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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

DENNIS R. HILDERBRANDT,
COMPLAINANT

DISCRIMINATION PROCEEDING

v.

Docket No. WEST 88-258-DM
MD 87-37

HECLA MINING COMPANY,
RESPONDENT

Republic Unit

DECISION

Appearances: Theresa D. Thompson, Esq., Maxey Law Offices,
Spokane, Washington,
for Complainant;
Fred M. Gibler, Esq., Evans, Keane, Koontz, Boyd,
and Ripley, Kellogg, Idaho,
for Respondent.

Before: Judge Cetti

This case is before me upon the complaint by Dennis R. Hilderbrant 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 that he was constructively discharged by Hecla Mining Company, (Hecla) on April 17, 1987 in violation of section 105(c)(1) of the Act.(FOOTNOTE 1)

Statement of the Case

Complainant Dennis Hilderbrandt filed a complaint with the Commission under Section 105(c) of the Act on September 21, 1987, alleging in essence that he quit working in the mine on April 17, 1987 because he believed that his health and safety were endangered by his work assignment. Complainant alleges he was constructively discharged. He complains that his employer the, Hecla Mining Company, treated him in a discriminatory manner in retaliation for his having engaged in protective activities. He also alleges that working conditions in the mine were so intolerable he had no alternative but to quit. Complainant seeks reinstatement, back pay, attorneys fees and any other allowable compensation that the Commission may order.

The parties have filed post-hearing briefs and proposed findings and conclusions of law. At the hearing the parties presented oral and documentary evidence and seven stipulations as follows:

Stipulated Facts

1. The employee, Dennis R. Hildebrandt, worked for Hecla Mining Company since 1981 when Hecla acquired the mine from Mr. Hildebrandt's previous employer. Mr. Hildebrandt worked in the Republic mine for several years until April 17, 1987. Mr. Hildebrandt worked as an underground miner with his partner, Clarence E. Heideman.

2. On April 3, 1987, Mr. Hildebrandt and his partner worked the graveyard shift and at the conclusion of the shift, he received a disciplinary notice for insufficient work during the shift.

3. During that shift, Mr. Hildebrandt and his partner encountered difficulties including (a) necessary equipment was not at the work site (b) smoke and gas at the unventilated work site, and (c) two separate groups of misfires (unblasted explosives in drilled holes).

4. Mr. Hildebrandt made a written hazardous condition complaint to MSHA alleging violations of mandatory MSHA standards during the April 3, 1987 shift.

5. A federal investigator inspected the mine, spoke with a number of persons and issued two citations for violations of MSHA mandatory standards.

6. On April 16, 1987, Mr. Hildebrandt was again working the graveyard shift with his partner. Following this shift, he was advised that he was not making sufficient work progress at his work station.

~1856

7. Later that same day, April 17, 1987, Mr. Hildebrandt advised Hecla that he was quitting work for Hecla.

Based upon the hearing evidence and the record as a whole, I find that preponderance of the substantial, reliable and probative evidence establishes the following:

Findings and Conclusions

The complainant Hilderbrandt, commenced work for Hecla Mining Company (Hecla) at its Republic Unit mine near Republic, Washington, in 1981 when Hecla acquired it from prior owners. Hilderbrandt had approximately 13 1/2 years experience as a miner at the mine. On April 17, 1987, Hilderbrandt terminated his employment with Hecla.

Hilderbrandt alleges he was discriminated against because of his status or perceived status by Hecla as a union operative, because he was safety representative and because he made safety-related complaints to the company and to the Mine Safety and Health Administration between April 3 and April 17, 1987. Hilderbrandt contends that because of such activity on his part he was assigned to work in an area of the mine which was unsafe and in which he could not earn a production bonus. He claims that as a result, he was compelled to terminate his employment.

Hecla denies that Hilderbrandt was disciplined for engaging in protected activity. It is Hecla's position that he voluntarily quit his job. Based upon the preponderance of the evidence and the record as a whole I find that Hilderbrandt was not disciplined for engaging in protected activity that he voluntarily quit his job on April 17, 1987 and suffered no adverse action that was motivated in any part by protected activity.

In 1983 Hilderbrandt was elected safety representative for purposes of the Mine Safety and Health Act. Hilderbrandt's claim that he was discriminated against because of his status as safety representative is, however, based primarily upon events occurring between April 3 and April 17, 1987 (Tr. 165). It is Hilderbrandt's position that he made safety complaints regarding his work areas in the mine to MSHA and to Hecla as the safety representative.

Conflicting evidence was presented by Hilderbrandt on the issue regarding his claim of discrimination for Union activities. Hilderbrandt testified at the hearing that he was not a supporter of the union during a certification election in May 1987, but he believed that Hecla thought he was a union supporter (Tr. 169). Hilderbrandt presented other evidence in which he stated that he was a supporter of the union certification in the May 1987 election. In Exhibit 11, pages 10 and 11, Hilderbrandt told the

~1857

MSHA special investigator investigating his discrimination claim that he was "one of the biggest supporters" of the union.

The three individuals Hilderbrandt claims were responsible for forcing him to terminate his employment were Mine Superintendent Tom Graham, Supervisor Bill Greenland, and Mine Manager Doug Wollant. None of these three individuals had any involvement with union certification matters (Tr. 390). Mr. Greenland and Mr. Wollant had only arrived at the Republic Union approximately one month before Mr. Hilderbrandt terminated his employment (Tr. 170). Mr. Graham had arrived only shortly before the union certification election in 1987 (Tr. 360). No evidence other than Hilderbrandt's suspicion was presented to show that these three individuals or anyone else from Hecla believed Hilderbrandt was involved with union activities.

Commencing approximately the middle of March 1987, Hilderbrandt and his partner, Clarence Heideman, began work in an area of the mine known as the GP3 drift (Tr. 456). This was an old area of the mine the company intended to use for future mining operations. In preparation for mining and development activities, it was necessary to rehabilitate the GP3 drift (Tr. 454).

Hilderbrandt was a contract or "gypo" miner. This designation means the miner has the opportunity to earn a bonus based on work performed over and above his hourly rate, which is commonly known as "day's pay." The bonus is paid when mining or development work begins. During the rehabilitation phase, the employee is paid at his "day's pay" rate (Tr. 454).

On the graveyard shift which commenced at 11 p.m. on Friday, April 3, 1987, Hilderbrandt and his partner were required to work in an area of the mine that was different from the GP3 drift in which they previously worked. Prior to going underground for the shift, Mr. Greenland, as Hilderbrandt's supervisor, instructed Hilderbrandt and his partner that their duties were to level off the muck pile which resulted from the prior crews blasting and to begin rock bolting the mined out area (Tr. 255).

When Hilderbrandt and his partner arrived at the underground work site, it became obvious that, as a result of lack of necessary equipment and smoke caused by the prior shift's blasting activities, they would not be able to accomplish the work originally assigned (Tr. 258).

Upon encountering these conditions, Hilderbrandt and his partner were instructed by their supervisor Mr. Greenland to begin setting up equipment for the next shift, which would have entailed placing rock bolts, mats, and wire in the area and to transport a slusher and bucket to the area (Tr. 262). They

~1858

failed to perform these tasks by the end of the shift. This work, had it been completed, would have taken approximately two hours (Tr. 269, 461-462).

Hilderbrandt complained during the shift to Greenland about the gassy conditions in the mine. He was not, however, required to work in the gassy conditions (Tr. 186). The mine had a gas or smoke problems. These conditions were the subject of frequent complaints by the miners and management personnel. MSHA was aware of the problem and was working with Hecla to correct the problem (Tr. 396).

At the conclusion of the Friday, April 3 graveyard shift, Supervisor Greenland informed Hilderbrandt he intended to suspend him for two days for failing to perform adequate work during that shift (Tr. 274). Hilderbrandt requested a conference with the mine superintendent, Mr. Graham, and Graham was called to the work site. Following a conference between Mr. Greenland and Mr. Graham, Graham ordered that Hilderbrandt not be suspended but instead that he be issued a Step 2 Employee Improvement Act Report (EIAR) (Tr. 275-276).

The Employee Improvement Action Report (EIAR) Step 2 did not result in any loss of work or pay to Hilderbrandt (Tr. 277). Under Hecla's progressive system of discipline, it would have been necessary for Hilderbrandt to receive a similar report for similar conduct during the next six-month period before he could have been disciplined. If he received no similar EIAR for three months, it would be reduced to a Step 1 (oral warning), and if he received no EIAR for six months, the EIAR Step 2 would be removed (Tr. 279-280). Hilderbrandt worked the graveyard shift on April 4, 1987, in the same area of the mine as on April 3, 1987, but never worked in that area of the mine again.

Commencing with his next-scheduled shift on April 5, 1987, Hilderbrandt returned to work in the GP3 drift doing the identical rehabilitation work he had been performing before April 3, 1987 (Tr. 369). He continued to work in this area of the mine (GP3 drift) until he voluntarily terminated his employment on April 17, 1987 (Tr. 369-370).

During the week of April 5, 1987, Hilderbrandt made a telephone call to the Mine Safety and Health Administration reporting safety complaints with regard to conditions he encountered on April 3, 1987 graveyard shift (Tr. 90). Specifically, he claimed that smokey conditions existed in the mine and that misfires were not refired during the shift. As a result of the telephone call, MSHA investigated and issued two citations - one for the April 3rd failure to fire the misfires and one for the April 3rd failure to monitor smoke in the mine.

~1859

During the period from April 3 through April 17, Hilderbrandt and his partner were doing the same work as members of the opposite crews on other shifts in the same area of the mine (Tr. 457-462).

On the shift which began at 11:00 p.m. on April 16, 1987, and continued over to the morning of April 17, Hilderbrandt and his partner had completed the rehabilitation work in the GP3 area and began development work (Tr. 455). Commencing with that shift, Hilderbrandt began to earn a production bonus, which is reflected on Hilderbrandt's Exhibit 16.

Mine Superintendent Graham had expected Hilderbrandt and his partner to be able to complete a cycle once they completed their rehabilitation efforts and began extending the drift (Tr. 376). During the initial mining stages in the GP3 drift Hilderbrandt and his partner were unable to complete a full cycle (Tr. 377-378). This was primarily because of muddy conditions in the area. Mr. Graham had instructed Mr. Greenland that if a full cycle was not completed he wanted to see Hilderbrandt and his partner to discuss the situation (Tr. 377). Accordingly, at the end of shift on the morning of April 17, Graham, Greenland, and Wollant met with Hilderbrandt and his partner. There was a discussion, the content of which is in dispute. Hilderbrandt claims that he stated he could not work safely and at the same time perform the amount of work required by Mr. Graham. Graham and Greenland, on the other hand, testified that Hilderbrandt made no complaints relating to safety. They testified that Hilderbrandt complained that because of the muddy conditions in the mine he could not complete a cycle. I credit the testimony of Graham and Greenland. At the end of the conversation, Greenland asked Hilderbrandt if he could commit to a half cycle. Hilderbrandt replied that with another 20 - 30 feet of rehabilitation work it might be possible (Tr. 121).

Hilderbrandt received no discipline for his work performance during the shift of April 16, 1987, and in fact received no disciplinary action after the April 3, 1987 EIAR (Tr. 388-389).

After the meeting with Hilderbrandt on the morning of April 17, 1987, Mine Superintendent Graham went to the GP3 drift where Hilderbrandt had been working to experience the working conditions first hand to determine what amount of work could be performed. He concluded that because of the muddy conditions in the drift he had expected too much work from his employees (Tr. 384).

During the afternoon of April 17, 1987, Hilderbrandt and his partner returned to the mine (Tr. 385). When Hilderbrandt

~1860

returned, Mine Superintendent Graham informed him that he owed him an apology regarding the amount of work which could be completed (Tr. 387). Hilderbrandt denies such a conversation. He testified that the only conversation was Hilderbrandt informing Graham that he (Hilderbrandt) quit. Other evidence submitted by Hilderbrandt supports the truth and accuracy of Graham's testimony of what was said at the meeting. In Hilderbrandt's Exhibit 11, page 9, Hilderbrandt informed the MSHA investigator investigating his discrimination claim that Graham stated as follows: "You guys are right. I apologize at this time for riding you so hard". Ed Sinner, another supervisor, overheard this conversation (Tr. 466). Although Graham apologized, Hilderbrandt quit without giving Graham the opportunity to explain what he intended to do with respect to Hilderbrandt's work area in the future.

Hilderbrandt terminated his employment on April 17, 1987. He took no steps to inform the Mine Safety and Health Administration of the alleged unsafe conditions in the mine, and he did not, as safety representative, take any steps to protect opposite crews of what he contends he felt was an unsafe condition.

Since he terminated his employment on April 17, 1987, Hilderbrandt has not requested employment with Hecla. He testified that he could not work there under the present management (Tr. 143).

The Mine Safety and Health Act, 30 U.S.C. 815(c), prohibits an employer from discriminating against a miner for engaging in protected activity.

In a discrimination case, the burden of proof is upon the complainant to show that (1) he engaged in protected activity and (2) that adverse action was taken against him which was motivated in any part by the protected activity. The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. If an operator cannot rebut the prima facie case in this manner, it may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone.

A constructive discharge can occur under the provisions of section 105(c) of the Act. For a miner to sustain his claim of a constructive discharge, he must show that the operator created or maintained conditions so intolerable that a reasonable miner would have felt compelled to resign. Hilderbrandt failed to do this.

~1861

With respect to the events of April 3, 1987, Hilderbrandt engaged in protected activity in making safety complaints. Hilderbrandt's complaints about the smokey conditions were not unique to him. Many employees complained about smoke in the mine, and MSHA was aware of the condition. Hilderbrandt was not required to work in the smokey area of the mine. Hecla reasonably determined that an insufficient amount of work was performed by Hilderbrandt during his April 3rd work shift. It is concluded that the operator had valid nondiscriminatory reasons for issuing the April 3rd Employee Improvement Action Report which cost Hilderbrandt neither time nor money.

The complaints made by Hilderbrandt to the Mine Safety and Health Administration during the week of April 5, 1987, constitute protected activity, and if Hilderbrandt had made safety complaints to management on April 17, 1987, such complaints would also be protected activity. However protected activity in and of itself is not actionable. It is necessary for the miner to show that adverse action resulted in some part from that protected activity to establish a prima facie case. Hilderbrandt has failed to establish a prima facie case, since he has not shown that any adverse action was taken against him which in any part was motivated by his protected activity.

Hilderbrandt's claim that because of the events of April 3 through April 17, 1987, he was forced to work in undesirable area of the mine at which he could not earn a production bonus are not supported by the facts. Hilderbrandt worked in the same area (GP3 drift) before April 3, 1987, as well as afterward doing the identical work for the identical pay. Moreover, his Exhibit 16 shows that he was able to earn a production bonus. No adverse action was taken against him for engaging in protected activity.

Even if Hilderbrandt believed conditions in the mine or the GP3 drift, where he worked before and after April 3rd and 4th were so intolerable that he could no longer safely work there, his belief was not reasonable. The objective evidence, including the fact that he took no steps to protect miners on the opposite shift, which he had an affirmative duty to do as safety representative, the fact he did not report to MSHA any alleged unsafe conditions of the GP3 drift where he worked and the fact other miners worked under identical conditions, and did not feel compelled to resign, tend to show that Hilderbrandt did not have a good faith reasonable belief that the work was unsafe or unhealthful and I so find. Moreover, an employer is only required to provide a reasonable option. Although Graham on the afternoon of April 17, 1987 apologized for his high work expectations, Hilderbrandt without further discussion quit his job. He failed to report back to work and did not ever seek employment with Hecla again.

