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LINDA LESTER V. GARDEN CREEK POCAHONTAS
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

LINDA SUE LESTER,
COMPLAINANT

DISCRIMINATION PROCEEDING

Docket No. VA 88-59-D

v.

Pocahontas No. 6 Mine

GARDEN CREEK POCAHONTAS CO.,
RESPONDENT

DECISION

Appearances: Susan Oglebay, Esq., Oglebay & Graham, Damascus,
Virginia, for Complainant; Donald D. Anderson,
McGuire, Woods, Battle & Boothe, Richmond,
Virginia, for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

Complainant contends that she was removed from her temporary roof bolting job and returned to the job of general inside laborer, because of safety complaints to her safety committeeman and a Federal inspector. She did not lose time from work, but claims lost wages measured by the difference in pay between the roof bolting job and the general inside laborer job from May 18, 1988 until May 1989 when she became a permanent roof bolter, except for the period between August 1988 and February 1989, when she was out of work because of an employment-related injury. Respondent concedes that complainant made a protected safety complaint. It denies that she was subjected to adverse action because of the safety complaint. Pursuant to notice, the case was called for hearing in Abingdon, Virginia, on July 18, 1989. Linda Lester, Kenneth Lester, John Woolford and Ray Lester testified on behalf of Complainant. George King, Tom Meade and Ronald D. Coleman testified on behalf of Respondent. Both parties were given the opportunity to file post-hearing briefs. Respondent filed such a brief; Complainant did not. Based on the entire record, and considering the contentions of the parties, I make the following decision.

FINDINGS OF FACT

Respondent, Garden Creek Pocahontas Co. (Garden Creek), is the owner and operator of an underground coal mine in Oakwood, Virginia, known as the Pocahontas No. 6 Mine. Complainant Lester

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is employed at the subject mine as a miner. She has worked at the mine since February 1981. Her jobs included general inside laborer, miner helper, scoop operator, roof bolter, apprentice electrician, and beltman. She worked as a roof bolter in November 1981, and in May 1983 for periods of time not disclosed in this record. As of April 22, 1988, she was employed as a general inside laborer.

In April 1988, Garden Creek was doing construction work to set up a new miner section. This involved cutting in a rock area, and necessitated bolting the rock roof. One permanent roof bolter, Tommy Proffett, was on the rock crew and a temporary roof bolter was assigned to work with him. After some days, the Union requested that the job be posted, and filled in accordance with the existing collective bargaining contract. A prior grievance settlement at the subject mine required the company to post a job vacancy whenever a temporary job existed for seven days or more. Garden Creek told the Union officials that the rock bolting project would be completed in a few days, but the Union wanted it posted anyway. Garden Creek agreed but informed the Union that "as soon as the project is completed this job will be eliminated." (Tr. 94)

On April 22, 1988, a notice of Temporary Vacancy for the position of roof bolter was posted. (R-Ex. A) The name D. Smith was written on the notice. Smith was a permanent roof bolter working on a coal-producing section, and had been one since 1981. He was off work because of an injury since June 1987. In June 1987, the mine was doing truss bolting which required six roof bolters on the day shift. In early 1988, the mine began using the super bolt system and phased out the truss bolting. In the super bolt system, only four roof bolters were required on the full-time day shift. Complainant was awarded the posted job on April 29, 1988. She began working on the new job on May 9, 1988, but was paid as a roof bolter beginning May 2, 1988. Complainant assumed that she was temporarily filling the job of Donnie Smith. Garden Creek intended that she was filling a temporary position doing rock bolting until the rock project was completed. On May 9, Complainant told her foreman that she was supposed to work on the coal producing section as Donnie Smith had done, rather than on rock work. She filed a grievance which management denied.

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On May 10, 1988, Complainant was told by her foreman, Ronald Coleman, that she would have to begin installing bolts herself without the assistance of the other roof bolter. She protested that the height of the area would require her to climb on to the roof bolter canopy and that she was afraid that she would be injured. She asked to have the safety committeeman and the Federal inspector who was at the mine, assess the safety of her work. The inspector told Complainant that he would not tell her the job was safe but that he could not see any other way that it could be done. So far as the record shows, no citations or orders were issued concerning the performance of the work.

On the following day, May 11, Coleman called Complainant aside and told her that she should either do her work or withdraw from the job. He told her that her roof bolting partner had complained that he was doing her work as well as his own. Coleman also told her that she was causing problems in talking to the safety committeeman and the inspector. After this conversation, Complainant became upset. She left work, and was taken to a hospital for what was diagnosed as hyperventilation. She returned on Friday, May 13, and was assigned to a belt crew. She continued working on the belt the following Monday and Tuesday, May 16 and 17, and on May 18 was told that the roof bolting job had been discontinued. She was paid as a roof bolter through May 18, 1988. The mine superintendent testified that the work was completed on May 16, but Complainant was not informed of this until May 18. The Superintendent was aware of Complainant's safety complaints to the safety committeeman and the inspector. Complainant's foreman Coleman was not involved in the decision to eliminate or discontinue her job.

In about March 1989, the mine added a third section crew to the day shift. Complainant bid for and was awarded the job of permanent roof bolter in April or May 1989. She has continued on that job to the date of the hearing.

ISSUES

1. Whether the temporary roof bolter position was discontinued and Complainant was removed from that position because she made safety complaints to her safety committeeman and a federal inspector?

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

CONCLUSIONS OF LAW

Respondent is subject to the provisions of the Federal Mine Safety and Health Act of 1977 (the Act) in the operation of the subject mine. Complainant is a miner protected under section 105(c) of the Act.

Under the Act, a complaining miner can establish a prima facie case of discrimination by proving that she engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. Secretary/Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (1980), rev'd on other grounds sub. nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was not motivated in any part by protected activity. If the operator cannot rebut the prima facie case in this manner, it may nevertheless defend affirmatively by proving that the adverse action was also motivated by other factors than the protected activity and that it would have taken the adverse action for these factors in any event. Robinette, supra.

I

The parties agree that Complainant made safety complaints to a safety committeeman and a Federal inspector, and that these Complaints constitute activity protected under the Act.

II

The action taken by Respondent in removing Complainant from the position of roof bolter on May 18, 1988, which resulted in a loss of pay, constituted adverse action.

III

The evidence establishes that Complainant's foreman Coleman reprimanded her for making safety complaints protected under the Act. The crucial issue is whether the safety complaints were in any way related to the adverse action described above. Coleman testified that he was not involved in the decision to eliminate the roof bolter position. I accept his testimony as credible.

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The Superintendent, George King, did make the decision to eliminate the position when the rock work was completed. King was aware of the fact that Complainant had made safety related complaints to the committeeman and the inspector. He testified, however, that this awareness was not related to the elimination of the roof bolting job. He testified that, in accordance with his agreement with the Union, when he was informed by the mine foreman that the rock project was completed, he told the foreman to inform Complainant that the job was eliminated. I accept the testimony of King as credible and consistent with the other evidence in the record. I conclude therefore that the adverse action suffered by Complainant was not in any way related to her protected safety complaints. The testimony of John Woolford and Ray Lester concerning their bolting activities after Complainant's temporary position was eliminated was explained by King and Coleman as related to clean up work or coal face bolting unrelated to the rock project. I accept their explanation as credible.

Further, I conclude that even if Complainant established a prima facie case of discrimination, the operator has established that the adverse action was motivated by unprotected factors, namely, the completion of the rock project, and that it would have taken the adverse action for these factors alone.

Therefore, Complainant has failed to establish that Respondent discriminated against her in violation of the provisions of section 105(c) of the Act.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED that Complainant's complaint of discrimination is DISMISSED.

James A. Broderick
Administrative Law Judge