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

GERALD SMITH,
COMPLAINANT

DISCRIMINATION PROCEEDING

v.

Docket No. KENT 89-218-D
MADI-CD-89-04

PYRAMID MINING, INC.,
RESPONDENT

Hall No. 2 Mine

DECISION

Appearances: Henry E. Hayden, Esq., Hayden & McKown,
Hartford, Kentucky for Complainant;
Patrick D. Pace, Esq., Rummage, Kamuf, Yewell,
Pace & Condon, Owensboro, Kentucky for
Respondent.

Before: Judge Melick

This case is before me upon the Complaint of Gerald Smith 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 unlawful discharge by Pyramid Mining, Inc. (Pyramid) in violation of section 105(c)(1) of the Act.1

In his Amended Complaint Mr. Smith alleges that he was unlawfully discharged on May 5, 1989, for the following reasons:

In 1989 at various times prior to his dismissal in May 1989, the Plaintiff had given the Defendant notification of various safety problems that existed in regard to his employment. Specifically, the Plaintiff complained numerous times about the brakes and air-conditioner on his loader and about fuel spills on the loader, emergency brakes being inoperative, and rear tires on the loader being dangerously worn. In addition, the Plaintiff had complained to the Defendant regarding the fact that he was not allowed to take breaks and was required to work many shifts straight through, 16 hours.

In order to establish a prima facie violation of section 105(c)(1) of the Act, the Complainant must prove by a preponderance of the evidence that he engaged in protected activity and the adverse action taken against him was motivated in any part by the protected activity. In order to rebut a prima facie case, the Respondent must show either that no protected activity occurred or that the adverse action was in no part motivated by the miners protected activity. Secretary of Labor on behalf of Pasula v. Consolidation Coal Company, Inc. 2 FMSHRC 2786 (1980), rev'd on other ground sub nom. Consolidation Coal Company v. Marshall 663 F.2d 1211 (3rd Circuit 1981).

While the Complainant herein has clearly established that he engaged in activities protected by the Act by reporting potential safety and health hazards to Pyramid management he has failed to sustain his burden of proving that his discharge was motivated in any part by those protected activities. It is undisputed that pursuant to a written request by Pyramid to all of its employees on or about March 31, 1989, (Complainant's Exhibit No. 2) for, among other things, "a report of any item not in proper operating condition such as brakes, horns, fire extinguishers, seat belts, back-up alarms, tire or track conditions and temperature and pressure gauge conditions on equipment", the Complainant submitted a typewritten list setting forth the following complaints or defects: "temperature gauge works part time, fuel pressure gauge doesn't work at all, air conditioner doesn't cool, brakes are no good, left ladder bent, back tires are slick, transmission is out" (Complainant's Exhibit No. 2).

Pyramid maintains on the other hand that Smith was discharged on May 5, 1989, for threatening its employees. In particular Mine Superintendent Harold Meredith, the official who actually discharged Smith, testified that he was told on May 3rd, by his Manager of Processing and Transportation, Randy Heintzman, that he had been told that the lives of both he and Safety Director Plummer had been threatened by Smith. Meredith specified in writing the reasons for Smith's discharge as follows:

Gerald has from time to time made threats to fellow employees also supervision. This problem has been an on going thing for several weeks Gerald has been called in the company office to discuss this problem several times. I feel to insure the safety of employees who work with Gerald to discharge him at this time. (Respondent's Exhibit No. 1)

Superintendent Meredith obtained his information indirectly from Heintzman who, in turn, had received his information from Smith's immediate foreman, James S. Williams. Williams testified that he had known Smith for about nine years while working at the Hall No. 1 Mine. According to Williams it was around May 1, 1989, that Smith came to his house bringing a doctor's excuse for an absence. Williams testified that Smith was at his house for about an hour or an hour and ten minutes and during the course of his visit threatened to "blow Heintzman's head off".

During the conversation, according to Williams, Smith also admitted that he had "gone after" Safety Director Plummer at an area gas station but that Plummer had "pulled out" before he got to him. Smith was apparently angry that Plummer had called his doctor to verify a previous excuse and discovered that, in fact, Smith had not actually seen the doctor. Williams testified that he believed the threats were serious because of Smith's "nature" and his prior experience. Williams also testified that Smith carried weapons in his truck including a .44 Magnum handgun and a 3 1/2 foot long stick. Williams testified that he was also aware of prior threats by Smith to beat or shoot a co-worker, Roger Dunning, in 1985 or 1986. According to Williams, Smith had also shown him the 3 1/2 foot long stick on prior occasions while threatening to "put knots on the head" of former Assistant Superintendent Hatten.

Smith denies making any such threats. According to Smith's theory at hearing Williams fabricated these threats as a means of getting rid of him and thereby of ingratiating himself with Pyramid management. Smith continues to maintain

that the actual reason for his discharge was his protected safety complaints.

I do not find however that Smith's testimony is credible. He has failed to discredit the testimony of Williams that he indeed made the threats attributed to him. In addition the motive he attributes to Williams for his allegations that Williams fabricated the threats is not credible. Clearly if Pyramid needed a pretext for discharging Smith after his safety complaints it had ample grounds to do so in early April 1989, when Smith was caught submitting a bogus medical excuse after taking several days off for personal business. The fact that Smith was not discharged at that time when ample grounds existed to do so only serves to corroborate managements position that it did not entertain a retaliatory motive based in his safety complaints when it later discharged him for threatening its employees.

Pyramid has, moreover, clearly established through credible testimony that Smith indeed threatened both management personnel and hourly workers immediately before his discharge and on prior occasions. It is also relevant and corroborative of Smith's ability to carry out such threats that Smith admitted owning five handguns, including the .44 Magnum apparently seen by Williams, and that he sometimes kept a handgun in his truck while at work.

Under the circumstances I find that Smith has failed to sustain his burden of proving that his discharge was motivated in any part by his protected activities.

ORDER

Discrimination Proceeding Docket No. KENT 89-218-D is DISMISSED.

Gary Melick
Administrative Law Judge

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FOOTNOTES START HERE

- 1. Section 105(c)(1) of the Act provides as follows:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment, has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such representative of miners or applicant for employment has instituted or caused to be instituted any

proceedings under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.