CCASE:
SOL (MSHA) V. SUMCO AND R.E. SUMMERS
DDATE:
19890602
TTEXT:

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 ROBERT VAUGHN,
COMPLAINANT

DISCRIMINATION PROCEEDING

Docket No. KENT 89-28-D

v.

SUMCO, INC. AND R.E. SUMMERS,
RESPONDENTS

DECISION

Appearances: Mary K. Spencer, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, on behalf of Complainant; Rodney E. Buttermore, Jr., Esq., Forester, Buttermore, Turner & Lawson, Harlan, Kentucky, on behalf of Respondents.

Before: Judge Broderick

STATEMENT OF THE CASE

On November 18, 1988, the Secretary of Labor (Secretary) filed a complaint on behalf of Robert Vaughn under section 105(c) of the Federal Mine Safety and Health Act of 1977 (the Act). The complaint alleges that Vaughn was discharged on June 30, 1988, for activity protected under the Act. In addition to the complaint, the Secretary filed an Application for Temporary Reinstatement. On November 28, 1988, I issued an order directing Respondent Sumco, Inc. to immediately reinstate Vaughn to the position from which he was discharged or to an equivalent position. On December 16, 1988, Respondent Sumco filed a answer to the complaint and a request for hearing. Pursuant to notice the case was called for hearing in Harlan, Kentucky on March 21, 1989. Robert Vaughn, Richard Davis, Ronnie Brock, George Vaughn, and Winston Madden testified on behalf of Complainant. Robert Earl Summers and Dianne Swanner testified on behalf of Respondents. Both parties have filed post hearing briefs. I have considered the entire record and the contentions of the parties and make the following decision.

FINDINGS OF FACT

Respondent R.E. Summers incorporated Sumco, Inc. some time in 1975. The operation involved in this proceeding commenced in January 1988. Summers assumed that the corporation was valid and continuing. In fact it was not, because it had failed to pay certain state fees. Legally, Summers was operating as an individual proprietor. The work consisted of reclaiming coal from an existing refuse pile, by removing slate and other waste, and washing and crushing the coal. The actual coal preparation work commenced about February 1, 1988. Approximately 15 miners were employed in the operation.

Complainant Robert Vaughn began working for Sumco on February 10, 1988, as a night watchman at the mine site. On or about May 9, 1988, he was transferred to a job as slate picker, working on the afternoon shift. He was paid $4.00 an hour. His duties involved removing slate and rock from the refuse on a picking table and throwing it into a hole at the end of the table. Robert Vaughn had not received any surface mine safety training prior to beginning this job, but in 1984 he had received inexperienced new miner training for underground mines.

Shortly after it began to operate the coal reclamation project, Sumco engaged a Mr. Arnold Gilbert who was to perform noise and dust monitoring and to set up a training plan for the employees. He contacted the Harlan Vocational School to conduct safety training classes, but was unable to arrange a program until about August 1, 1988.

On or about June 8, 1988, complainant Vaughn injured his thumb in a fall at home. He was treated in a hospital emergency room and a splint was placed on his thumb. He was excused from work because of the injury. During the time he was off work, he was called to jury duty. On June 22, 1988, while still under treatment for his thumb, he visited the mine site after returning from jury duty. The mine site was near his residence, and he rode to the mine with a truck driver. Two federal inspectors were at the mine at this time. Summers saw Vaughn and ordered him off the mine property. Vaughn testified that he was told to leave because the inspectors "were checking mining training papers." (Tr. 14) Summers testified that he told him to leave because he was in the loading area without a hard hat or hard toed shoes. Summers admitted that he "possibly told him they [the inspectors] were there checking papers." (Tr. 113). I find as a fact that Summers directed Vaughn to leave the mine site because he was not properly attired and because the Federal inspectors were checking the miners' training papers. On June 23, 1988, a citation was issued to Sumco for failure to submit a training plan to MSHA. The citation was terminated the

same date when a plan (prepared by Arnold Gilbert) was submitted. The training was to commence in August. Before the training began, citations were issued to Sumco, because some of the miners did not have up-to-date safety training papers.

On June 27 or 28, Vaughn took a medical record indicating that he could return to work on June 28 to the mine and asked Summers if he could resume work. Summers told him he could return the following day. Vaughn later realized he had jury duty the following day and he called Summers at home. He was directed to return on June 30. Vaughn did so, bringing with him another doctor's certificate, authorizing his return to work June 28, 1988. There is a dispute as to whether his thumb was still in a splint. I find that it was not. Summers told Vaughn to report for work the following Monday. Vaughn asked whether he would receive the 70 cent per hour premium that others received on the evening shift. Summers rejected the request and there was a heated discussion between the two concerning the request and the fairness of paying Vaughn less than the other miners. Finally, Summers told Vaughn to go on home "since he didn't have any training and he still had his thumb in a cast." (GX5). Vaughn left the office and was told to leave his hard hat which he threw back in through the door. Summers testified that the reference to training in his statement to the MSHA investigator (GX5) meant work experience and not safety training. I reject this explanation since the same word is used three times in the three page statement clearly referring to safety training. I find that Summers discharged Vaughn (Vaughn did not quit) for two reasons: (1) he was upset at Vaughn's request for a raise because Summers felt he was teaching Vaughn a new job "so he could go on to do something with his life" (Tr. 117); (2) Sumco had been cited for not having submitted a training plan and for having employees who had not received the proper training, and Summers was concerned about receiving another citation.

The Secretary filed an application for temporary reinstatement, and I issued an order on November 28, 1988, to Sumco to reinstate Robert Vaughn. He returned to work on December 5, 1988. He worked December 5, 6 and 8, shovelling around the belt lines on the washer. On December 9, 1988, Vaughn and 11 or 12 others were laid off because a defect in Sumco's permit from the State Department of National Resources prevented it from continuing the job. Some employees were retained on an irregular basis to wash screened coal and dismantle the equipment. In early January 1989, the entire operation ceased. I find as a fact that Respondents did not have work for which complainant Vaughn was qualified after December 8, 1988.

ISSUES

1. Whether Complainant Vaughn was discharged for activities or status protected by the Act?

2. If so, to what remedies is he entitled?

CONCLUSIONS OF LAW

I

At all times pertinent hereto, Respondents were mine operators and Complainant Vaughn was a miner. They were subject to and protected by the Mine Act, and specifically section 105(c) of the Act. I have jurisdiction over the parties and subject matter of this proceeding.

II

Section 115 of the Act requires each mine operator to submit a training plan to MSHA for approval. The Act requires that such a training plan provide among other things that new miners having no surface mining experience shall receive no less than 24 hours of training if they are to work on the surface. It requires that the training be provided during normal working hours and that miners be paid at their normal rates while receiving such training. 30 C.F.R. 48.23 requires that in the case of a new mine or a reopened or reactivated mine, the operator shall have an approved training plan prior to opening, reopening or reactivating the mine. Each new miner shall receive no less than 24 hours of training before being assigned to work duties, unless the MSHA District Manager permits a portion of the training to be given after assignment to work duties. The required courses are set out in 48.23(b).

III

Section 104(g) of the Act provides that if an inspector finds a miner who has not received the safety training required under Section 115, he shall issue an order requiring that the miner be withdrawn and prohibited from reentering the mine until he has received such training. A miner who is ordered withdrawn shall not be discharged or otherwise discriminated against, nor shall he suffer a loss of compensation during the period of training. The Commission held in Secretary/Bennett v. Emery Mining Corp., 5 FMSHRC 1391, 1395, (1983), rev'd in part sub nom. Emery Mining Corp. v. Secretary of Labor, 783 F.2d 155 (10th Cir. 1986) that Section 105(c) of the Act "prohibits interference with rights provided by the Act, including rights provided under section 115." Unlike the situation in Emery, where applicants for employment wre involved or in Secretary/Williams v. Peabody Coal Co., 822 F.2d 1134 (D.C. Cir. 1987), involving former

employees who had been laid off, Vaughn was clearly a miner when he was discharged, and therefore was protected under section 115.

IV

In order to establish a prima facie case of discrimination under section 105(c), a complainant has the burden of establishing that his activity or status was protected under the Act and that the adverse action complained of was motivated in any part by the protected activity or status. See Secretary/Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (1980) rev'd on other grounds sub. nom. Consolidation Coal Co. v. Secretary, 663 F.2d 1211 (3d Cir. 1981). In the present case, I have found as a fact that the discharge of complainant was motivated in part because Respondent had failed to provide the statutorily mandated training. Therefore, complainant has established a prima facie case of discrimination. The operator may rebut such a prima facie case if he establishes that he was also motivated by unprotected activity, and that he would have taken the adverse action because of the unprotected activity alone. Pasula, supra; Secretary/Robinette v. United Catle Coal Co., 3 FMSHRC 803 (1981). The evidence in the present case does establish that Respondent's discharge of complainant was motivated in part by unprotected activity, namely by Summer's reaction to complainant's request for a 70 cents an hour raise. Respondent Summers has not, however, carried his burden of establishing that he would have discharged complainant for this reason alone. On the contrary, the evidence is clear that a major factor motivating his visiting the adverse action on complainant, was the fact the complainant had not received safety training and Respondent feared that he would receive another citation or closure order because of this. I conclude that Complainant was discharged in violation of section 115 and 105(c) of the Act.

V

Complainant is entitled to back pay with interest from June 30, 1988 to December 4, 1988. I conclude that he was laid off for economic reasons on December 8, 1988, and is not entitled to back pay thereafter. The evidence in the record is not sufficiently clear as to the monetary amount of the back pay to which complainant is entitled. The interest on the back pay should be determined in accordance with the Commission decision in UMWA v. Clinchfield Coal Co., 10 FMSHRC 1493 (1988).

In determining an appropriate penalty for the violation, I am considering the facts that Respondent began operating in January 1988 and was not familiar with the MSHA training requirements, that the Harlan MSHA office was confused as to the

training requirements, and that Respondent has ceased operating the mine. I conclude that a penalty of $100 is appropriate.

ORDER

Based on the above findings of fact and conclusions of law IT IS ORDERED:

1. Respondents shall pay to claimant Vaughn back wages from June 30, 1988 to December 4, 1988 inclusive, with interest thereon computed in accordance with the Commission decision in UMWA v. Clinchfield Coal Co., supra. Counsel shall confer within 15 days of the date of this decision, in an effort to stipulate the amount due complainant under this order.(FOOTNOTE 1) If they are unable to so stipulate, Complainant shall submit within 30 days of the date of this decision, its statement of the amount due. Respondent may respond within 10 days thereafter.

2. Respondents shall, within 30 days of the date this decision becomes final, pay a civil penalty in the amount of $100.

3. The above decision will not become final until a subsequent order is issued awarding back pay and declaring the decision to be final.

James A. Broderick
Administrative Law Judge

ÄÄÄÄÄÄÄÄÄÄÄÄÄÄ
FOOTNOTES START HERE
~FOOTNOTE_ONE
1. Respondents' stipulation of the amount due hereunder will not, of course, limit their right to seek review of this decision.