication of this case. I have also considered all oral arguments and representations made by the parties on the record during the course of the hearing.

Issues

The issues in this case are (1) whether or not Mr. Sharp's section foreman Harlan Couch harassed Mr. Sharp by requesting him to produce an excuse for a day's absence from his job, (2) whether or not Mr. Couch's request for such an excuse was motivated by his alleged belief that Mr. Sharp had called an MSHA inspector and informed him about certain violative mine conditions which resulted in an inspection and issuance of citations against the respondent; and (3) whether the respondent's decision to treat Mr. Sharp's absence from work as an unexcused absence was made to retaliate against him for past discrimination claims filed against the respondent, or to harass him or otherwise retaliate against him for calling the inspector.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. 301 et seq

2. Sections 105(c)(1), (2) and (3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c)(1), (2) and (3).

3. Commission Rules, 29 C.F.R. 2700.1 et seq.

Complainant's Testimony and Evidence

Arnold Sharp, the complainant, stated that on April 4, 1988, he informed Mr. Harlan Couch, his day shift foreman, that he had to be off work of April 11, 1988, because he had to be in court in Lexington on that day, and that Mr. Couch "said fine." Upon his return to work after his court appearance, Mr. Sharp stated that Mr. Couch informed him that he had

to provide proof showing where he was at on April 11, "because the federal had been there and wrote them up citations, and I was the one report them" (Tr. 16). Mr. Sharp asserted that he was harassed because the mine inspector was at the mine and "wrote them up." He also stated that "everytime a mine inspector comes on the job I'm harassed" (Tr. 17).

Mr. Sharp explained that his court appearance was in connection with a consumer complaint that he had filed with the Better Business Bureau against an automobile dealer who had failed to make certain repairs to an automobile which he had purchased. Mr. Sharp produced copies of certain documents concerning his complaint, and one of the documents is a Notice of Hearing dated April 5, 1988, from the Better Business Bureau of Central Kentucky, Inc., informing Mr. Sharp that he was to appear before an arbitrator at 11:00 a.m., April 11, 1988, in Lexington, Kentucky, when the complaint would be heard. Mr. Sharp confirmed that he appeared at the hearing on April 11, and did not go to work. He also stated that he had also reminded Mr. Couch on April 9, that he would be in court and not at work, and that Mr. Couch responded that "it would be fine."

Mr. Sharp stated that Mr. Mike Cornett took over as boss of the day shift on April 11, the day that he was off, and that when he returned to work on the evening of April 12, Mr. Couch accused him of calling the MSHA inspectors and reporting the conditions which resulted in the issuance of citations that same day. Mr. Sharp stated that Mr. Couch told him that "we think you called" the inspectors, and informed him that unless he could produce proof as to his whereabouts on April 11, he would be fired (Tr. 20).

Mr. Sharp admitted that when Mr. Couch asked him to produce some proof that he was in court, he did not show him the documents from the Better Business Bureau because Mr. Couch did not "ask him right." Mr. Sharp stated that "if he had asked right, I would have gladly showed him" (Tr. 21). Mr. Sharp stated that instead of informing him that he needed to see proof of his court appearance, Mr. Couch accused him of calling in the mine inspectors, and that is why he did not show the documents to Mr. Couch (Tr. 21-22). Mr. Sharp confirmed that he subsequently contacted the inspectors and obtained copies of their "mine inspection reports" in order to prove that they issued citations on the day he was allegedly harassed by Mr. Couch. Mr. Sharp confirmed that he had not called in the inspectors or reported any violations, but that he did tell Mr. Couch that this was the case. When asked why he failed to tell Mr. Couch that he had not reported anything

to the inspectors, Mr. Sharp responded "It doesn't do any good to tell him. I didn't see any use in it, I was being accused of it" (Tr. 22-23).

Mr. Sharp confirmed that his allegation of harassment is based on the fact that Mr. Couch threatened to fire him if he could not produce proof that he was in court, and the fact that the respondent resents him since he prevailed in a prior discrimination case. Mr. Sharp stated that he is harassed every day when he is at work, and he produced a notebook with his notes which he claimed were examples of instances of harassment. He also produced "a piece of a rain suit" which he claims he was required to wear while steam-cleaning equipment, and he cited this as an example of harassment by the respondent (Tr. 25-27).

Mr. Sharp produced a notebook containing personal notes which he kept, and he offered them to the court as "examples" of acts of harassment by the respondent. He was given an opportunity to review the material and to cite any instances of harassment which may be documented by these materials (Tr. 28-30).

Mr. Sharp produced some notes dated April 30, and May 4, 1988, dealing with the failure of two individuals named "Allan" and "John" to produce doctor's excuses for days they missed work. Mr. Sharp implied that they were not asked to provide proof to Mr. Couch that they missed work, and that he is the only person who is required to show such proof (Tr. 31).

Mr. Sharp produced a copy of a memorandum dated July 26, 1988, addressed to him, which stated "This is to serve notice that you have been warned verbally about stopping work and leaving the job site prior to the end of the shift on July 20 and 26, 1988." Mr. Sharp denied that he left work early on these days, and he asserted that the respondent attempted to get other miners to sign and make false statements against him to support management's claim that he left work early (Tr. 32-33).

Mr. Sharp confirmed that he was not laid off or disciplined in any way by Mr. Couch as a result of taking off work for his consumer complaint appearance (Tr. 35, 38-40). Mr. Sharp asserted that the respondent has attempted to have miners make false statements against him because "they are trying to set me up to fire me, because they resent me because I beat them in the first case. They started from day one when I went on the job from Judge Fauver's decision. It started

the first day I started to work . . . and the notes tell everything they have done" (Tr. 35).

When asked why he had not given his notebook and notes to MSHA when he filed his complaint on April 13, 1988, Mr. Sharp responded as follows (Tr. 41).

> JUDGE KOUTRAS: And another question I would have is, why wasn't all this given to MSHA when you went there on April the 13th to file this complaint? Why didn't you give the complaint examiner that pile of paper there?
>
> THE WITNESS: It was give to him.
>
> JUDGE KOUTRAS: And what did they do?
>
> THE WITNESS: Nothing, because MSHA is in with the company.
>
> JUDGE KOUTRAS: Oh, okay. The judge is in with the company, and MSHA is in with the company, right?
>
> THE WITNESS: I ain't saying the judge is.
>
> JUDGE KOUTRAS: Well, okay.
>
> THE WITNESS: But I'm saying MSHA is.
>
> JUDGE KOUTRAS: MSHA is.
>
> THE WITNESS: They won't take nothing against Big Elk Creek Coal.
>
> JUDGE KOUTRAS: Okay.
>
> THE WITNESS: I don't care what kind of proof you give them. I've given them all kinds of proof.

On cross-examination, Mr. Sharp stated that his conversation with Mr. Couch on April 12, 1988, concerning his consumer complaint appearance took place on the mine parking lot prior to his starting work at 6:00 p.m., and he described the conversation which took place as follows (Tr. 52-53):

> Q. Was there anybody close enough to overhear what was being said?

A. No, but he told it on the C.B.

Q. Okay, I'll get to that in a minute. Now, if you would, tell me as best you can recall it word for word what you said, and what Harlan Couch said on that occasion on April the 12th.

A. I come up, I parked, got out of my truck, started walking over towards the other men. He stopped, said where's the proof that you were in court yesterday. I said, what do you mean. I told you I was out. He said, well, the mine inspector has been up there, and we think you reported us. We got wrote up. You've got to show proof where you was at or you're fired on account of it.

Q. What did you say?

A. Didn't say nothing, except I didn't bring proof because if they'd have asked it right --

Q. Now, what did you say? Did you say anything in response to his statement.

A. No, not that I can recall.

Q. Was that the end of the conversation?

A. As far as I can recall, yes.

Q. Did Mr. Couch say anything else?

A. Not that I can recall.

Mr. Sharp denied that he ever told Mr. Couch that he would be off work on April 11, 1988, because he was going to court against the respondent in Lexington. He also denied that he ever told Mr. Couch that he was going to court in Lexington to sue the respondent for $150,000 or "a lot of money" (Tr. 54-55).

In response to further questions, Mr. Sharp stated that some of his fellow miners, including Mr. Ronnie Ball, told him

that they heard Mr. Couch state on the C.B. radio at the mine that he was going to require him to prove that he was in court on April 11, or he would fire him "because they got wrote up" (Tr. 58). Mr. Sharp confirmed that he did not personally hear Mr. Couch make the statements over the C.B. (Tr. 57).

Mr. Sharp confirmed that he simply told Mr. Couch that he had to be in court in Lexington, and did not further explain what the proceeding was all about (Tr. 78).

NOTE: Prior to the convening of the hearing on the record, Mr. Sharp advised me that he had subpoenaed mine employee Ronnie Ball to appear on his behalf, and he furnished me with a copy of the subpoena certifying that he served the subpoena on Mr. Ball. However, Mr. Ball failed to appear.

After confirming that Mr. Ball was in fact employed by the respondent, respondent's counsel was requested to ascertain Mr. Ball's whereabouts and to instruct him to come to the hearing. Respondent's counsel advised me that he requested respondent's management representative, who was present in the courtroom, to locate Mr. Ball and to instruct him to come to the hearing. Mr. Ball was subsequently contacted, and instructed to come to the hearing (Tr. 86). The hearing proceeded, and the parties were informed that Mr. Ball would be given an opportunity to testify when he arrived (Tr. 6).

Mr. Sharp asserted that Mr. Ball would testify that he was "set up and fired" by the respondent because he would not sign a false statement against him, and that he has turned this information over to "the Federal," and that Mr. Ball will be subpoenaed to appear in Federal court with regard to this matter. Mr. Sharp stated that he has turned the matter over to the U.S. Attorney in Lexington for prosecution (Tr. 37).

Mr. Sharp stated further that Mr. Ball would also testify that he heard Mr. Couch state over the mine C.B. radio that he would fire Mr. Sharp if he did not provide proof that he was in court (Tr. 38).

Mr. Sharp later confirmed that he served the subpoena on Mr. Ball on December 31, 1988, on the mine parking lot (Tr. 56-57).

Mr. Sharp also testified that the respondent attempted to have Mr. Ball and another miner, Stanley Boggs, sign false statements that he (Sharp) had threatened to kill Harlan Couch, Mike Cornett, and M. C. Couch, and that Mr. Ball was subsequently fired for damaging a truck. Mr. Sharp stated

that after Mr. Ball was fired, he discussed the matter with him, and Mr. Sharp advised him to file a complaint with MSHA. Mr. Ball filed a complaint on June 23, 1988, but he was subsequently reinstated by the respondent after signing a release and dropping his complaint (Tr. 58-60).

Ronnie Ball was called to testify, and he denied that he was served with any subpoena appear at the hearing (Tr. 111-114).

Mr. Ball denied that he ever heard Mr. Harlan Couch announce over the mine C.B. radio that he would fire Mr. Sharp if he could not prove that he was in court on April 11, 1988 (Tr. 115-116). Mr. Ball stated further that he has no information or evidence with respect to any alleged acts of harassment by the respondent against Mr. Sharp, and that he has never discussed with Mr. Sharp any of the complaints he has initiated against the respondent (Tr. 118).

Mr. Ball confirmed that he was discharged by the respondent in June, 1988, after a rim on a truck he was driving was broken, and that his dismissal was for "a few days until they found out that I was not the cause of the rim being busted." He confirmed that he had filed a discrimination complaint with MSHA several days after his discharge, but later agreed to dismiss the complaint after he returned to work. Mr. Ball stated that during MSHA's investigation of his complaint, the MSHA special investigator who interviewed him stated in his report that he had been fired because "I did not go for the company against Arnold Sharp and that was a false statement, so, I dropped charges" (Tr. 118-122).

Respondent's Testimony and Evidence

Harlan Couch, respondent's night shift foreman, testified that he has worked for the respondent for approximately 1 year, and that in April of 1988, 19 miners worked on his shift. Mr. Couch stated that on April 4, 1988, Mr. Sharp requested to be off work on April 11, 1988, because "he had to go to court with the company. I told him okay." Mr. Couch stated that he assumed Mr. Sharp had some action against the company. Mr. Sharp asked him again on April 11, 1988, and Mr. Couch told him "fine." At that time, Mr. Couch stated that he asked Mr. Sharp if his court appearance was still with the company, and that Mr. Sharp replied "yes, concerning $150,000 worth" and Mr. Couch replied "that's okay" (Tr. 64-66).

Mr. Couch confirmed that Mr. Sharp was off work on April 11, 1988, and that when he (Couch) asked day shift foreman Mike Cornett about the trial, Mr. Cornett advised him that the respondent was not in court with Mr. Sharp. Upon Mr. Sharp's return to work on April 12, Mr. Couch stated that he discussed the matter with Mr. Sharp, and he explained the conversation which took place as follows (Tr. 67-68):

> A. Yeah. I asked him for an excuse because he had been in court. I told him it was a company policy to have an excuse. I also told him he'd lied to me, because he said he was going to court with the company, and he'd never done it.
>
> Q. What did he say, anything?
>
> A. He said, I don't have to have no excuse. That's what he said.
>
> Q. Did you ever take any action against him because of that?
>
> A. No, sir.
>
> Q. Did you ever threaten to discharge him because he didn't have an excuse?
>
> A. No, sir, I didn't.
>
> Q. Did you talk on the C.B. radio about the situation?
>
> A. No, sir.
>
> Q. Did you mention anything about a federal mine inspection to Mr. Sharp?
>
> A. No. They get them on the day shift ever now and then and they pull a night shift on me. That's the ones I would know about.
>
> Q. And you testified you didn't know about this mine inspection?
>
> A. No, sir. He comes on days. That's Mike Cornett's department on days. He takes care of all of that.

Q. Mike Cornett takes care of federal mine inspections that happen on day shift?

A. That's right.

Q. As far as you know, have you treated Mr. Sharp in this situation any differently than you would anybody else?

A. No, sir.

During his cross-examination of Mr. Couch, Mr. Sharp produced copies of an MSHA computer print-out showing the respondent's history of civil penalty assessments. This document reflects civil penalty assessments for 14 alleged violations which are included in 14 section 104(a) citations served on the respondent on April 12, 1988. Mr. Sharp also produced copies of the citations which reflect that they were served on Foreman Mike Cornett on the morning of April 12, 1988 (Tr. 70-71).

Mr. Couch denied any knowledge of the violations, and he denied that he accused Mr. Sharp of calling in the MSHA inspector who issued the citations, or that he had any knowledge that Mr. Sharp had in fact called in the inspector (Tr. 74-75). Mr. Couch also denied any knowledge of making any announcement over the C.B. radio that he would fire Mr. Sharp if he failed to present an excuse for his court appearance (Tr. 77).

Mr. Couch denied that he ever accused Mr. Sharp of calling in MSHA, or that he ever threatened to fire him for not having an excuse for his court appearance. Mr. Couch stated that he advised Mr. Sharp that it was company policy to have an excuse for such an absence, but that Mr. Sharp never presented such an excuse. Although Mr. Sharp violated company policy for not presenting an excuse for his absence from work, Mr. Couch stated that he did not discipline Mr. Sharp because he purportedly filed a complaint with MSHA. Mr. Couch stated further that he simply reported the matter to M. C. Couch, the mine superintendent, and according to mine policy, any decision to discipline Mr. Sharp was within the discretion of the respondent (Tr. 81-84).

Mr. Couch stated that the company policy concerning excuses for absences was in effect before he came to work for the respondent, and that Mr. Sharp was aware of it (Tr. 84-85).

In response to further questions, Mr. Couch confirmed that he believed Mr. Sharp's failure to produce an excuse for

his absence from work on April 11, 1988, was an unexcused absence (Tr. 86). Mr. Couch reiterated that Mr. Sharp had lied to him when he said that he would be in court against the respondent, and that he simply turned the matter over to the mine superintendent. Mr. Couch reviewed the documents offered by Mr. Sharp with respect to his consumer complaint, and he confirmed that he had never previously seen the documents, and that Mr. Sharp never showed them to him or offered any explanation as to why he was not at work other than his statement that he was in court (Tr. 87-88).

Marcus Couch, Jr., mine surface superintendent, stated that he has worked for the respondent for approximately 5 years and that he is not related to Harlan Couch. Mr. Couch confirmed that he was aware of an MSHA inspection which took place on April 12, 1988, during which citations were issued, and he characterized the inspection as a routine quarterly mine inspection. He denied that mine management was "upset" with Mr. Sharp because of this inspection, and he also denied blaming Mr. Sharp for the inspection (Tr. 90-92).

Mr. Couch confirmed that no adverse action was taken against Mr. Sharp for his unexcused absence of April 11, 1988, and that he did not treat the absence as unexcused because Mr. Sharp has previously filed complaints with MSHA's, or as a means of retaliating against him (Tr. 93).

On cross-examination, Mr. Couch stated that Mr. Sharp has not been treated any differently from other employees with respect to the respondent's excused or unexcused leave policy. Mr. Couch stated further that employees other than Mr. Sharp have been "written up" for unexcused absences and absenteeism, and that company records will attest to this fact (Tr. 94-95). Mr. Couch explained the procedures for documenting such absences, and stated that other employees have in fact been cited for unexcused absences. He confirmed that after two unexcused absences, an employee is subject to discharge (Tr. 97).

Mr. Couch was shown copies of the documents produced by Mr. Sharp with respect to his consumer complaint and appearance at the hearing, and he stated that "this is the first time I've ever saw this" (Tr. 104). Mr. Couch confirmed that he would probably have accepted these documents as an excuse for Mr. Sharp's absence of April 11, 1988, but since Mr. Sharp did not present them or document his absence, his absence from work was treated as unexcused (Tr. 105).

Findings and Conclusions

In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of production and proof to establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Company, 2 FMSHRC 2768 (1980), rev'd on other grounds sub nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981); Secretary on behalf of Jenkins v. Hecla-Day Mines Corporation, 6 FMSHRC 1842 (1984); Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510-2511 (November 1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no way motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it may nevertheless affirmatively defend by proving that (1) it was also motivated by the miner's unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Company, 4 FMSHRC 1935 (1982). The ultimate burden of persuasion does not shift from the complainant. Robinette, supra. See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983); and Donovan v. Stafford Construction Company, No. 83-1566 D.C. Cir. (April 20, 1984) (specifically-approving the Commission's Pasula-Robinette test). See also NLRB v. Transportation Management Corporation, ___ U.S. __, 76 L.ed.2d 667 (1983), where the Supreme Court approved the NLRB's virtually identical analysis for discrimination cases arising under the National Labor Relations Act.

Direct evidence of actual discriminatory motive is rare. Short of such evidence, illegal motive may be established if the facts support a reasonable inference of discriminatory intent. Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510-11 (November 1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983); Sammons v. Mine Services Co., 6 FMSHRC 1391, 1398-99 (June 1984). As the Eight Circuit analogously stated with regard to discrimination cases arising under the National Labor Relations Act in NLRB v. Melrose Processing Co., 351 F.2d 693, 698 (8th Cir. 1965):

> It would indeed be the unusual case in which the link between the discharge and the

> [protected] activity could be supplied exclusively by direct evidence. Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence. Furthermore, in analyzing the evidence, circumstantial or direct, the [NLRB] is free to draw any reasonable inferences.

Circumstantial indicia of discriminatory intent by a mine operator against a complaining miner include the following: knowledge by the operator of the miner's protected activities; hostility towards the miner because of his protected activity; coincidence in time between the protected activity and the adverse action complained of; and disparate treatment of the complaining miner by the operator.

In Bradley v. Belva Coal Company, 4 FMSHRC 982, 993 (June 1982), the Commission stated as follows:

> As we emphasized in Pasula, and recently re-emphasized in Chacon, the operator must prove that it would have disciplined the miner anyway for the unprotected activity alone. Ordinarily, an operator can attempt to demonstrate this by showing, for example, past discipline consistent with that meted out to the alleged discriminatee, the miner's unsatisfactory past work record, prior warnings to the miner, or personnel rules or practices forbidding the conduct in question. Our function is not to pass on the wisdom or fairness of such asserted business justifications, but rather only to determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed.

Protected Activity

Section 105(c)(1) prohibits a mine operator from discharging a miner, or otherwise discriminating against him for making safety complaints to MSHA or to mine management. That section also prohibits a mine operator from discriminating against a miner, or otherwise interfering with any of his statutory rights under the Act. A miner is protected against any retaliatory action by the respondent because of any safety complaints he may have made to MSHA or to mine management. He is also protected against retaliation for exercising his section 103(g) right to request an inspection of the mine by MSHA when he has reasonable grounds to believe that violations exist in the mine.

Further, I believe that section 105(c)(1) is broad enough to protect a miner against retaliation for threatening to contact or inform mine enforcement agencies about perceived safety violations in the mine.

Mr. Sharp's Complaint

In the case at hand, Mr. Sharp alleges that his section foreman Harlan Couch harassed him on April 12, 1988, when he asked him to produce some proof of his absence from work on that day. Mr. Sharp claims that Mr. Couch had previously given him permission to be away from work, and that the request to provide proof of his whereabouts was motivated by Mr. Couch's belief that he had called an MSHA inspector to the mine for an inspection which resulted in several citations being issued to the respondent.

The MSHA Inspection of April 12, 1988

The evidence establishes that the inspection in question took place during the day shift, and that the citations were issued to the day shift foreman and not to Mr. Harlan Couch. Mr. Couch denied any knowledge of the inspection when he confronted Mr. Sharp about his absence on April 12, and superintendent Marcus Couch confirmed that he considered the inspection to be routine and that he was not upset about it. He also confirmed that he had no reason to believe that Mr. Sharp initiated the inspection, and he denied that the inspection had anything to do with his decision to treat Mr. Sharp's absence as unexcused. Insofar as foreman Harlan Couch is concerned, the record establishes that he took no action against Mr. Sharp for the unexcused absence, and simply informed Marcus Couch that Mr. Sharp could not produce any excuse for his purported court appearance.

Given the history of ongoing confrontations between Mr. Sharp and mine management, and Mr. Sharp's proclivity for filing discrimination claims, I have serious doubts that foreman Harlan Couch would directly accuse Mr. Sharp of calling in an MSHA inspector or openly announce over the mine C.B. radio that he would fire Mr. Sharp for causing the inspection which resulted in the issuance of the citations. With regard to this purported announcement, Mr. Sharp admitted that he did not personally hear Mr. Couch make the statement, and his own witness Ronnie Ball denied that he ever heard Mr. Couch make the statement. Further, Mr. Sharp produced no other witnesses or any evidence to support his allegation in this regard.

In view of the foregoing, I find no credible or probative evidence to support any conclusion that the MSHA inspection of April 12, played any role, either directly or indirectly, in the respondent's decision to treat Mr. Sharp's absence of April 11, 1988, as an unexcused absence. Further, even assuming that the respondent suspected Mr. Sharp of initiating the inspection, I find no credible or probative evidence to establish that the respondent's consideration of Mr. Sharp's absence as unexcused was made to retaliate against Mr. Sharp or to harass him for any protected activities.

The Respondent's Leave Policy

The respondent produced credible probative evidence with respect to its established absenteeism policy, including the requirement that employees must document or present excuses for all unexcused absences. Foreman Harlan Couch testified that the policy requiring employees to produce proof for an absence from work which may be considered unexcused has been in effect for over a year, that it was in effect when he came to work for the respondent, and that Mr. Sharp was aware of the policy. Mr. Sharp did not deny that he was aware of the policy, but claimed that it is not enforced against anyone but him.

Superintendent Marcus Couch explained the respondent's leave policy, including the procedures requiring employees to document all absences which are considered as unexcused, and he confirmed that after two unexcused absences, an employee may be discharged. Mr. Couch also confirmed that other employees have been cited for unexcused absences, and that he treated Mr. Sharp no differently from other employees in concluding that his absence on April 11, was unexcused. Indeed, Mr. Couch confirmed that had Mr. Sharp produced or shown him the documents which he had in his possession with respect to his consumer complaint, he would have considered Mr. Sharp's absence as excused leave. However, since Mr. Sharp failed or refused to present this documentation, or to further explain his court appearance, and since he was unaware of these documents and saw them for the first time at the hearing, Mr. Couch confirmed that he considered Mr. Sharp's absence as unexcused and contrary to the respondent's leave policy.

Having viewed Harlan and Marcus Couch during the course of the hearing, I find them to be credible witnesses and I find no credible evidence to support any conclusion of any disparate treatment of Mr. Sharp. Mr. Sharp's contentions that the respondent's leave and absenteeism policy was not enforced against other employees, and that he was singled out

by the respondent, are rejected as unsupported by any credible or probative evidence. Although Mr. Sharp mentioned the names of several employees who he contended were allowed to miss work without excuses, he failed to produce any witnesses or other credible evidence to support his claim.

Mr. Sharp's Absence of April 11, 1988

The evidence establishes that on two occasions prior to April 11, Mr. Sharp informed his foreman Harlan Couch that he would be off work that day because he had to be "in court" in Lexington, and that Mr. Couch gave his tacit approval to Mr. Sharp when he replied "it would be fine." Mr. Couch testified that Mr. Sharp advised him that his court appearance was in connection with a legal action he filed against the respondent, and Mr. Sharp denied that he made such a statement to Mr. Couch.

Harlan Couch further testified that when he learned on April 12, upon Mr. Sharp's return to work, that he had not been in Court in a case against the respondent, he concluded that Mr. Sharp had lied to him and he asked him to produce proof that he was in fact in court on April 11. When Mr. Sharp could not produce such proof, Mr. Couch reported the matter to mine superintendent Marcus Couch, and took no further action against Mr. Sharp.

Mr. Sharp testified that his "court" appearance was in fact an appearance before the Better Business Bureau in Lexington in connection with a consumer complaint that he had filed against an automobile dealer who had failed to make certain repairs to an automobile which Mr. Sharp had purchased. Mr. Sharp produced copies of several documents concerning his appearance, including a copy of a notice of hearing dated April 5, 1988, instructing him to appear before an arbitrator for a hearing on his complaint, and a copy of the arbitrator's decision in Mr. Sharp's favor.

Harlan and Marcus Couch both testified that they were unaware of the fact that Mr. Sharp's "court" appearance was in connection with his consumer complaint, and they confirmed that they had not previously seen the documentation produced by Mr. Sharp for the first time during his discrimination hearing of January 4, 1989. They also confirmed that Mr. Sharp had not previously offered any explanation or details concerning his purported "court" appearance. I find Harlan and Marcus Couch's testimony to be credible, and it is corroborated by

Mr. Sharp himself who confirmed that he did not show the documents to Harlan Couch or offer any further explanation as to his whereabouts on April 11.

The evidence establishes that Mr. Sharp's purported "court" appearance on April 11, was not in fact an appearance before a court of record, but rather, an appearance before an arbitrator in connection with a consumer complaint. I take note of the fact that the Better Business Bureau notice of hearing received by Mr. Sharp informing him to appear at the hearing on April 11, is dated April 5, a day after Mr. Sharp's first notification to Harlan Couch that he would be in Court on April 11. Although Mr. Sharp could not recall when he actually received notification of the hearing, at page 4 of his brief, he acknowledges that he was initially informed of the hearing by telephone on April 4.

It seems clear to me from the documentation produced by Mr. Sharp that he was in fact at the hearing in Lexington on April 11, in connection with his consumer complaint. It is also clear that Mr. Sharp had at least two opportunities to show the April 5 Notice of Hearing to Harlan Couch. One opportunity was on March 9, when Mr. Sharp had the notice of hearing in his possession and reminded Mr. Couch that he would be in "court." A second opportunity presented itself on April 12, when Mr. Sharp returned to work and was confronted by Mr. Couch who asked him for an explanation as to his purported "court" appearance.

Although Mr. Sharp may not have had any reason to show Harlan Couch the notice of hearing on April 9, when Mr. Couch informed him that his absence from work "would be fine," I find that Mr. Sharp's refusal on April 12, to show Mr. Couch the notice of hearing regarding his hearing appearance, or to otherwise offer an explanation to Mr. Couch was inexcusable. Given the respondent's leave and absenteeism policy, Mr. Couch's doubts concerning Mr. Sharp's appearance in court, valid or otherwise, and the fact that Mr. Couch was Mr. Sharp's supervisor, I believe that Mr. Couch was entitled to some explanation, and that Mr. Sharp's refusal to provide proof of his whereabouts placed him at risk of being charged with an unexcused absence. Mr. Sharp's unreasonable refusal to explain his whereabouts to Mr. Couch obviously triggered management's decision to treat the absence as unexcused.

I conclude that had Mr. Sharp shown Harlan Couch the hearing notice concerning his consumer complaint appearance,

Mr. Couch may not have had any legitimate reason for concluding that Mr. Sharp's absence from work was an unexcused absence. As a matter of fact, superintendent Marcus Couch, the individual who made the decision that Mr. Sharp's absence was unexcused, confirmed that had Mr. Sharp presented the documentation which he deliberately withheld and refused to supply, he would have treated Mr. Sharp's absence from work as excused.

In view of the foregoing, I conclude and find that Harlan Couch's request of Mr. Sharp for some proof of his asserted court appearance was a legitimate and reasonable request, notwithstanding his previous approval to Mr. Sharp, and that the inquiry by Mr. Couch was not made to harass Mr. Sharp or to otherwise retaliate against him for any protected activity. I also conclude and find that the only action taken by Harlan Couch against Mr. Sharp was to report the matter to superintendent Marcus Couch, and that Harlan Couch's reporting of the matter was a legitimate and reasonable exercise of his supervisory authority.

With regard to Marcus Couch's determination that Mr. Sharp's absence from work was unexcused, I conclude and find that given the fact that Mr. Sharp refused to provide an explanation which was readily in his possession and at his disposal, Mr. Couch's decision was a justifiable and reasonable exercise of his authority as the mine superintendent. I also conclude and find that Mr. Couch's determination was not made to harass Mr. Sharp or to otherwise retaliate against him for any protected activities.

I further conclude and find that Mr. Sharp has failed to present any credible or probative evidence to support his claim of discrimination and that he has failed to establish a prima facie case.

ORDER

In view of the foregoing findings and conclusions, and on the basis of a preponderance of all of the credible testimony and evidence adduced in this case, I conclude and find that Mr. Sharp has failed to establish that the respondent has

discriminated against him or has otherwise harassed him or retaliated against him because of the exercise of any protected rights on his part. Accordingly, Mr. Sharp's complaint IS DISMISSED, and his claims for relief ARE DENIED.

George A. Koutras
Administrative Law Judge