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TROY W. CONWAY V. PEABODY COAL
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

TROY W. CONWAY, JR., COMPLAINANT	DISCRIMINATION PROCEEDING
	Docket No. KENT 88-127-D
v.	
	MADI CD 88-02
PEABODY COAL COMPANY, RESPONDENT	Camp 9 Preparation Plant

DECISION

Appearances: C. Terry Earle, Esq., Earle & Baird, Greenville, Kentucky, for Complainant;
Eugene P. Schmittgens, Jr., Esq., Peabody Holding Company, St. Louis, Missouri, for Respondent.

Before: Judge Melick

This case is before me upon the Complaint by Troy W. Conway, Jr., 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 discrimination by the Peabody Coal Company (Peabody) in violation of section 105(c)(1) of the Act.(FOOTNOTE 1) Mr. Conway alleges that he was laid-off on October 30, 1987, in unlawful retaliation for his reporting of safety and health related complaints to Peabody.

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 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 operator may rebut the prima facie case by showing either that no protected activity occurred or that it was not motivated in any part by protected activity. If the 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, 195-6 (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 a nearly identical test under the National Labor Relations Act.

The evidence shows that Troy Conway, Jr., a 30 year old miner, was employed by Peabody during relevant times as a nonunion lab technician at the Camp No. 9 Preparation Plant. It is undisputed that in the course of his work in testing coal samples and specifically in performing float/sink analyses, the chemical perchlorethylene was used. Further it is undisputed that perchlorethylene can be hazardous and that protective clothing should be worn when performing such analyses (See Exhibit R-1).

According to Conway, he learned on October 8, 1986, from Warehouse Clerk Markham that Markham had received a "breakdown sheet," apparently the manufacturer's document explaining the hazards related to perchlorethylene, but Conway was unable to obtain the sheet from Markham.

Conway claims that he then went to company Safety Director Larry Cleveland and Acting Superintendent Kenny Luckhurst on October 9 or 10, to obtain the information but that Cleveland told him "he didn't get anything new that day". Conway testified that he then went to see his father, Troy P. Conway, Sr., who was Chairman of the Union Safety Committee, to help obtain the "breakdown" or "MSDS Sheet" on the subject chemical. Conway acknowledges that three days later he received a copy of the requested "MSDS Sheets" from his foreman Keith McNew.

According to Conway, lab conditions also changed that same day when McNew posted warning signs throughout the preparation plant noting as follows: "Do not enter without respirator, or protective clothing". Conway also testified that 2 or 3 days after he received the "MSDS" sheet the lab workers also received additional respirators, protective gloves, splash goggles and full-length protective aprons. Conway believed that he was responsible for these changes as a result of his request for the "MSDS" sheet.

Conway maintains that thereafter Mine Superintendent Wes Shirkey harrassed him, verbally abused him and accused him of failing to perform his work. Shirkey purportedly also told Conway that he had an "attitude problem", hung around the union people too much, and stirred up too much trouble.(FOOTNOTE 2)

Troy P. Conway, Sr., was, during relevant times, chairman of the mine committee and member of the safety committee of the local union, and preparation plant mechanic. The senior Conway testified that on October 10 his son reported that he had been refused a copy of the health sheet breakdown (presumably for perchlorethylene). Conway senior testified that the next day he went to see Cleveland and Luckhurst. Luckhurst purportedly told Conway that "you and little Troy is [sic] going to have to quit stirring up the union and the company people over this perc". Shirkey later told him that he knew of Troy, Jr.'s complaint about the breakdown sheets.

The senior Conway also testified about a later incident, on March 24, 1989, following a complaint about alleged violations in failing to provide rubber mats to protect welders from electrocution. It is not disputed that Shirkey said in regard to the complaint that it was "bull shit" and that he would have to fire someone on the safety committee over this. It is also not disputed that Shirkey on another occasion referred to a miner who filed a "103(g)" safety complaint as a "dirty mother fucker".

Within this framework of evidence it is clear that the Complainant made protected safety and health complaints to a representative of miners, Troy Conway, Sr., concerning the failure of Peabody to provide "breakdown" or "MSDS" sheets describing the hazardous nature of the chemical perchlorethylene being used by the Complainant at that time. Furthermore the testimony of Troy Conway, Sr., is undisputed that Shirkey acknowledged to him that he knew of Troy, Jr.'s complaint to the Union Safety Committee. Moreover the senior Conway's testimony that Assistant Mine Superintendent Kenny Luckhurst told him that "you and little Troy are going to have to stop stirring up the union and the Company people over this perc" is not disputed. When this evidence is considered in conjunction with the undisputed testimony of the senior Conway that Shirkey cursed and threatened other employees for reporting safety violations, it may reasonably be inferred that Peabody management would have been motivated to retaliate against the junior Conway for his protected activities.

The credible evidence also shows that in 1986, mine management was reluctant to reveal to its lab personnel the hazardous nature of the chemical perchlorethylene. Whether or not the posting of warning signs and the issuance of a memorandum preceded the Complainant's request of the specific "MSDS" warning data issued by the chemical manufacturer it is clear that this request triggered a retaliatory threat communicated to the senior Conway by Assistant Mine Superintendent Luckhurst. It is also clear that following these protected activities by the Conways, additional protective gear was provided to lab personnel. Under the

circumstances Conway has established a prima facie case of unlawful discrimination. Pasula, supra.

On the facts of this case however I find that the operator has proven by its affirmative defense that it would have taken the adverse action of laying-off the Complainant in any event for the stated economic reasons and not based upon any protected activity. Pasula, supra. The evidence in this regard is as follows. Wesley Shirkey testified that he was sent in July 1984, to supervise the Camp No. 9 Preparation Plant because the plant had not been up-to-par. He explained that before the lay-offs in October 1987, they had been receiving coal to be processed at the No. 9 Preparation Plant from the Camp No. 1, No. 2, and No. 11 Mines. In October 1987, the Camp No. 11 Preparation Plant closed down and the entire sampling process changed because the analytical value of the coal changed. Accordingly testing was no longer needed every 30 minutes and one senior lab technician job on each shift was no longer needed. The lay-off of Conway and another senior lab technician therefore followed.

In determining which personnel would be laid off Shirkey testified that he considered company-wide seniority and job evaluations. According to the undisputed testimony of Shirkey, Conway, Jr. was the second least senior lab technician company-wide. As a result Conway and Paul Brown, the least senior company-wide lab technician, were laid off. In addition to the Complainant's lack of seniority, Shirkey noted that Conway had been reprimanded for failing to perform significant job duties in early 1987. Conway had reportedly falsified coal samples and failed to have taken samples.

Peabody Foreman William McNew testified that he was not involved in the decision to lay-off employees in October 1987. McNew testified that he caught Conway in September 1986, and again in February 1987, failing to collect his required coal samples. In February 1987 he verified Conway's neglect of duty by marking the level and the weights of the samples in Conway's sampling buckets. There was no change in the level of the material in Conway's sampling buckets after several days and some of the weights of the samples actually decreased. If proper sampling was being performed the weights of the samples and the quantity of samples in the buckets should have been increasing. Conway was issued a letter of reprimand for this neglect in his work and the related false entries he made in his logs.

The operator's evidence in support of its lay off decision is credible and has not been rebutted by Conway. Under the

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circumstances the operator has successfully defended itself by affirmatively proving that it would have taken the adverse action of laying off Mr. Conway in any event for unprotected reasons alone. Pasula, supra., Robinette, supra.

ORDER

Discrimination Proceeding Docket No. KENT 88-127-D is hereby dismissed.

Gary Melick
Administrative Law Judge
(703) 756-6261

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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 miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding 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.

~FOOTNOTE_TWO
2. Conway also testified that he complained to Shirkey in 1985 after he became sick from fumes in the preparation plant and on another ocassion asked Shirkey for a fan to suck the coal dust out of the raw coal room of the preparation plant where they worked. While Conway at first alleged that because of these complaints Shirkey retaliated by complaining that he was "stirring up the lab people" Conway concedes that Shirkey later told his father that he made a mistake and was no longer accusing him (Conway) of stirring up the lab people as a result of these complaints. Conway accordingly appears to acknowledge that these accusations and activities no longer have a bearing on the instant case.