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ARNOLD R 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 R. SHARP,
COMPLAINANT

DISCRIMINATION PROCEEDING

v.

Docket No. KENT 89-70-D
MSHA Case No. PIKE CD 89-02

BIG ELK CREEK COAL COMPANY,
RESPONDENT

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 with the Commission on January 25, 1989, against the respondent pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977. Mr. Sharp initially filed his complaint with the Secretary of Labor, Mine Safety and Health Administration (MSHA), at its Hazard, Kentucky Field Office, on November 3, 1988. In a statement executed by Mr. Sharp on that day on an MSHA complaint form, he made the following complaint:

M. C. Couch, Jim Neece (sic), and Big Elk Coal Co., Inc., are harassing me because I have missed work to stay home to take care of my sick wife. She is confined to bed rest and under a doctor's care. I have notified management and taken them a statement from the doctor. They still call my residence and harass me and my family, saying that this is no excuse for me to miss work. I want the harassment to stop.

MSHA conducted an investigation of Mr. Sharp's complaint, and by letter dated January 12, 1989, advised him that on the basis of the information gathered during the course of its investigation, a violation of section 105(c) of the Act had not

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occurred. Mr. Sharp pursued his complaint further with the Commission, and filed it on January 25, 1989, stating as follows: "I disagree with MSHA determination and I'm asking for all expenses and damage (sic) in case number PIKE CD-89-02."

The respondent filed an answer to the complaint denying that it has harassed Mr. Sharp for any reason, including his staying home to take care of his sick wife. Respondent asserted that it took reasonable action in handling Mr. Sharp's absences from work, including the absences attributed to his wife's illness.

A hearing was held in Pikeville, Kentucky, on May 16, 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 matter. I have also considered all oral arguments and representations made by the parties on the record during the course of the hearing.

Issues

The critical issue presented in this case is whether or not the respondent's alleged harassment of Mr. Sharp in connection with his absences from work was motivated in whole or in part by any protected safety activities on the part of Mr. Sharp. I take note of the fact that in his complaint filed with MSHA, as well as the Commission, Mr. Sharp does not allege that the alleged harassment by the respondent was in any way "safety related." His complaint simply states that the alleged harassment resulted from Mr. Sharp's missing work to stay home with his sick wife. However, during the course of the hearing, Mr. Sharp alleged, for the first time, that the respondent harassed him for missing work because it sought to punish his wife for preparing a brief on his behalf in connection with an earlier discrimination proceeding which he initiated against the respondent, and that the respondent harassed him for missing work in order to retaliate against him for filing several prior discrimination complaints against the respondent. These and other issues raised by Mr. Sharp during the course of the hearing are identified and discussed in the course of this decision.

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.

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Complainant's Testimony and Evidence

Complainant Arnold Sharp testified that he took his wife to the hospital emergency room on October 28, 1988, when she became ill, and also took her back on October 30, when her condition worsened. He took her to the family doctor on October 31, who prescribed bed rest, gave her medication, and advised her that she needed a back operation because of a ruptured disk and pinched leg nerve condition. He stated that he tried to hire people to take care of his wife while she was restricted to bed so that he could work, but that he could not find anyone to stay with her (Tr. 16).

Mr. Sharp stated that he telephoned the respondent on November 1, 1988, and spoke to Mr. Jim Meese at his office in Lexington, and advised him that he needed to be off work "a few days" to stay with his wife, and that Mr. Meese told him that he could be off work as long as he had a doctor's statement attesting to his wife's condition. Mr. Sharp stated that he obtained a doctor's statement and took it to the mine office at Isom, Kentucky, and gave it to Mine Superintendent M. C. Couch's secretary, Gloria. When asked to produce a copy of the statement, Mr. Sharp stated that had lost it (Tr. 17-19).

Mr. Sharp stated that Mr. M. C. Couch telephoned him at home on November 1, 2, and 3, 1988, and advised him that "my place was at work, not home with my wife." Mr. Sharp stated that Mr. Couch also stated to him that "Doctor's statements don't mean shit to him. He could care less if my wife lived or died" (Tr. 20). Mr. Sharp confirmed that after taking a doctor's statement to the mine office on November 1, he took off work, and Mr. Couch kept calling him, and that his wife would listen in on the calls through a cordless telephone in her bedroom (Tr. 21).

Mr. Sharp stated that as a result of Mr. Couch's telephone calls, he filed a complaint with MSHA on November 3, 1988, and also swore out a warrant against him for harassment because the telephone calls were upsetting his wife. Mr. Sharp explained the status of his court complaint against Mr. Couch and he stated that the state district court judge informed him that the matter belonged in the criminal circuit court and that "its turned over to my attorney right now, but we ain't never filed it in court yet" (Tr. 23). Mr. Sharp confirmed that the district court dismissed his case, but that he intends to pursue it in the circuit court (Tr. 25).

Mr. Sharp stated that after leaving court on November 16, 1988, Mr. Couch called him and changed his working hours from 6:00 p.m. to 4:00 a.m. to 5:00 p.m. to 3:00 a.m., and reassigned him (Tr. 24). Mr. Sharp stated that Mr. Couch changed his working hours "to keep me from helping my wife with the kids of an evening, getting them from school. So I couldn't help her none

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of an evening" (Tr. 26). Mr. Sharp confirmed that he worked these new hours until he was fired on February 28, 1989 (Tr. 27).

Respondent's counsel raised an objection to Mr. Sharp's testimony concerning the steam jenny on the ground that he filed a subsequent MSHA complaint on February 8, 1989, PIKE CD 89-07, claiming that his assignment to the steam jenny was in retaliation for filing the November 3, 1988 complaint which is the subject of the instant case (Exhibit R-6). Counsel stated that MSHA dismissed his complaint, and Mr. Sharp stated that he did not appeal the dismissal of his complaint (Tr. 28-30; 35).

Mr. Sharp confirmed that he did not work for 2 weeks, from November 1, 1988, through November 14, 1988, and stayed home with his wife, and that he returned to work on November 15, 1988 (Tr. 32). He contended that when he returned to work, his new foreman Mack Cornett informed him that his job was to "steam jenny," and that he performed these duties until he was fired (Tr. 33). He claimed that he was taken off his job as a truck driver, and was assigned as a laborer in order to harass him "because I was off with my wife, because she took sick" and "because I filed that complaint on the 3rd of the month" (Tr. 34).

When asked to produce any evidence of his claim of harassment while he was off work for the 2-week period and home with wife, Mr. Sharp referred to certain notes which he kept concerning his work duties after he returned to work, and he stated that the harassment began after he returned to work on November 15, 1988 (Tr. 39-40). When asked whether he viewed these job assignments after he returned to work as harassment, Mr. Sharp replied "No," but again referred to the matter of being required to "steam jenny" in freezing weather (Tr. 40-41).

The notes produced by Mr. Sharp were daily notes made during November and December, 1988, and January 1989, and one noted item dated November 28, 1988, concerned an unexcused absence given to him that day when Mr. Sharp took his wife to a doctor for a checkup (Tr. 41). Mr. Sharp explained that his job foreman Harlan Couch, (not related to M. C. Couch), gave him an unexcused absence after he called in to advise that his wife was sick, and that he did so in order to harass him because his wife wrote up the brief in one of his earlier discrimination cases, and in spite of the fact that he produced a doctor's excuse for that absence. Mr. Sharp also stated that Harlan Couch told him "Don't lay out no more or you will be fired" (Tr. 42-45; 49).

Mr. Sharp produced a memorandum dated October 27, 1988, addressed to all mine employees from M. C. Couch, advising them that they must advise the office when they know they are going to be late or off work, and must produce a written doctor's excuse when going to a doctor. Mr. Sharp identified this memorandum as the respondent's work absence policy, and he asserted that prior

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to this, respondent had no rules regarding work absences, and that employees could take off without calling in or producing a doctor's excuse (Tr. 50).

Mr. Sharp stated that mine employee J. R. Deaton missed 33 work days in the past 5 months and was not required to produce a doctor's excuse. Mr. Sharp stated that he did not know the reason for Mr. Deaton's absences, and stated that "he just took off any time he wanted to" (Tr. 51). He also stated that employee Jack Johnson missed 2 weeks of work, but did not know why (Tr. 52). Mr. Sharp further identified employee Rick Stacy as an individual who told him that he missed 3 days of work and was charged with unexcused absences for those days and was told that he would be laid off for 3 days after his third unexcused absence (Tr. 53).

Mr. Sharp confirmed that the respondent fired him after he missed work with strep throat, and that he has a pending complaint with respect to the discharge (Tr. 55).

Mr. Sharp referred to a November 8, 1988, letter mailed to him by Mr. Jim Meese, and he claimed that Mr. Meese advised him that he would give him a leave of absence to stay home with his wife (Tr. 56). Mr. Sharp also produced a copy of a letter which he stated was drafted by his attorney, and then rewritten by Mr. Sharp, concerning his need to have time off work (exhibit C-3). Mr. Sharp stated that a copy of this letter was sent to Mr. Meese (Tr. 57-60).

Mr. Sharp stated that he requested Mr. Meese to give him until November 14, 1988, to advise him further as to his need for a leave of absence, and after taking his wife to the doctor again on that day, he went back to work the next day and did nothing about Mr. Meese's suggestion that he take a leave of absence "because I didn't need it" (Tr. 62). Mr. Sharp stated that he did not in fact take a leave of absence and did not inform Mr. Meese that he did not need it because "I went back to work. There wasn't no use to tell him that" (Tr. 62).

Mr. Sharp produced copies of his payroll records, and he contended that they establish that pursuant to the respondent's work "show up" pay policy, he was required to work 2 hours before being sent home for lack of work, while other employees were allowed to go home and receive 2 hours pay without being required to work. Mr. Sharp cited November 16, 19, and 23, 1988, as days he was required to work before being sent home pursuant to this policy (Tr. 65-68).

On cross-examination, Mr. Sharp stated that he was not aware that as of the end of October 1988, he had missed 56 days of work, but was aware that "I missed with a broke foot," and he denied that anyone had ever discussed his absenteeism with him

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(Tr. 70). Mr. Sharp could not recall speaking with Mr. Meese on October 24, and 26, 1988, about being off work on October 28, 1988, to watch his daughter perform as a cheerleader (Tr. 72). He confirmed missing 2 weeks of work, beginning on October 31, 1988, to be with his wife when she was sick because he had no one to take care of her (Tr. 72).

Mr. Sharp confirmed that when he was off work on October 31 and November 1, 1988, he advised Mr. Meese that he would go to work if he could find someone to stay with his wife, but after trying, he could find no one to stay with her (Tr. 72-73).

Mr. Sharp denied that he told Mr. M. C. Couch's secretary that he was going "to shut the company down" when he took her a doctor's statement on November 1, 1988, but admitted telling her that he was going to "indict" Mr. Couch for making false statements against him (Tr. 73). Mr. Sharp confirmed that he swore out a warrant against Mr. Couch for upsetting his wife with telephone calls threatening to fire him (Tr. 75). Mr. Sharp confirmed that his complaint against Mr. Couch was dismissed and voided by the district court judge, and although the court's order advised him to file his action in the circuit court, Mr. Sharp confirmed that he has not done so (Tr. 77).

Mr. Sharp confirmed that when he returned to work his pay rate remained the same (Tr. 77). He confirmed that his wife has not had an operation, and that Mr. Harlan Couch informed him at the end of November, 1988 that if he missed any further work because of his wife's condition he would be fired (Tr. 80).

Mr. Sharp confirmed that Mr. M. C. Couch spoke with him on November 1, 2, and 3, 1988, about his absences, and that on each occasion told him that he could "care less about my wife, if she lived or died, that wasn't his problems, that was mine, and he could care less. My place was at work, not home with her, taking care of her" (Tr. 84).

Mr. Sharp stated that he made notes concerning Mr. Couch's comments about his wife, and after producing them, he admitted that he prepared them "a couple of weeks ago" from his original notes which he did not have with him (Tr. 85). He explained that his original notes which were made the day that Mr. Couch called him "got folded up in a drawer and wadded up" and that is why he copied them down (Tr. 87).

Mr. Sharp confirmed that he spoke to M. C. Couch on October 28, 1988, and told him that he needed the day off because his wife had to be taken to the emergency room. Mr. Sharp stated that Mr. Couch told him to either come to work or be fired, and Mr. Sharp stated that he made no notes of this conversation (Tr. 87).

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Mr. Sharp produced copies of documents, showing that he was off for 2 days on January 9, and 10, 1989, with the flu and that he was granted excused leave for January 9, when he produced a doctor's excuse, but was charged with an unexcused absence for January 10. The "slip" for that day contains a notation that Mr. Sharp did not call the office, and he claims that he did. He asserted that he called the office on January 9, and informed the respondent that he would be off for 2 days, and that Mr. Harlan Couch advised him that he was supposed to call on each day (Tr. 90).

Mrs. Imogene Sharp, the complainant's wife, testified that on October 28, 1988, her husband took her to the emergency room after she became ill, and when they returned home, her husband called the mine office at Isom, Kentucky, and asked to speak to Mr. M. C. Couch. Mr. Couch returned his call while her husband was picking up their children from school, and she advised Mr. Couch that her husband had to be off work that evening because she had been taken to the emergency room. Mrs. Sharp stated that Mr. Couch told her that "you tell Arnold he needs to be at work tonight or else he's fired" (Tr. 92).

Mrs. Sharp stated that when her husband returned home, he called Mr. Couch, and that after Mr. Couch told him "you're to be at work tonight, or you're fired," her husband reported for work that evening. Mrs. Sharp stated that she has a ruptured disk, and that her condition worsened, and that she visited her family doctor Elmer Ratliff, on October 31, 1988, and he advised her to stay in bed, and that she would require further tests and x-rays (Tr. 92).

Mrs. Sharp stated that her husband called Mr. Couch on November 1, 1988, and informed him that he needed to be off work that day, but that Mr. Couch would not let him off and "Arnold hung the phone up" and called Mr. Jim Meese who informed him that he could take the day off if he had a doctor's statement documenting Mrs. Sharp's condition. Mrs. Sharp stated that her husband obtained the doctor's statement and took it to the mine office that day, but that Mr. Couch continued to call Mr. Sharp, and told him that if he didn't come to work he would be fired (Tr. 93). Mrs. Sharp stated that she was aggravated because Mr. Meese told her husband he could take off work, and Mr. Couch threatened to fire him. She confirmed that her husband received a letter from Mr. Meese concerning his need to be off work, and that Mr. Sharp obtained a warrant against Mr. Couch because she was upset, and to keep him from calling her home about her husband.

Mrs. Sharp confirmed that she typed the brief filed by her husband in his first discrimination case, and she believed that she was resented because of this and her husband was being harassed and punished (Tr. 95). Mrs. Sharp stated that she

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phoned the mine office on February 15, 1989, and left a message for her husband to come home because she was sick, but that he never received the message (Tr. 96). She believed that her husband was being harassed because Mr. Couch threatened to fire him (Tr. 98).

Mrs. Sharp confirmed that her husband missed 69 days of work in 1 year, which "couldn't have been helped," and she believed that he was not being treated equally because "he's not the only one who missed work" (Tr. 98-99). Mrs. Sharp confirmed that her husband told her that Mr. J. R. Deaton missed 33 days of work in the past 5 months, and that Mr. Richard Sexton fell off a horse and missed 6 months of work with a broken foot (Tr. 100). She also confirmed that some of the 69 days of missed work by her husband was due to the fact that he broke his foot, and that the 2-weeks of missed work which is at issue in this case resulted from the fact "that he was off with me" (Tr. 101). Mrs. Sharp also believed that another employee, Danny Napier, missed work when his wife had an operation (Tr. 101).

In response to further questions, Mrs. Sharp stated that when Mr. Couch spoke with her husband over the telephone he made the statement that the doctor's excuse "didn't mean shit," and that she listened in on the conversation on another occasion when Mr. Couch stated that "he didn't care if she lived or died" (Tr. 104). She confirmed that on this occasion, Mr. Sharp and Mr. Couch were arguing with each other and that she started to cry (Tr. 104).

Mrs. Sharp stated that Mr. Meese gave her husband permission to be off work for 2 weeks, and that Mr. Meese did not state that this was contingent on Mr. Sharp bringing in doctor's slips (Tr. 106). Mrs. Sharp believed that the telephone calls to her home were made because the respondent resented her for writing her husband's brief in a prior case, and that Mr. Couch's calls were made to harass her because they were always made when her husband left home to pick up their children (Tr. 107). Mrs. Sharp also believed that Mr. Meese gave her husband permission to stay home from work to take care of her as long as her husband supplied a doctor's excuse attesting to her condition (Tr. 108-109).

Respondent's Testimony and Evidence

James Meese testified that he is employed by the respondent in its Lexington, Kentucky office, and that he is in charge of administration. He stated that he was at the mine site on Monday, October 24, 1988, and on his way back to Lexington he encountered Mr. Sharp at a gas station in Isom, Kentucky. Mr. Sharp spoke to him and requested to be off on Friday, October 28, and Mr. Meese told Mr. Sharp to take it up with his foreman Harlan Couch.

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Mr. Meese stated that he subsequently received a telephone call from Mr. Sharp on Wednesday, October 26, 1988, and Mr. Sharp informed him that Mr. M. C. Couch had denied his request to be off on Friday. Mr. Meese stated that it was his understanding that Mr. Sharp wanted the day off to attend a school event with his daughter, and at that time, Mr. Sharp had missed approximately 56 days of work.

Mr. Meese stated that Mr. Sharp called him again on Friday, October 28, and again informed him that Mr. Couch would not give him the day off. Mr. Sharp further informed Mr. Meese that he had a doctor's appointment that evening and did not know whether he would be able to report to work. Mr. Meese again informed Mr. Sharp to take it up with his supervisor, and Mr. Meese called Mr. Couch to advise him of Mr. Sharp's calls. He also suggested to Mr. Couch that he call Mr. Sharp to determine whether he was going to report to work, and Mr. Meese confirmed that Mr. Sharp did in fact report to work (Tr. 114-117).

Mr. Meese stated that Mr. Sharp called the mine office on Monday morning, October 31, 1988, and "reported off" for that day, as well as Tuesday, November 1, and that he stated that "he needed to attend to his wife at home. He was going to get some sort of doctor's slip" (Tr. 118). Mr. Sharp did not report for work on October 31.

Mr. Meese stated that Mr. Couch telephoned Mr. Sharp on Tuesday morning, November 1, to check on his leave status. Mr. Sharp called Mr. Meese that same day and advised him that he was taking his wife to the doctor and was not going to come to work (Tr. 118). Mr. Meese stated that Mr. Sharp again telephoned him on two more occasions on Tuesday and advised him that his wife was confined to bed rest and that he would try to find someone to sit with her, but that he was not coming to work. Mr. Meese called Mr. Sharp back and advised him to obtain a doctor's excuse for his absences (Tr. 119).

Mr. Meese stated that he and Mr. Couch jointly decided to excuse Mr. Sharp's absence of October 31, and Mr. Meese advised Mr. Sharp that he could be off that day, as well as November 1st (Tr. 120).

Mr. Meese stated that on Wednesday, November 2, 1988, Mr. Sharp brought a doctor's excuse to the mine office, and the excuse indicated that his wife would need bedrest for at least a week (Tr. 120). At that time, Mr. Sharp informed the office secretary, Gloria Stacy, that he would not be at work that evening and he "reported off." Mr. Meese telephoned Mrs. Sharp's doctor on the morning of November 2, to ascertain whether the doctor believed that Mrs. Sharp needed around the clock attention. Mr. Meese stated that the doctor said nothing about Mrs. Sharp's condition, and with respect to whether she needed

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daily attention, stated to Mr. Meese "That's something you'll have to work out with your employee. I cannot tell you one way or the other, if she needs it or not" (Tr. 122).

Mr. Meese stated that he was present when Mr. Couch telephoned Mr. Sharp on November 2, and advised him to have someone stay with his wife so he could come to work. Mr. Couch also advised Mr. Sharp that the doctor's excuse was for his wife and that he was expected to do his job and to be at work. Mr. Meese stated that he never heard Mr. Couch state that he didn't care whether Mrs. Sharp lived or died, and did not hear him use any curse words (Tr. 123).

Mr. Meese stated that after Mr. Couch called Mr. Sharp, Mr. Sharp called his office, and they exchanged several calls that same day. Mr. Sharp advised him that he was swearing out a criminal complaint against Mr. Couch for harassment, and stated that he had the right to stay home with his wife. Mr. Meese stated that he reminded Mr. Sharp that he had taken time to find someone to stay with his wife and needed to pursue this search (Tr. 124).

Mr. Meese confirmed that he was again present when Mr. Couch telephoned Mr. Sharp on November 3, 1988. He explained that Mr. Sharp had called the mine office that morning and advised Mrs. Stacy that he had filed an MSHA complaint and would not report to work. Mr. Sharp advised Mr. Couch that he filed the complaint because he was being harassed. Mr. Couch and Mr. Meese advised Mr. Sharp that "we have a rock truck sitting, we have a job open, we feel that you have had plenty of time to find someone to sit with your wife, and we just reminded him of those facts" (Tr. 126).

Mr. Meese stated that during Mr. Sharp's initial absences from October 31 to November 3, 1988, his truck was parked, but he was not replaced because management did not know exactly when he would be returning to work (Tr. 127). Mr. Meese confirmed that he wrote Mr. Sharp a letter on November 8, 1988, after Mr. Sharp called the mine office on November 7, and advised that he would have to be off another week because he had taken his wife to the doctor again, and she would be confined to bed for a week.

Mr. Meese stated that he had spoken to Mr. Sharp about taking a leave of absence, and asked Mr. Sharp to provide him with a firm date for his return to work. After Mr. Sharp failed to respond, Mr. Meese decided to send him the letter concerning a leave of absence (Tr. 128, exhibit R-3).

Mr. Meese confirmed that he received a letter dated November 10, 1988, from Mr. Sharp on November 14, and on November 15, Mr. Sharp called him at his office and informed him that he would be returning to work that evening, but that his

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wife would need to return to the doctor on November 28, that she may need an operation, and that he may have a need to be off in the future, but was unclear and did not know for certain (Tr. 129, exhibit R-4).

Mr. Meese stated that he wrote Mr. Sharp a letter on November 15, 1988, and informed him that his absences disrupted the scheduling of equipment, that he failed to give management a timely response with respect to his absences, and that he was being reassigned to another position "until he could get this situation worked out" (exhibit R-5, Tr. 130).

Mr. Meese stated that no action has been taken against Mr. Sharp because of any safety complaints on his part, or because of his filing of discrimination complaints against the company (Tr. 131).

Mr. Meese stated that he was aware of one employee who was off work for 2 days when his wife gave birth, but he could not recall the employee's name. Mr. Meese confirmed that he knew J. R. Deaton, as a mine employee, but in the absence of his attendance records, he had no knowledge as to whether he had any absences from work. Mr. Meese had no independent recollection of any absences by employees Jack Johnson and Richard Sexton, but confirmed that he would be aware of any leave problems if they were off for any extended periods of time (Tr. 132-133).

Mr. Meese stated that employees with excessive absenteeism are notified of their absences by certified mail, as was Mr. Sharp, and that similar letters have been sent to other employees. Mr. Meese stated that his November 15, letter to Mr. Sharp was part of his effort to deal with his work attendance (Tr. 134).

Mr. Meese explained the respondent's "two hour show up pay" procedure, but stated that he was not clear as to the exact policy, and was not aware of the particular circumstances concerning Mr. Sharp and this policy. Mr. Meese stated that as a general rule, an employee who reports for work when major machinery is down and there is no work for him to do is sent home with 2 hours of pay. The question of how each employee is treated with respect to this policy depends on the nature of his job and is discretionary with the employee's foreman (Tr. 135-136).

Mr. Meese confirmed that when Mr. Sharp came to work on November 15, he was assigned to a laborer's position and operated a steam jenny from time to time (Tr. 137). He denied that he took any action against Mr. Sharp because his wife wrote a brief in connection with his prior discrimination complaint. He also denied ever telling Mr. Sharp, or instructing anyone else to tell him, that he was on a leave of absence for an indefinite period of time. He also denied having any conversations with Mrs. Sharp

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about Mr. Sharp's leave, except for one telephone call in which he left a message for Mr. Sharp to call him back. He denied saying anything to Mrs. Sharp indicating that Mr. Sharp could have any time off (Tr. 138).

During his cross-examination of Mr. Meese, Mr. Sharp stated that mine employee Richard Sexton missed 6 months of work with a broken foot and crushed leg which he sustained when he got drunk and fell off a horse (Tr. 141). Mr. Sharp also indicated that mine employee J. R. Deaton missed 33 days of work in the last 5 months, and that Jack Johnson missed 2-1/2 weeks in February, 1989, because he was sick (Tr. 143).

When asked why he did not produce these two individuals for testimony in this case, Mr. Sharp replied that "both of them is mixed up in Labor cases, and they say they don't want to get them mixed up in that." Mr. Sharp conceded that he never attempted to subpoena these individuals (Tr. 144).

Mr. Sharp also questioned Mr. Meese about employees Bony Banks and Ricky Stacy, missing work to be with their wives in an emergency, and Mr. Meese stated that he had no knowledge of these matters (Tr. 145, 150). He also denied any personal knowledge of the circumstances concerning Mr. Sexton, Mr. Deaton, and Mr. Johnson without reviewing their employment records (Tr. 152).

Mr. Meese denied that mine management required Mr. Sharp to steam clean coal equipment knowing he would become ill in order to punish him (Tr. 148). He also denied ever telling Mr. Sharp that he would steam clean equipment as long as he worked for the respondent, and that he would continue to harass him (Tr. 153).

In response to further questions, Mr. Meese stated that the respondent's leave policy was reduced to writing in letter form, and that it was a restatement of prior unwritten policy which required employees to call in and bring in doctor's excuses (Exhibit C-2; Tr. 154). He confirmed that under this policy an employee would state the time period he will need to be excused from work so that the respondent can work out a schedule to cover his work and position, and that any leave of absence granted by the respondent would be without pay. He also confirmed that the respondent was willing to work this out with Mr. Sharp (Tr. 154-155).

Mr. Meese stated that Mr. Sharp missed 41 days of work during January and February, 1988, when he broke his foot in a home accident, and that he had scattered absences during the remainder of the year, for a total of 69 absences for 1988 (Tr. 160). Mr. Meese stated that absences resulting from job related injuries for which an employee receives workmen's compensation are excused absences and are treated differently from non-work

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injury related absences under the respondent's leave policy (Tr. 163).

Mr. Meese stated that the respondent has no written formal leave discipline policy, but that employees do receive warnings and are notified of their absentee record by certified mail. They are also informed when they need to discuss their leave record with their supervisors or when there is a need for improvement in their work attendance (Tr. 163-164).

Mr. Meese summarized the respondent's position in this matter as follows (Tr. 159-160; 164-165):

Q. So what you're telling me, Mr. Meese, is that, beginning with the onset of Mr. Sharp's illness with his wife, that your position for the company in this case is that, absent any specific information from him as to specifically when he wanted to be off, how long he wanted to be off, and all that business, you took the position that the company could no longer afford to be without him as a rock truck driver, and that's why they gave that job to someone else or let the truck set or whatever, and then put him on as a laborer?

A. That's correct.

Q. I guess what this boils down to is Mr. Sharp wants to be home to take care of his wife, who is ill and needs and operation, and the company says, "I'm sorry, we can't accommodate you because we need you at work." Is that what it boils down to?

A. Basically, yes, sir.

Q. And when you tell him that we can't accommodate you, Mr. Sharp, I'm sorry, you have to get somebody to look after your wife, Mr. Sharp comes back and says the reason they're doing that to me, Judge, is they're trying to take it out on me, because my wife wrote the brief in the first case that I prevailed against them? Is that what you thing this case is all about, or am I being oversimplistic about it?

A. No, I believe Mr. Sharp has it in his mind that his family comes first, and he's related that to me several times over the telephone, and I view work as more, as equal, or more important. You have to go to work. You have to provide for your family. I've related that to him several times, and whenever he cannot get a favorable decision in one area, he will keep going to everywhere he can to try to get it. And I feel in this instance that he felt that because we weren't giving

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him a favorable response to his request, he issued a warrant for harassment, and he filed an MSHA complaint. At that point, we had no--didn't quite know what to know.

Mr. Meese denied Mr. Sharp's assertions that he resents Mr. Sharp's family, or that he "set up" and fired Mr. Sharp and canceled his insurance coverage in order to punish his wife (Tr. 166).

Marcus "M.C." Couch, Jr., respondent's surface mine supervisor, stated that Mr. Sharp telephoned him during the latter part of October, 1988, and informed him that he would not be at work on Friday, October 28, 1988, because of some athletic or cheerleading event concerning his daughter. Mr. Couch stated that Mr. Sharp said nothing about his wife during this conversation, and that after he informed Mr. Sharp that he was needed on the job, he did report for work that day (Tr. 168).

Mr. Couch stated that during the week of October 31, 1988, he returned several calls that Mr. Sharp had made to him at the mine office. During the first call, Mr. Couch stated that he asked Mr. Sharp to try and find someone to stay with his wife and that he was needed at work. Mr. Sharp advised him that he would try to find someone to stay with his wife (Tr. 170).

Mr. Couch stated that he had a second short telephone conversation with Mr. Sharp on Tuesday, November 1, 1988, and that he explained to Mr. Sharp that he was needed at work (Tr. 170).

Mr. Couch stated that he had a third telephone conversation with Mr. Sharp after Mr. Sharp swore out a warrant against him accusing him of harassing his wife, and as a result of this action by Mr. Sharp, Mr. Couch stated that he had no further telephone contact with Mr. Sharp, and that he "stayed away from him from there out" (Tr. 170).

Mr. Couch vehemently denied that he ever told Mr. Sharp that he "didn't care whether his wife lived or died." He also denied ever telling Mr. Sharp that he "didn't give a shit about any doctor's excuses that he brought in" (Tr. 171). He also denied any telephone conversations with Mrs. Sharp concerning Mr. Sharp's coming to work during the week of October 31, 1988 (Tr. 171). Mr. Couch further denied that he ever threatened to fire Mr. Sharp for not coming to work (Tr. 172).

Mr. Couch explained the circumstances under which Mr. Sharp's working hours were changed when he returned to work on November 15, 1988. He stated that all laborers are required to report to work at 5:00 p.m., an hour prior to the equipment operators who report at 6:00 p.m., in order to fuel and prepare the equipment for the second shift operation. He confirmed that

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the laborers work until 3:00 a.m., and that the equipment operators work until 4:00 a.m. (Tr. 172).

With regard to Mr. Sharp's operating the steam jenny or steam cleaner in the winter time, Mr. Couch stated that all 90 employees under his supervision have operated the steam jenny at one time or another, regardless of the weather. He denied that he has ever taken any action against Mr. Sharp because of any complaints that he may have filed with MSHA, complaints about safety, or because of any discrimination complaints which he has filed. He also denied taking any action against Mr. Sharp because his wife was involved in the typing of his brief in an earlier discrimination case (Tr. 173-174).

On cross-examination, Mr. Couch confirmed that the respondent purchased a new steam jenny in April, 1989, and now has three of these machines (Tr. 174). He also confirmed that he informed Mr. Sharp that he would perform the duties of a laborer, including steam cleaning, fueling equipment, and cleaning up, and that he changed his working hours after he was relieved of his rock truck duties and assigned as a laborer (Tr. 177-178).

Mr. Couch stated that he recently notified employee J. R. Deaton that he was missing too much work and that he would receive a written notice to this effect (Tr. 179). He confirmed that employee Jack Johnson was hospitalized, and that employee Bony Banks has had a written notice served on him for several weeks for missing too much work (Tr. 180).

Mr. Couch confirmed that employee Mike Campbell was transferred from the reclamation day shift to the production second shift to drive the truck that Mr. Sharp was previously assigned to (Tr. 185-186). With regard to Mr. Sharp's "show up" time, Mr. Couch stated that as a laborer, Mr. Sharp would be required to work cleaning off a piece of machinery, and if the equipment did not operate, he could be sent home. He could also be assigned to cleaning up coal on his night shift, and Mr. Couch did not recall ever requiring Mr. Sharp to work for 2 hours, and then sending him home (Tr. 192).

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.

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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.

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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 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.

The evidence in this case establishes that on or about Monday, October 24, 1988, at a chance meeting with Mr. Meese, Mr. Sharp made a verbal request of Mr. Meese to be off work on Friday evening, October 28, 1988. Mr. Meese informed Mr. Sharp to contact his supervisor to discuss the matter, and that he (Meese) could not give him the day off. Subsequently, on Wednesday, October 26, 1988, Mr. Sharp telephoned Mr. Meese at his office in Lexington and informed him that Mr. Couch would not give him the day off, and Mr. Sharp again requested Mr. Meese to allow him to be off on Friday evening. Mr. Meese informed Mr. Sharp that it was not his decision to make, and Mr. Meese believed that Mr. Sharp wanted the evening off to attend a school event with his daughter. Mr. Sharp telephoned Mr. Meese again on Friday, October 28, 1988, and again informed Mr. Meese that Mr. Couch would not give him the evening off. Mr. Sharp also informed Mr. Meese at this time that he had a doctor's appointment for Friday evening, and did not know whether he would be able to report for work. Mr. Meese again informed Mr. Sharp to take the matter up with his foreman, and Mr. Sharp did in fact show up for work that evening.

Mr. Meese's credible testimony reflects that Mr. Sharp telephoned the mine office on Monday morning, October 31, 1988, and "reported off" for that day, as well as Tuesday, November 1, 1988, in order to stay home with his wife who was ill. Mr. Sharp confirmed that he telephoned Mr. Meese on November 1, 1988, and advised him of his need to be off work for "a few days" to stay home with his wife, and that Mr. Meese informed him that he could be off as long as he had a doctor's statement attesting to his wife condition. Mine policy, as reflected by a memorandum issued on October 27, 1988, by mine superintendent M. C. Couch (exhibit C-2), required all employees to inform the mine office when they know they will be off work, and to produce a written excuse when they miss work to go to a doctor. Mr. Sharp produced a statement

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from a doctor dated October 31, 1988, which attests to the fact that he brought his wife to the doctor that day. The doctor also indicated in his statement that Mr. Sharp's wife "needs to be on bed rest for one week." Mr. Sharp could not produce a doctor's statement for his absence of November 1, 1988, claiming that he gave the original excuse to Mr. M. C. Couch's secretary, and that he had lost the copy of the excuse. In any event, Mr. Meese confirmed that he and Mr. M. C. Couch jointly decided to excuse Mr. Sharp's absence of October 31, 1988, and that Mr. Meese excused his absence of November 1, 1988.

The evidence further establishes that on Wednesday, November 2, 1988, Mr. Sharp went to the mine with a copy of the doctor's excuse of October 31, 1988, for his wife, which indicated that she was in need of bed rest for at least a week. At that time, Mr. Sharp advised Mr. M. C. Couch's secretary that he would not be at work that evening, and Mr. Sharp "reported off" and did not work. Mr. Meese confirmed that he telephoned Mrs. Sharp's doctor that same morning to inquire about her condition and to determine whether she required daily attention. Mr. Meese testified that the doctor advised him that he could not state whether or not Mrs. Sharp required daily attention, and that this was a matter for Mr. Meese "to work out with your employee."

A copy of Mr. Sharp's attendance record (exhibit C-5), reflects that he was absent from work from November 3, 1988, through November 13, 1988, and Mr. Sharp confirmed that he did not report for work for 2 weeks, from November 1, through November 14, 1988, when he was home with his wife, and that he next reported for work on November 15, 1988. Mr. Sharp produced a copy of a doctor's statement dated November 7, 1988, which reflects that his wife had an appointment with a neurosurgeon for "a possible ruptured disk," and that she was confined to bed rest until she could see that doctor. He also produced a copy of a doctor's statement which states that his wife visited a doctor's clinic and that she was brought in by Mr. Sharp. The statement is dated in November, but the day of the visit is not clear, and it appears to be "11/14."

Mr. Meese testified that after he learned that Mr. Sharp had called the mine office on November 7, 1988, to advise that he would be off work for another week because he had again taken his wife to the doctor and that she would be confined to bed for a week, he sent Mr. Sharp a letter on November 8, 1988 (exhibit C-3(a)). In the letter, Mr. Meese informed Mr. Sharp that his absences from work on November 3, 5, and 7, 1988, were considered by mine management as unexcused. Mr. Meese further informed Mr. Sharp in the letter that management had a need for someone to perform his rock truck driver's duties, and that if he could not return to work within a reasonable time, management would be forced to hire a permanent replacement to fill that job, and that

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Mr. Sharp should consider taking a leave of absence for the time that he needed to be off work. Mr. Meese confirmed that he had previously spoken to Mr. Sharp about taking a leave of absence and requested him to provide a firm date for his return to work. However, when Mr. Sharp could not provide him with the requested information, Mr. Meese confirmed that he decided to send the letter in question.

Mr. Meese confirmed that he received a response to his letter from Mr. Sharp on November 14, 1988 (exhibit R-4). In that letter, Mr. Sharp states that after another doctor's appointment on an unspecified Monday, he "will know whether or not a temporary leave of absence is in order," and that he complied with company policy by calling the mine office to report off work on the dates mentioned in Mr. Meese's letter, and that he also supplied management with doctor's excuses for the days in question. Mr. Sharp alluded to another letter which he claimed had been drafted by his attorney, and which he had rewritten and mailed to Mr. Meese, explaining his need to be off work. I have reviewed that purported letter, and it is an unsigned "rough draft" in some unknown individual's handwriting. I find no credible evidence that Mr. Sharp sent Mr. Meese any letter other than the one dated November 10, 1988, with his signature. This is the same letter received by Mr. Meese on November 14, 1988. Further, I find no credible support for Mr. Sharp's assertion that Mr. Meese in fact granted him a leave of absence (Tr. 56). The letter clearly states that Mr. Sharp should consider a leave of absence, and Mr. Sharp confirmed that this was the case (Tr. 57). I also find no credible evidence to support any conclusion that Mr. Sharp ever made a decision to request a leave of absence, or to otherwise inform Mr. Meese of his desire to do so.

Mr. Meese's credible testimony reflects that Mr. Sharp telephoned Mr. Meese at his office on November 15, 1988, and informed him that he would return to work that evening, but that his wife would need to return to the doctor again, that she may need an operation, and that Mr. Sharp may have a need to be off work again at some further uncertain time. Mr. Sharp did in fact return to work on November 15, 1988, and he confirmed that he did not take any leave of absence, and did nothing about Mr. Meese's suggestion that he request a leave of absence.

Upon Mr. Sharp's return to work on November 15, 1988, he was reassigned from his rock truck driver's position to a laborer's position at the same rate of pay, and his work hours were changed from 6:00 p.m. to 4:00 a.m. to 5:00 p.m. to 3:00 a.m. Mr. Meese confirmed that he sent Mr. Sharp a letter on November 15, 1988, informing him of his reassignment, and the letter states as follows (exhibit R-5):

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This is to confirm our conversation in which we discussed your assignment to a laborer position effective immediately.

This past year you have missed a total of 69 work days. Most recently, you have been off due to a medical problem in your family. Although we pressed you for a firm date of return so that we could put you on a leave of absence and plan for our production needs, you refused to give us a firm date. Therefore, we are compelled to put someone who is more dependable in your former position. Your absences over the past year have been very disruptive to our ability to schedule your truck in an orderly manner, thereby contributing to inefficiencies.

In the next 90 days, we expect to see an improvement in your attendance. If improvement is not forthcoming, we will have no alternative but to take disciplinary action.

Mr. Sharp continued to work for the respondent until he was terminated on February 28, 1989.

Mr. Sharp's Complaint

The basis of Mr. Sharp's discrimination complaint in this case is his assertion that mine superintendent Marcus "M.C." Couch harassed him by making telephone calls to his home during the period November 1-3, 1988. Mr. Sharp confirmed that his wife listened in on the calls through a cordless telephone in her bedroom, and that she was upset by the calls. Mr. Sharp confirmed that the telephone calls prompted the filing of his complaint with MSHA on November 3, 1988, and also prompted him to swear out a criminal warrant against Mr. Couch for harassment. The record reflects that this complaint was dismissed by a local Kentucky state court judge on March 7, 1989.

Mr. Sharp alleges that Mr. Couch's motive in calling him at home was to harass him for having filed a prior discrimination complaint against the respondent in which he prevailed, and to punish his wife because she drafted some of his briefs which he filed in connection with prior discrimination complaints which he had filed against the respondent. He also alleges that other employees had missed work for illnesses or to stay home with a sick wife, but were not accorded the treatment that he received from the respondent because he missed work to stay with his wife.

In the course of the hearing in this case, Mr. Sharp alluded to several additional alleged acts of discrimination by the respondent which are not the subject of his present complaint. He claimed that the respondent discharged him out of retribution

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for his prior discrimination complaints and to punish him for staying home with his wife. Mr. Sharp has filed a complaint concerning this discharge, and it is my understanding that it is still pending. Under the circumstances, I will make no findings or conclusions concerning Mr. Sharp's discharge.

With regard to Mr. Sharp's allegations of disparate treatment in connection with his absences from work, he claimed that other employees missed work because of illnesses to themselves or their spouses, but were not subjected to any discriminatory treatment by the respondent. Although I find no connection between this allegation and the alleged telephone harassment of Mr. Sharp by Mr. Couch, I do note in passing that Mr. Sharp failed to call any of the employees in question to testify in this case, and he did not produce any credible facts or evidence to support such a claim. Further, in view of Mr. Sharp's pending discrimination claim resulting from his discharge, and his assertion during the course of the hearing that he was terminated after missing work with a strep throat (Tr. 55), I believe that any further findings and conclusions on this issue is best left to the judge who will adjudicate that claim.

Mr. Sharp claimed that his reassignment as a laborer after his return to work on November 15, 1988, and his work assignments in connection with that job (steam cleaning equipment), were made to punish and harass him for filing the November 3, 1988, complaint which is the subject of this case, and because he missed work to stay home with his ill wife (Tr. 34). With regard to this complaint, the record reflects that Mr. Sharp filed a complaint with MSHA on February 2, 1989, Complaint Docket No. PIKE CD-89-07 (exhibit R-6). MSHA apparently investigated the complaint and found no violation of section 105(c) of the Act. Respondent's counsel confirmed that MSHA dismissed the matter, and Mr. Sharp confirmed that he took no further appeal to the Commission with respect to MSHA's decision. Under the circumstances, I conclude and find that this complaint is moot, and since it is outside the scope of the instant complaint filed by Mr. Sharp, I decline to make any findings or conclusions with respect to Mr. Sharp's allegations.

Mr. Sharp also raised an issue concerning the respondent's work "show up" policy, and claimed that he was treated differently from other employees because he was required to work on November 16, 19, and 23, 1988, before being sent home pursuant to this policy. I find that Mr. Sharp's allegations in this regard are outside the scope of the complaint and issues which are the subject of the instant proceeding, and I declined to make any findings or conclusions regarding Mr. Sharp's allegations. My findings and conclusions in this case will be limited to Mr. Sharp's complaint concerning the alleged harassing telephone calls by Mr. Couch.

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With regard to the telephone calls in question, I take initial note of the fact that the record in this case clearly reflects that the issue concerning Mr. Sharp's absences from work is unrelated to any illness on the part of Mr. Sharp. His absences from work were the result of his desire to stay home to be with his sick wife, and Mr. Sharp obviously made a judgment that his first priority was to be with his wife rather than to report for work when the respondent expected him to be there. Although I sympathize with Mr. Sharp's predicament, particularly in light of his wife's illness, I must balance his concern for his wife and the legitimate business interest of the respondent in attempting to maintain the continuity of its day-to-day mining operation.

The record in this case establishes that some of the calls were initiated by Mr. Couch, and some were "call backs" by Mr. Couch in response to prior calls initiated by Mr. Sharp. There is no evidence that the calls were made during other than normal business hours, or that they were made at unusual hours of the day or evening. Although Mr. Sharp indicated that some of the calls were taken by his wife while he was away from the house picking up his children from school, I find no credible evidence that Mr. Couch deliberately timed his calls so that he could harass Mr. Sharp's wife. Although Mrs. Sharp believed that this was the case, and stated that all of the calls made by Mr. Couch were at a time when her husband was not at home, Mr. Sharp testified that he received the calls made on November 1-3, 1988, by Mr. Couch during which they discussed his absences from work.

With regard to the frequency of the calls prior to the filing of the complaint on November 3, 1988, Mr. Couch testified that he returned several calls that Mr. Sharp had placed to him at the mine office during the week of October 31, 1988, during which he discussed with Mr. Sharp his need to be at work and to find someone to stay with wife. Mr. Couch confirmed another telephone conversation with Mr. Sharp on November 1, 1988, when he again discussed the need for Mr. Sharp to come to work. Mr. Couch confirmed a subsequent telephone conversation with Mr. Sharp after he swore out the warrant against him on November 3, 1988, and as a result of the warrant, Mr. Couch confirmed that he had no further telephone contact with Mr. Sharp.

With regard to the alleged harassing nature of the calls, Mr. Sharp claimed that Mr. Couch's alleged threats to fire him for not reporting to work, and Mr. Couch's alleged statements that "doctor's statements don't mean shit" and that "he could care less whether his wife lived or died," were upsetting to his wife and were intended to punish his wife for assisting him with his prior complaints. The evidence establishes that these statements attributed to Mr. Couch were not made directly to Mrs. Sharp. She was listening in on another telephone, and she

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testified that Mr. Couch made the statements, and that she began to cry after Mr. Sharp and Mr. Couch began arguing. Mr. Couch vehemently denied making the statements, denied that he ever spoke to Mrs. Sharp and told her that he would fire Mr. Sharp for not coming to work, but he confirmed that he returned some calls made by Mrs. Sharp after Mr. Sharp was terminated. Mr. Meese testified that he was present when Mr. Couch spoke with Mr. Sharp over the telephone from his office concerning his failure to come to work, and that he never heard Mr. Couch make the statements in question.

Having viewed Mr. Sharp's demeanor during the course of the hearing in this case, it is more than obvious to me that he has a most extreme personal dislike for Mr. Couch. Although Mr. Couch's demeanor reflects a rather outward calm and dispassionate nature, given the fact that Mr. Sharp obtained a warrant and took him to court for allegedly harassing his wife, and has on several occasions caused Mr. Couch to be called to answer for his alleged discriminatory actions against Mr. Sharp, I would venture a guess that Mr. Couch is not particularly fond of Mr. Sharp. However, the issue here is not whether Mr. Couch or Mr. Sharp like each other. The issue is whether or not one can conclude from the credible evidence in this case that the telephone calls made to Mr. Sharp's home by Mr. Couch establish harassment, and if so, whether the harassment was motivated by Mr. Couch's desire to punish Mr. Sharp or to otherwise discriminate against him for engaging in any safety activity protected by the Act.

Having viewed Mr. Couch and Mr. Meese during the course of the hearing, I find them to be credible witnesses. I find it very difficult to believe that the telephone calls in question were made by Mr. Couch to punish or otherwise harass Mr. Sharp's wife for simply preparing some of his briefs in prior discrimination cases. I find no credible evidentiary support for any such conclusion. I also find it difficult to believe that Mr. Couch did not care whether Mr. Sharp's wife lived or died. Mr. Couch simply did not impress me as being that type of an individual. Even if Mr. Couch did make the statements attributed to him, Mrs. Sharp would not have heard them had she not been listening in on the conversation. Further, given Mr. Couch's obvious frustrations in attempting to determine when Mr. Sharp would return to work, the argumentative and hostile mood which prevailed during the conversation, and Mr. Sharp's provocative nature and propensity for making indiscriminate accusations against Mr. Couch, I believe that if the statements attributed to Mr. Couch were in fact made, they were made in the anger of the moment, and that Mr. Sharp more than likely provoked Mr. Couch, and he reacted in kind. Mr. Couch testified that Mr. Sharp had cursed him on several occasions during telephone conversations (Tr. 170).

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After careful review of all of the testimony and evidence in this case, I conclude and find that the telephone calls and conversations initiated by Mr. Couch, as well as Mr. Sharp, during which the subject of Mr. Sharp's absences from work because of his wife's illness were discussed, do not constitute harassment by Mr. Couch because of any protected activity on the part of Mr. Sharp. Mr. Sharp's absences from work because of his wife's illness is not protected activity under the Act. I find no credible evidence to support any conclusion that the respondent acted unreasonably in its attempts to determine when Mr. Sharp would be able to return to his normal work schedule at the mine.

I conclude and find that the respondent had a legitimate, reasonable, and plausible concern for Mr. Sharp's absences, and the need to insure that he either return to work, or at least give the respondent some assurance as to when he would be able to return to his normal scheduled work. Mr. Sharp did neither. As a result of his failure to respond, and his sporadic day-to-day attendance record, Mr. Sharp placed the respondent in a position of not knowing from day-to-day if or when he would show up for work, when he would return to work on a regular basis, or whether he would request a leave of absence to stay home with his wife.

I conclude and find that mine management's actions in dealing with Mr. Sharp, including the telephone calls by Mr. Couch, were prompted by a legitimate and rational effort to determine if and when Mr. Sharp would return to his normal work schedule at the mine. Given Mr. Sharp's overall attendance record, and his rather erratic and unpredictable practice of reporting on and off work during late October, and early November, 1988, when he wife was ill, I cannot conclude that the telephone calls made by Mr. Couch to Mr. Sharp's home, or the conversations Mr. Sharp had with Mr. Meese, were anything more than a reasonable effort by mine management to resolve a work attendance problem with one of its employees. I further conclude and find that Mr. Sharp has failed to present any credible evidence to support his claim that management's actions were motivated by its desire to harass or punish him for any safety related activities protected by the Act.

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.

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Accordingly, Mr. Sharp's complaint IS DISMISSED, and his claims for relief ARE DENIED.

George A. Koutras
Administrative Law Judge