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DONALD H. GIBSON V. CYPRUS BAGDAD COPPER
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

DONALD H. GIBSON,
COMPLAINANT

DISCRIMINATION PROCEEDING

Docket No. WEST 89-11-DM

v.

MD 87-47

CYPRUS BAGDAD COPPER COMPANY,
RESPONDENT

DECISION

Appearances: R. Henry Moore, BUCHANAN INGERSOLL, 600 Grant Street, 58th Floor, Pittsburgh, Pennsylvania 15219, for Complainant.
Donald H. Gibson, pro se, 885 Munley Drive, Reno, Nevada 89503

Before: Judge Cetti

This case is before me upon the pro se discrimination complaint of Donald H. Gibson, under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 802, et seq., the "Act," alleging unlawful discharge by Cyprus Bagdad Copper Company (Cyprus) in violation of section 105(c)(1) of the Act.1

Mr. Gibson initially filed his complaint with the Secretary of Labor, Mine Safety and Health Administration (MSHA), at its Phoenix, Arizona, office, on July 22, 1987. In a statement executed by Mr. Gibson on that day on an MSHA complaint form, he made, in pertinent part, the following complaint:

> Mr. Walz came out to my job to inspect my job performance. During one of these visits I asked him about the drug traffic inside of this mine, and specifically about the drugs found, since I work around a lot of moving equipment. He told me, "It's none of your business," and that I am good for nothing but lube and fuel driver. I never seem to see my foremen only Larry Walz. I have brought this to the attention of Employee Relations but they have refused to act on any of my requests about this man's behavior towards me. Since this incident occurred, Mr. Walz gave me an unexcused absence. I had already taken care of this with my immediate foreman and had my job secured. Mr. Walz overode this absence and told me to appeal it. I did so, and it was rescinded. Mr. Walz received a copy of this and was upset about this and stated that it was immaterial. Since then, I received a 30-day suspension for not greasing rippers. In my PM sheets there is no mention of these rippers. I was again told it was immaterial. Mr. Walz at that time called me "a safety hazard." Again I brought up the drug use and stated, "How come there no suspension pending investigation for possession of cocaine on these premises?" He told me, "It's none of your business. Stay out of it." I seem to feel that, because I am the only person who has actually faced these gentlemen with this information, that I am continuing to be harrassed.

> No one else has ever received a suspension for that amount of time, even for damaging equipment. I have broken no rules and only try to do my job. I was recalled on the layoff with no problems. Again, since Mr. Walz came to this company in 1986 and I confronted him about the use of drugs, I have had nothing but problems. . . . I really do enjoy my job and pray for reinstatement with Cyprus Bagdad, and that my 30-day suspension be looked into also.

MSHA conducted an investigation of Mr. Gibson's complaint, and by letter dated September 16, 1988, 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 occurred. Mr. Gibson then pursued his complaint with the Commission.

Respondent filed an answer to the complaint stating in part:

> Cyprus Bagdad specifically denies that it or any person acting on its behalf violated section 105(c) of the 1977 Act.
>
> Complainant was terminated from his employment with Cyprus Bagdad on July 21, 1987, because he had an unacceptable work record and continuing irregular attendance after being repeatedly warned that, unless his work and attendance record improved, he would be subject to termination.

Cyprus's answer enumerates a partial listing of the events which lead up to the decision to terminate complainant and attached numerous exhibits documenting its answer.

Mr. Gibson, in his initial complaint filed on an MSHA complaint form, left blank the line that asked for the date of the discriminatory action. In the line asking for the person(s) responsible for the discriminating action, Mr. Gibson typed in the name "Larry C. Walz," one of Cyprus's superintendents.

To help clarify Mr. Gibson's allegations against Cyprus, his response to my prehearing order is set forth in pertinent part as follows:

> During my employ with Cyprus Bagdad Copper Corporation (1980-1987) myself and any other employee could request time off as needed. (Immediate supervisor approval) There was no rules stating how many

days a year you were allowed. I have never had an "unexcused absence." I mentioned that there was a drug problem within the mine. They (Mr. Walz) told me it was none of my business. I did file a formal complaint with MSHA during this period, stating that I felt a need for an investigation was needed because of two separate incidents that occurred in the mine. From then on it was continuous harrassment. There is noted in the rule book of the company (CBCC) that there is a "chain of command" that has to be followed. This was not how it was in my case at all. Mr. Walz completely overrode my immediate supervisor and any other foreman or salaried personnel who might have tried to intervene.

This is what I hope to be able to bring forth is that in fact it was not my absenteeism that caused my termination but the fact that I requested an investigation of the mine for safety reasons and for that reason only I was terminated.

STIPULATIONS

At the hearing, the parties stipulated to the following, which I accept as established facts:

1. That the presiding administrative law judge, August F. Cetti, has jurisdiction over this matter.

2. The Bagdad Mine Company was owned and operated by Bagdad Copper Company (Cyprus), and had MSHA ID No. 02-00137.

3. The Bagdad Mine is located in Bagdad, Arizona, and employs approximately 550 persons.

4. Donald H. Gibson was first employed by Cyprus, or its predecessor corporation, in 1980.

5. On February 12, 1984, Mr. Gibson was laid off during a reduction in force. He was rehired on October 23, 1984.

6. At the time of his termination, Mr. Gibson was an hourly employee assigned to the mine maintenance department.

7. The company records show that on June 7, 1983, Mr. Gibson was given an unexcused absence for his failure to report to work on that day.

8. Company records show that on July 22, 1983, Mr. Gibson was given a verbal reprimand for his failure to report to work on July 18, 1983.

9. The company records show that on August 8, 1983, a general report was made concerning Mr. Gibson's excused absence from work on August 7, 1983.

10. The company records show that Mr. Gibson received a Notice of Termination for unexcused absence from work on October 16, 17, 18, 1983. The termination was modified to a 10-day suspension on October 25, 1983.

11. The company records show that on March 7, 1985, Mr. Gibson received a warning concerning excessive absenteeism.

12. The company records show that on March 11, 1985, Mr. Gibson received a supension for two working days and two hours of another day for poor judgment in utilizing his time on duty.

13. Company records show that on September 19, 1986, Mr. Gibson received a written warning which included attendance guidelines for excess absenteeism.

14. The company records show that on March 6, 1987, Mr. Gibson was given attendance guidelines because of his poor attendance record.

15. Company records show that on April 29, 1987, Mr. Gibson received a written warning for an unexcused absence from work on April 24, 1987.

16. On May 22, 1987, Mr. Gibson was given a suspension pending an investigation concerning his failure to perform his job duties.

17. On May 27, 1987, at the conclusion of the investigation, Mr. Gibson received a suspension for 18 additional working days.

18. On July 16, 1987, Mr. Gibson was given a suspension pending an investigation for termination because of unexcused absences on July 14 and 15 of 1987.

19. On July 21, 1987, Mr. Gibson's employment was terminated.

20. On July 17, 1987, Mr. Gibson first contacted the Mine Safety and Health Administration concerning complaints he had concerning the drug and alcohol abuse at Cyprus.

21. On July 29-30, 1987, MSHA inspectors, Gary Day and Virgil Wainscott, investigated Mr. Gibson's complaint concerning drug and alcohol abuse, and issued a notice of negative finding concerning the complaint.

22. On July 21, 1987, Mr. Gibson filed a complaint of discrimination with the Mine Safety and Health Administration which is now at issue in this case.

23. On September 16, 1988, the Mine Safety and Health Administration issued a determination that no violation of section 105(c) of the Federal Mine and Health Safety Act of 1977 has occurred.

ISSUES

1. Whether Mr. Gibson's complaint that he was being treated unfairly in comparison to other employees, made at the time that he was told of his suspension for deficient work performance in May 1987, was activity protected under the Act.

2. Whether Mr. Gibson's complaints concerning disparate treatment of Robert Otteson constituted protected activity under the Act.

3. Whether Mr. Gibson's telephone call to MSHA concerning the issue of whether his wife could attend his disciplinary hearing was activity protected under the Act.

4. Whether any protected activity that Mr. Gibson might have engaged in motivated in any part his suspension on May 27, 1987, or his discharge on July 21, 1987.

5. If protected activity motivated in any part the decisions to suspend Mr. Gibson and to discharge him; whether such discipline would have been taken in any event, because of his history of absenteeism and his poor work performance.

At the hearing of August 24, 1989, the following witnesses testified for the complainant:

Donald Gibson, complainant
Irene Gibson, complainant's wife
Mervin Corbitt, supervisor of equipment operators
Larry P. Burkhead, heavy equipment operator

A continued hearing was delayed at the request of complainant, Mr. Gibson who was temporarily unable to go to the hearing as a result of injuries he sustained when he was struck by a car while he was crossing a street.

At the continued hearing in Phoenix, Arizona, credible testimony on the relevant issues was taken from the following 20 Cyprus employees.

Charles Rising	-	Manager, Human Resources
Patsy C. Morris	-	Mine Maintenance Supervisor
Harry Cosner	-	Mine Manager
Junior Morgan	-	General Mine Foreman
Vernon Swinson	-	Mill Maintenance Supervisor
Don Berdine	-	Mill Maintenance Superintendent
Raphael Perkins	-	Mine Maintenance Supervisor
Daniel L. Mead	-	Manager Community Services
Ron Foster	-	Master Equipment Operator
Harold R. Rubash	-	Lubrication Maintenance
Robert Otteson	-	Mine Supervisor
Joe Mortimer	-	Safety Director
Robert Swain	-	Mine Maintenance Supervisor
Janette Bush	-	Manager, Human Resources (as of 7/88)
Larry Walz	-	Mine Maintenance Superintendent
Pete Mendibles	-	Equipment Operator
Floyd Chandler	-	Equipment Operator
Peter Gray	-	Mine Supervisor
Raphael H. Perkins	-	General Supervisor of Maintenance
William T. Watson	-	Maintenance Supervisor

Messrs. Rising, Walz, and Ms. Morris testified as to the facts and circumstances surrounding the termination of Mr. Gibson's employment, including the unexcused absences he received in July 1987, his suspension for substandard work performance in May 1987, his unexcused absence in April 1987, his work history in general, and the motivation for the termination of his employment. In addition, Ms. Morris testified as to certain conversations she had with Mr. Gibson during the middle of July 1987. Mr. Rising also testified as to the drug and alcohol program at the mine and to the discipline of other miners.

Mr. Cosner testified concerning the facts and circumstances surrounding the termination of Mr. Gibson's employment, including the unexcused absence he received in April 1987, his suspension for substandard work performance in May 1987, the unexcused absences he received in July 1987, and his work history.

Messrs. Morgan, Swinson, Linger, and Foster testified as to the facts and circumstances surrounding Mr. Gibson's suspension n May 1987 for substandard work performance.

Mr. Berdine testified as to the facts and circumstances surrounding Mr. Gibson's suspension in May 1987 for substandard work performance, Mr. Gibson's unexcused absence in April 1987, and an incident in March 1985, when Mr. Gibson was suspended.

Messrs. Perkins and Watson testified as to Mr. Gibson's work history.

Mr. Rubash testified as to the circumstances of his assignment to a job performing lubrication work at the concentrator.

Mr. Meade testified generally as to his contacts with Mr. Gibson, including the housing problem after Mr. Gibson's termination.

Mr. Otteson testified as to an incident for which he was disciplined in June 1987.

Chris Crowl testified as to his conversations with Mr. Gibson in May - June 1987.

Ms. Bush testified generally as to discipline records maintained at the mine, to the drug and alcohol program at the mine, and to discipline of other miners.

At the conclusion of the hearing, the matter was left open for post-hearing briefs and proposed findings and orders. Respondent filed a helpful brief; complainant filed no brief. The matter was submitted for decision on May 17, 1990.

FINDINGS OF FACT

I

Cyprus operates an open pit copper mine in Bagdad, Arizona, employing approximately 550 persons.

II

Complainant, Donald H. Gibson, became employed by the predecessor company to Cyprus in 1980. He was employed in the mine maintenance department as an hourly employee. Early in his employment, he began to have attendance problems. He missed days of work and frequently did not follow the procedures for notifying his supervisors that he was not going to come to work. On June 7, 1983, he was given a verbal warning for an unexcused absence.

III

In July 1983, Mr. Gibson's absentee problems had become serious enough that his supervisor, Patsy Morris, invoked formal discipline against him. On July 18, 1983, she gave him a verbal reprimand for an unexcused absence from work. After he had returned to work, he gave as an excuse the inability to return to Bagdad in time to work after taking a family member to the airport. Mrs. Morris had previously counseled Mr. Gibson about his absences, as had other supervisors.

IV

Mrs. Morris and Robert Swain again noted their concern over Mr. Gibson's attendance in August 1983 when he took a day off that was unexcused. Not long after their concern was conveyed to Mr. Gibson, he again took three days off, resulting in unexcused absences for October 16, 17, and 18, 1983. Initially, it was determined that his employment should be terminated but that determination was changed to a ten-day suspension.

V

On February 12, 1984, Mr. Gibson was laid off as part of a general reduction in force. This layoff continued until October 23, 1984, when Mr. Gibson returned to work as an hourly employee in the maintenance department. He had previously been a leadman, an hourly employee with certain supervisory authority, but did not hold that position when he returned from layoff.

VI

After Mr. Gibson returned from layoff, he again accumulated unexcused absences. In March of 1985, he was formally counseled by his supervisor, Raphael Perkins, conerning his absences. He had two more absences in 1985, after he was counseled.

VII

Not long after his counseling session, he received a suspension for failing to utilize his time properly. He was observed at a remote location in a company truck parked in a fashion and for a period that suggested to Cyprus that he had been sleeping. The investigation concerning that incident raised questions as to the accuracy of Mr. Gibson's statements concerning his behavior.

VIII

There was a change in supervisors in the maintenance department in the first half of 1986, and it was September 1986, before the new maintenance superintendent, Larry Walz, realized that Mr. Gibson had developed a serious absentee problem. At that time, he placed Mr. Gibson on attendance guidelines that required that any absence from work would be considered unexcused and would result in a suspension or possible termination. At that time, Mr. Gibson's absentee rate was the worst in his department, over 10 percent, as opposed to a plant average of 2.5 percent.

IX

In March 1987, the guidelines were reissued, but were somewhat less stringent. Mr. Gibson was told that, if he was absent from work, he would receive a written warning for his first absence before he would be subject to termination for a second absence.

X

Not long after the guidelines were relaxed, Mr. Gibson took a day off from work because of some personal business he wanted to attend to concerning a court appearance of his stepson. He was given a written warning for this absence and was told that a further absence would result in his discharge.

XI

When he received the written warning, Mr. Gibson appealed the discipline to Harry Cosner, the Mine Manager. Mr. Cosner considered the fact that Mr. Gibson's attendance had improved, that Mr. Berdine, the maintenance supervisor at the concentrator where Mr. Gibson was assigned, had not had any negative reports about Mr. Gibson's job performance, and the fact that Mr. Gibson's absence was a result of his attendance at Court proceedings for his stepson. He wanted to motivate Mr. Gibson to continue his improvement and indicated that if Mr. Gibson did not miss any work through July 1, then the written warning would be rescinded. The guidelines issued in March would, however, remain in effect, and if Mr. Gibson was absent during this probation period it would result in discharge.

XII

In May 1987, Mr. Gibson's job was to service equipment out at the concentrator associated with the mill, rather than at the

mine. Responsibility for his supervision was divided between the mine and mill maintenance departments. Mr. Walz would, however, be responsible for any discipline given to him. As part of his duties Mr. Gibson was also responsible for servicing the equipment involved in what was known as the tailings project. That project was supervised directly by an hourly person, Ron Foster.

XIII

Early in May some of the employees on that site came to Mr. Foster and complained that Mr. Gibson was not properly servicing the equipment. Mr. Foster took the matter to his supervisor, Junior Morgan. On May 18, Junior Morgan brought the probem to Patsy Morris, who he knew was familiar with servicing of equipment. They inspected the equipment that day and found deficiencies in the lubrication. The next day Mrs. Morris returned to inspect the equipment again with Vernon Swinson who was in charge of maintenance at the concentrator. They determined that the equipment had not been lubricated. While they were at the site, they also determined that several pieces of the equipment had not been fueled. They also examined the worksheets Mr. Gibson was required to fill out concerning the equipment he serviced and found them to be confusing. Their findings were reported to their supervisors, Mr. Berdine in Mr. Swinson's case and Mr. Walz in Mrs. Morris's case.

XIV

On May 20, Mr. Berdine and Mr. Swinson inspected two bulldozers and a front-end loader which were of concern. They found that the equipment had not been lubricated. In particular, there was no lubrication done on the rippers, which were in regular use.

XV

On May 21, Mr. Walz, Mr. Swinson, and Joan Schmidt, a representative from the Cyprus Human Resources Department, inspected these two dozers as well as a loader. Again they determined that this equipment had not been property serviced.

XVI

As a result of this investigation, on May 22 Mr. Gibson was suspended from work until an investigation was completed to determine whether he had also falsified his worksheets.

XVII

A meeting was held on May 27 to give Mr. Gibson the opportunity to present evidence on his behalf. He was accompanied to the meeting by another hourly employee, Bruce Covey. The meeting

was conducted by Charles Rising, the Manager of Cyprus's Human Resources Department and Mr. Walz. The first part of the meeting involved a discussion of the issues and the evidence. A break was then called so that Mr. Walz and Mr. Rising could determine the appropriate discipline to be given to Mr. Gibson.

XVIII

They decided that because of the inconsistencies in how Mr. Gibson filled out company forms they could not prove he deliberately falsified these records. They also decided during the break to suspend Mr. Gibson for an additional 18 working days, making the full suspension to encompass a calendar month. They arrived at their relatively severe penalty because they felt they had to get Mr. Gibson's attention. He had not responded particularly well to earlier discipline and they thought they would give him one last chance to correct his deficiencies as an employee.

XIX

When the meeting resumed, Mr. Gibson was informed of his suspension. At that time he asked why he was being suspended when other miners who wrecked equipment or used alcohol or drugs might not be. Mr. Rising directed the discussion back to Mr. Gibson's situation and told him that he should use his time during suspension to decide whether he wanted to be a Cyprus employee. This was the first time that Mr. Gibson mentioned drug and alcohol use at the mine.

XX

Mr. Gibson appealed his suspension to W.J. Lampard, Cyprus's Vice President and General Manager. His suspension was upheld. Mr. Gibson met with Mr. Lampard and Mr. Rising. At that meeting Mr. Gibson complained that Mr. Walz was treating him unfairly but did not raise any safety related issues.

XXI

As a result of Mr. Gibson's suspension, the 60-day probation period for eliminating his unexcused absence for April 24 was extended. The probation was not completed on July 13 when Mr. Gibson asked his supervisor Patsy Morris if he could take a portion of the day off to attend a court hearing for his stepson; he indicated he would make up the time on Saturday. She permitted him to do so, but the next morning, after the shift had

started, Mr. Gibson called her and told her that he would not be coming to work that day. Mrs. Morris asked him if he knew the consequences of his action and he indicated that he did. That evening he called Mrs. Morris at home to ask if he could take the July 15 as a vacation day. She indicated that she would see what she could do, but did not indicate that he could have the day as vacation.

XXII

Mr. Gibson did not come to work on July 14 and 15. Mr. Walz made the decision at this point that he should be discharged and determined to suspend him for that purpose. Mr. Gibson had violated the attendance guidelines in effect since March by taking unexcused absences on July 14 and 15. Mr. Gibson was informed of his suspension after he had reported for work on July 16.

XXIII

An investigation was conducted concerning Mr. Gibson's reason for having to leave work on July 13. It was determined that he may not have actually gone to court as he had indicated to Mrs. Morris.

XXIV

A meeting was held on July 21 and Mr. Gibson was given an opportunity to present evidence that would mitigate his actions. The decision had been made prior to the hearing that discharge was appropriate unless information of extenuating circumstances was presented by Mr. Gibson. Prior to the meeting, Mr. Rising consulted with Messrs. Cosner and Lampard, who concurred in this decision. No evidence of extenuating circumstances was presented and Mr. Gibson was informed that he was discharged.

XXV

Cyprus had disciplined other employees for excessive absenteeism. Some of these employees were also discharged. Some employees were placed on similar attendance guidelines prior to Mr. Gibson's discharge.

XXVI

On July 17, after his suspension pending discharge, Mr. Gibson made a complaint to MSHA concerning discipline for drug and alcohol use at Cyprus. He made such complaint initially by telephone and confirmed that complaint in writing the same day.

Neither Mr. Rising nor Mr. Walz nor anyone else in management involved in Mr. Gibson's discharge was aware of such complaint prior to his discharge. This complaint was investigated by MSHA and was found to be without foundation. Cyprus had an existing drug and alcohol policy and no violation of any mandatory standard was found. Cyprus had begun developing a drug-testing program that included testing for cause in 1986. They had an existing program in place in 1987 that included testing applicants for employment. Their drug and alcohol policy prohibited use on the property. If employees were under the influence of drugs or alcohol on duty, they could be discharged.

XXVII

Earlier in 1987, there had been incidents at the mine involving the discovery of a vial of cocaine in a truck and marijuana in a drill. These incidents were investigated but the persons responsible could not be identified. Credible evidence was presented that if the persons responsible for the presence of the drugs were identified under the existing discipline policy, they could have been discharged. Under the testing, which was put into effect after Mr. Gibson's discharge, persons have been discharged.

XXVIII

At the time of the meeting on July 21 concerning his discharge, Mr. Gibson expressed a desire to have his wife accompany him into the meeting. The policy was that only employees could so accompany an employee into such a meeting and his request was refused. At that time, he asked to call MSHA to see if the company's position could be overridden. Mr. Rising dialed the MSHA number for Mr. Gibson and then left the room when he talked to the MSHA personnel.

XXIX

After his discharge, Mr. Gibson sought unemployment compensation. Such compensation was denied because he had been discharged for proper reasons.

After his discharge, pursuant to the usual practice, Mr. Gibson and his wife were asked to terminate their occupation of the company-owned housing that they were renting. Cyprus offered to make available other housing, so long as they could qualify under the company's income requirements. Eventually, Cyprus was compelled to seek to have the Gibsons evicted under the month-to-month rental agreement which contained a 30-day notification provision. The Gibsons were given a number of

extensions of their occupancy of the house. A court order was eventually entered with the Gibsons' agreement that they would vacate the house in March 1988. They complied with the court order.

XXX

On June 12, 1987, while Mr. Gibson was on suspension, a supervisor named Robert Otteson attempted to conduct a tour of the mine for some friends on a day when he was not scheduled to work. It was the belief of the security guard and Mervin Corbitt, a supervisor, that Mr. Otteson was intoxicated. Pursuant to company policy, he was not permitted to go beyond the entrance to the mine property.

XXXI

Mr. Otteson reported the incident to his supervisor, Kent Watson, the next morning. As a result, Mr. Otteson was given, on July 8, a written warning that a repeat of the incident would result in his discharge.

XXXII

Some time after the incident occurred, Mr. Gibson apparently called Chris Crowl, the former Human Resources Manager at Bagdad to inquire as to why Mr. Otteson had not been disciplined. Mr. Crowl inquired concerning the issue with Mr. Rising who told him that the matter had been investigated and was proceeding to discipline.

DISCUSSION

I. ESTABLISHED LAW

It is well established that, in order to make out a prima facie case, a complainant bears the burden of production and proof in establishing that he engaged in protected activity, that adverse action was taken against him, and that the adverse action was motivated, in part, by the protected activity. Secretary of Labor/Paula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (Rev. Comm. October 1980), rev'd on other grounds, 663 F.2d 1211 (3d Cir. 1981); Secretary of Labor/Robinette v. United Castle Coal, 3 FMSHRC 803, 817-18 (Rev. Comm. April 1981). The operator may rebut by showing that no protected activity occurred, that there was no adverse action, or that the adverse action was not motivated in any part by protected activity. The operator may also defend affirmatively by showing that the

adverse action was also motivated by the miner's unprotected activity and that it would have taken the adverse action in any event for the unprotected activity alone. Secretary of Labor/Paula v. Consolidation Coal Co., 2 FMSHRC at 2797-2800; Secretary of Labor/Robinette v. United Castle Coal Co., 3 FMSHRC at 817-818; Bolch v. FMSHRC, 719 F.2d 194, 195-196 (6th Cir. 1983). The ultimate burden of proof never shifts from the miner. See Robinette, 3 FMSHRC at 817; Secretary of Labor/Paula v. Consolidation Coal Co., 2 FMSHRC at 2797-2800; Secretary of Labor/Robinette v. United Castle Coal Co., 3 FMSHRC at 817-818; Bolch v. FMSHRC, 719 F.2d 194, 195-196 (6th Cir. 1983). The ultimate burden of proof never shifts from the miner. See Robinette, 3 FMSHRC at 817; Secretary of Labor/Bush v. Union Carbide, 5 FMSHRC 993, 997, n.8 (Rev. Comm., June 8, 1983); Schultz v. Lizza Industries, Inc., 6 FMSCRC 8, 16 (Rev. Comm., January 9, 1984).

II. CYPRUS'S POSITION

It is Cyprus's position that there was no evidence of protected activity prior to Mr. Gibson's suspension on May 27, 1987, and that Mr. Gibson did not make out a prime facie case concerning this discipline. Further, the raising of disparate treatment by Mr. Gibson at the meeting of May 27 was not, in fact, protected activity but concerned only his treatment in comparison to other employees. It is also Cyprus's position that the complaints concerning Mr. Otteson did not constitute protected activity. While Mr. Gibson did make a complaint concerning discipline for drug and alcohol use to MSHA on July 17, after he was suspended pending discharge, there was no knowledge of this protected activity by management prior to his discharge. Mr. Gibson did call MSHA on the morning of the meeting concerning his discharge but such activity was not protected because it did not involve a safety issue but rather the attendance of his wife at the meeting.

Cyprus contends that even if Mr. Gibson did engage in protected activity prior to his discharge, such activity did not motivate his discharge in any part. Even if it did, Mr. Gibson would have been discharged for unprotected activity alone; his chronic absenteeism had reached a point at which Cyprus decided that discharge was the only reasonable action Cyprus could take since Mr. Gibson had failed to correct his attendance problems.

III. THE MAY SUSPENSION

Mr. Gibson did not engage in any protected activity prior to his suspension on May 27, 1987, for failing to perform his duties. He made no complaints to either MSHA or the persons involved in

his discipline concerning safety-related matters prior to his suspension.

It has been stipulated that Mr. Gibson did not contact MSHA with any complaints about discipline for drug and alcohol use at the mine until July 17, 1987, long after his suspension in May. The question the arises as to whether, prior to his suspension on May 27, he made any safety complaints to the operator which could arguably be construed as protected activity and thus a basis for an argument that protected activity motivated his suspension.

Mr. Gibson conceded that he first raised the issue of discipline of persons who used drugs and alcohol on May 27 at the meeting concerning his suspension. The context of his mentioning of the issue, must, however, be examined. On May 22, Mr. Gibson had been suspended pending investigation for failing to perform his duties. After further investigation and consideration of the issues by Cyprus, a meeting was held on May 27 to discuss this matter with him. Mr. Gibson was given the opportunity to present information in order to explain his notations on company forms and the deficiencies discovered by Messrs. Walz, Berdine, Swinson, Foster, Morgan, and Mrs. Morris. These issues were discussed in the first part of the meeting and then a recess was held. During the recess, Messrs. Walz and Rising discussed the information and arguments presented by Mr. Gibson and determined that a suspension was warranted. They decided on an additional 18 working-day suspension in order to try to bring home the point to Mr. Gibson that this performance needed to be corrected.

The meeting was then reconvened. When Mr. Rising told Mr. Gibson that he was going to be suspended, Mr. Gibson reacted and asked why he was being suspended when other persons who damaged equipment or used drugs or alcohol were not disciplined. It was not until after the suspension was announced that Mr. Gibson raised this issue.

This complaint of disparate treatment was not activity protected under the Act. It was not directed to a safety issue but rather to a fairness issue. The circumstances of the making of the statements clearly indicate that it was not intended to be a safety complaint but rather was related solely to Mr. Gibson's perception of the fairness of the discipline he was receiving. It was raised defensively not out of a concern for safety miners but rather out of reaction to the discipline he had received. Under these circumstances, his statements should not receive the protection of the Act. The Commission has indicated that its function under section 105(c) is not to determine the fairness of a particular action but to provide protection for activity under

the Act. See, e.g., Bradley v. Belva Coal Co., 4 FMSHRC, 982 (Rev. Comm. June 4, 1982).

The question arises as to what constitutes proteced activity. Section 105(c)(1) indicates that protection is offered to a complaint of an alleged danger or safety and health violation. See Secretary of Labor/Gabossi v. Western-Fuels Utah, Inc., 10 FMSHRC 953, 958 (Rev. Comm. August 15, 1988). In this cae, Mr. Gibson's "complaint" was not made for reason of safety. It appears that it was designed only to divert attention from his own poor work performance.

There is no evidence in the record that Mr. Gibson made any other safety-related complaints to either Larry Walz or Charles Rising prior to his supension meeting. The only evidence on the record that could arguably be construed as a complaint is testimony about a dispute Mr. Walz and Mr. Gibson had in March 1986, concerning the installation of a backup alarm. It was clear from the credible evidence that this dispute involved no safety complaint but only a dispute as to how the job was to be performed. This activity, even if it were considered to be protected, is too remote in time from May 1987 to have any bearing on the issues here. See Klimczak v. General Crushed Stone Co., 5 FMSHRC 684, 690 (ALJ Melick, April 6, 1983) (4 months too long to support reference of connection); Frazier v. Morrison-Knudson, Inc., 5 FMSHRC (ALJ Morris, January 19, 1983) (4 months too long to support reference).

The May 27 suspension was not motivated in any part by purportedly protected activity involving Mr. Gibson's complaint of disparate treatment since it was made after he was informed of his additional suspension. Protected activity close in time to adverse action may in some circumstances be considered as showing a discriminatory motive but it can hardly be argued that protected activity, if Mr. Gibson's complaint of disparate treatment was such, after the discipline has been decided upon and announced, in any way motivated the adverse action.

Even if the circumstances of this suspension are examined further, it is clear that it was not motivated in any part by protected activity.

Early in May there had been complaints from members of Ron Foster's crew that Mr. Gibson was not servicing their equipment properly, both from a lubrication standpoint and a fueling standpoint. These complaints were brought to Mr. Foster's supervisor, Junior Morgan, who approached Patsy Morris. Mrs. Morris had pre-previously been involved in servicing of equipment and, upon

inspection of the equipment, she and Mr. Morgan found that it was not being serviced properly. In order to make sure of their conclusions, Mrs. Morris and Vernon Swinson, who was normally in charge of the equipment at the concentrator, reinspected it the next day and determined that the servicing had not been done or was inadequate.

They then brought it to the attention of their supervisors Messrs. Walz and Berdine, who also examined the equipment. There was no doubt in any of their minds that the servicing had not been done. They felt that the lack of servicing was obvious and undisputable. The only question was whether Mr. Gibson had also falsified the company records concerning his activities.

Even after all of the inspections, Mr. Gibson was given an opportunity to explain his actions. He was unable to do so, although Messrs. Rising and Walz came to the conclusion that they could not prove that Mr. Gibson had falsified the company records because the records were too confusing and inconsistent. For that reason, they did not discharge him but decided to give him one last chance to correct his behavior.

The conclusion that the equipment was not serviced properly is confirmed by the testimony of Ray Rubash, who had held the particular position previously and had trained Mr. Gibson, and who was assigned to it after Mr. Gibson was removed from it. When Mr. Rubash resumed the position, he was required to do additional lubrication because it had not ben done for some time. He also had to repair equipment and replace parts because of the failure to properly lubricated the equipment. The preponderance of the evidence clearly establishes that Mr. Gibson had not been performing his duties.

The suspension given to Mr. Gibson was severe, but it must be considered in context. He had and extensive history of discipline and it appears from the record that his failure to perform his duties was deliberate. He could have been discharged, but Messrs. Rising and Walz decided he could have one last chance. By way of comparison, evidence was presented that an employee who had damaged equipment through momentary inattention, was given a suspension almost as long, and other employees who damaged equipment were discharged.

Even the testimony of Mr. Gibson casts doubt on the argument that the May 27 suspension was motivated by protected activity. Mr. Gibson stated that all the discipline that he received was a result of personal animus against him by Larry Walz. For example, he claimed that the May 27 suspension was motivated by the

fact that Mr. Cosner modified the warning issued on April 29 by Mr. Walz. He also said his first confrontation with Mr. Walz occurred when he told Mr. Walz that he did not know what he was doing. He claimed that his assignment to the job at the concentator upset Mr. Walz because he displaced Mr. Rubash, a friend of Mr. Walz.2 If, in fact, these incidents were the basis of a dislike of Mr. Gibson by Mr. Walz, they are not protected activity under the Act. If Mr. Gibson's conjectures are to be believed, Mr. Walz acted against him for personal reasons unrelated to protected activity.

IV. THE JULY DISCHARGE

A. No protected activity prior to July 17

Between his supension on May 27 and his suspension with intent to discharge on July 17, Mr. Gibson did not engage in protected activity. The fact that he did not do so supports the argument that his discharge on July 21, for absenteeism and for his poor work history, was not motivated in any part by protected activity.

After his suspension on May 27, Mr. Gibson appealed it to the Vice President and General Manager, W.J. Lampard. He and his wife met with Messrs Lampard and Rising in early June. At that time, Mr. Gibson did not raise the issue of drug and alcohol use at the mine, rather, he told Mr. Lampard that Mr. Walz was treating him unfairly.

On June 12, there was an incident involving Robert Otteson, a supervisor at the mine, who sought admission to the mine when he was off duty. The guard at the security gate believed that Mr. Otteson was intoxicated and referred his request for admission to Mr. Corbitt, who was on duty that night. After some discussion with Mr. Corbitt, Mr. Otteson left the mine because he had been refused entry consistent with the existing policy at the mine. The next day, Mr. Otteson reported the incident to his supervisor Kent Watson. The incident was investigated and Mr. Otteson was warned that he would be discharged if a similar

incident ever occurred. Credible evidence was presentd that if Mr. Otteson had been on duty, he would have been discharged at the time.

Apparently, Mr. Gibson, as a follow-up to his belief that his suspension was not proper, complained to Chris Crowl, formerly the Human Resources Manager at Bagdad, at the time located in the parent company's office in Englewood, Colorado, about the Otteson incident. It was Mr. Gibson's perception that Mr. Otteson had not been disciplined and Mr. Gibson apparently felt that this was unfair when considered with respect to his own suspension.

Again, this contact with Mr. Crowl does not appear to constitute protected activity. It appears to be a defensive measure by Mr. Gibson to bolster his arguments that his suspension was unfair. As such, it does not represent protected activity.

B. No protected activity motivated the July discharge

Mr. Gibson stipulated at the hearing that he did not contact MSHA until July 17. At that time, he called them and discussed his belief that Cyprus was not dealing appropriately with drug and alcohol use at the mine. He followed up that telephone contact with a letter dated and sent on July 17 concerning this issue. There is no evidence on this record that anyone in management who was involved in the decision to discharge Mr. Gibson, was aware of this telephone contact or of the writing of the letter.

It is well established that an operator must be aware of protected activity to motivate action against an employee. Schulte v. Lizza Industries, Inc., 6 FMSHRC 8, 15 (Rev. Comm. January 9, 1984); Secretary of Labor/Bishop v. Mountin Top Fuel, Inc., 2 FMSHRC 1126, (March 31, 1981); Buford Smith v. R.J.F. Coal Co., Inc., 11 FMSJRC 2050, 2055-6 (October 24, 1989); Luttrell v. Jericaol Mining, Inc., 10 FMSHRC 1328, 1334 (September 30, 1988). There was no such knowledge here and the July 17 letter is found to be no part of any motivation for the discharge.

It should, of course, also be noted that this contact with MSHA occurred after Mr. Gibson had been suspended with the intent to discharge him. He was suspended shortly after the start of the shift on July 16 and this contact came after that.

Mr. Gibson did telephone MSHA on the day of his meeting concerning his discharge. A dispute arose that morning about

whether his wife would be permitted to attend the meeting. When Mr. Gibson was told that he was entitled to have another employee at the meeting but that his wife could not attend, he asked to call MSHA. Mr. Rising dialed the number for him and left the room during the conversation.

It does not appear that this contact was the type of activity intended to be protected by the Act. As far as the evidence indicates, it did not involve a safety complaint, but one of disciplinary procedure. As such, it was not the sort of activity to be protected under section 105(c).

Even if it is assumed, for the sake of argument, that Mr. Gibson engaged in protected activity and that management was aware of it, the evidence at hearing did not indicate that the discipline given to Mr. Gibson was motivated in any part by the protected activity. While it is often difficult to prove discriminatory intent directly, the Commission has discussed the sorts of cirumstantial evidence of discriminatory intent that are appropriate to consider. These include knowledge by the operator of the miner's protected activities, hostility toward the miner because of his protected activity, coincidence in time between the protected activity and the adverse action and disparate treatment of the complaining miner. See Secretary of Labor/Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508 (Rev. Comm. November 1981), rev'd on other grounds, 709 F.2d 86 (D.C. Cir. 1983); Sammons v. Mine Services Co., 6 FMSHRC 1391 (Rev. Comm. June 1984); Sharp v. Big Elk Creek Coal Co., 11 FMSHRC 382, 394 (March 20, 1989). An examination of these factors does not indicate that the discharge was motivated, in any part, by protected activity. There was limited knowledge of his protected activity, no hostility toward the protected activity was shown and there was no disparate treatment of Mr. Gibson.

The only action by Mr. Gibson which arguably can be considered protected is his telephone call on July 21 to MSHA about the attendance of his wife at the meeting concerning his discharge. His letter of July 17 was not then known to management

and could not have played a role in his discharge. His complaints concerning Mr. Otteson were simply considered to be concerned about fairness of his suspension.3

The fact that a miner has a conversation with MSHA personnel does not necessarily mean such conversation is protected activity. See Hacker v. Black Streak Mining Co., 11 FMSHRC 2240, 2265 (ALJ Koutras November 9, 1989). Even protected activity close to time to the adverse action may not be sufficient to show the connection between the two. Grafton v. National Gypsum, 12 FMSHRC 63, 66-67 (ALJ Weisberger, January 12, 1990) (one day).

In this case, the decision to discharge Mr. Gibson had, in effect, been made prior to the meeting on July 21. Before the meeting, Mr. Rising had consulted with both Messrs. Cosner and Lampard concerning a discharge and they had concurred in the decision. The purpose of the meeting was to give Mr. Gibson one last chance to explain his absences on July 14 and 15, which he failed to do at the meeting.

Under such circumstances, no reliance on the closeness in time is proper. See, e.g., Lester v. Garden Creek Pocahontas Co., 11 FMSHRC 1763 (decision made to discontinue position made before safety complaints were made); Luttrell v. Jericoal Mining, Inc., 10 FMSHRC 1320, 1331 (September 30, 1988).

Essentially, Mr. Gibson is relying here on conjecture to show a nexus between any protected activity and his discharge. This does not provide sufficient basis for showing that the protected activity is motivated in any part his discharge. See Buelke v. Thunder Basin Coal Co., 11 FMSHRC 238, 244 February 16, 1989); Buford Smith v. R.J.F Coal Co., Inc., 11 FMSHRC 2050,

2055, n.2 (October 24, 1989). There was not evidence that either the telephone call to MSHA or any other matter related to complaints about drug and alcohol abuse was discussed at the July 21 meeting or was a factor in the decision to discharge Mr. Gibson.

Also, it was undisputed that even if some of the incidents that Mr. Gibson would rely upon are considered protected activity, there was a lack of knowledge of those incidents by all the parties involved in his discharge. Mrs. Morris did not know of the discussions at the May 27 meeting, was not aware of Mr. Gibson's complaints about Mr. Otteson, and did not know of the July 17, letter. Yet she recommended Mr. Gibson be discharged.

Mr. Walz did not know about the July 17 letter or about Mr. Gibson's complaints about Mr. Otteson, yet he believed discharge was proper. Mr. Rising did not know of the July 17 letter, yet he believed that discharge was appropriate.

I am satisfied from the record, that Mr. Gibson's discharge was not related to any arguably protected activity. It is undisputed that Mr. Gibson was absent on the two days in question. It is also undisputed that the attendance policy that he was subject to indicated that in the event of a second unexcused absence, he would be subject to discharge. When he called Mrs. Morris to say that he would not be coming to work on July 14 he admitted that he knew the consequences of his actions.

In September 1986, prior to any arguably protected activity by Mr. Gibson, he was placed on attendance guidelines that required him to maintain an unblemished attendance record and it was clearly warranted. He had a history of discipline for attendance problems, a history that included a ten-day suspension in lieu of discharge. In 1986 his attendance was the worst of any employee in the maintenance department.

When Mr. Gibson showed some improvements in his attendance, the guidelines were reissued and relaxed to a degree. Unfortunately, Mr. Gibson almost immediately violated those guidelines and was absent from work on April 24. Under the guidelines he was to receive a warning and that is what Mr. Walz gave him. His appeal to Mr. Cosner raised the possibility that this warning could be removed from his file, but reemphasized that the guidelines remained in effect.

On July 13, his supervisor permitted him to take partial day off to attend a court hearing that he may well not have attended. On July 14, after the start of the shift, Mr. Gibson called

Mrs. Morris and told, not asked her, that he was taking the day off. Their conversation made it clear that he was aware of the consequences of his action. Later that day he called Mrs. Morris at home to try to get a vacation day for the next day. This day of vacation was neither promised to him by Mrs. Morris, nor ultimately granted.

He thus had two more unexcused absences from work. One was sufficient basis for his discharge. He was unable to justify either absence at the time of his meeting and his employment was, by general consensus, terminated. This sort of action by an employee can properly be the basis of a discharge. See, e.g., Secretary of Labor/Brock v. Blue Circle, Inc., 11 FMSHRC 2181 (ALJ Koutras, November 7, 1989) (abuse of breaks and unsatisfactory job performance); Sharp v. Elk Creek Coal Co., 11 FMSHRC 382 (ALJ Koutras, March 20, 1989) (discharge for missing work); Thompson v. Island Creek Coal Co., 11 FMSHRC 17 (ALJ Maurer, September 13, 1989) (employee discharged for failing to report to work on one day).

Although Mr. Gibson claimed he was singled out by Mr. Walz, an examination of the record of other employees who were placed on attendance control programs shows no such disparate treatment. On April 21, 1986, Clyde Burke was placed on attendance guidelines requiring him to have perfect attendance for 90 days. On June 2, 1987, he was once again placed on such guidelines. He arrived one hour late to work on June 30, 1987, and was suspended for five days, a greater penalty than Mr. Gibson received for the first violation of his guidelines. On November 21, 1987, Mr. Burke was again one hour late to work and his employment was terminated.

On March 18, 1987, Clifford Minter was placed on such guidelines. He missed a portion of one day to go to court and all of the next day. He was suspended and was told that any further absences would result in his termination. Duane Dahlin was placed on similar guidelines also, in that he was given a final warning that if he had further absences, his employment would be terminated. It is clear that Mr. Gibson was not singled out. In fact, it appears that he was treated somewhat more leniently than his co-workers.

Mr. Gibson attempted to make an issue of the fact that Mr. Walz, a superintendent, was directly involved in his discipline. The evidence was that Mr. Walz's involvement was not unusual. For example, the memorandum concerning the termination of Mr. Burke's employment was signed by a superintendent, as were his attendance guidelines. The memorandum terminating Robert

Kesterson's employment for three absences was signed only by Mr. Walz. Mr. Neely's letter of discipline was signed by his superintendent.

The procedure was that the Vice President and General Manager must concur in a decision to discharge an employee, although he need not sign the letter of termination. In this case, both Mr. Lampard and Mr. Cosner, the Mine Manager, were consulted and concurred on the decision.

It must also be recognized that in May, when he was suspended, Mr. Gibson was told that he should decide whether he wanted to continue employment at Bagdad. He was instructed at that time: "If you fail to make a substantial improvement in your overall performance, you will be terminated." Mr. Rising was trying, by means of the lengthy suspension, to finally communicate to Mr. Gibson that he had to improve or he would be terminated. Mr. Gibson's response was to take almost three days off soon after he returned from his suspension. He took those days off knowing that Mr. Walz would act against him.

Violation of such a "last chance" policy such as Mr. Gibson was under is not a violation of section 105(c). Mullins v. Clinchfield Coal Co., 11 FMSHRC 1948 (ALJ Koutras, October 3, 1989). Application of the absentee policy was not directed solely at Mr. Gibson and no disparate treatment was shown. See Sharp v. Big Elk Coal Co., 11 FMSHRC 382 (ALJ Koutras, March 1989). Further the policy was applied to Mr. Gibson long before he even engaged in any arguably protected activity.

In evaluating the motivation in discharging Mr. Gibson, some discussion is appropriate of Mr. Gibson's history of excuses concerning his absences. There was undisputed testimony from persons other that Mr. Walz that Mr. Gibson was in the habit of giving suspect excuses, usually after the fact, for his absences.

When Mr. Gibson's work record at Cyprus is considered as a whole, it is clear that, as an employee, he had been given a number of chances to demonstrate that his employment should be continued. His discharge on July 21, 1987, was really the culmination of a career at Bagdad of absenteeism and unreliability. The evidence shows that his discharge was not motivated in any part by protected activity, and it also shows that, even if protected activity played a part in his discharge, Mr. Gibson would have been discharged in any event for his unprotected activity in absenting himself from work.

In Bradley v. Belva Coal Company, 4 FMSHRC 982, 993 (June 1982), the Commission stated as follows:

> As we emphasized in Pasula, and recently reemphasized 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 out 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.

Cyprus has satisfactorily shown with credible evidence a business justification for Mr. Gibson's May 27th suspension and his July 21st discharge.

CONCLUSION OF LAW

1. Cyprus did not violate Section 105(c) of the Federal Mine Safety and Health Act of 1977 ("the Act"), 30 U.S.C. 815(c).

2. Any protected activity that Mr. Gibson engaged in did not in any part motivated his suspension on May 27 or his discharge on July 21.

3. Even if the suspension and discharge of Mr. Gibson were motivated in any part by the fact that he engaged in protected activity, he would have been suspended and discharged for unprotected activity alone.

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. Gibson 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. Accordingly, his claims for relief ARE DENIED and the Complaint and this proceeding and are DISMISSED.

AUGUST F. CETTI
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 the 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 or miners or applicant for employment on behalf of himself or of any statutory right afforded by this Act.

2. The evidence indicates that Mr. Gibson's belief concerning personal animus was unfounded. Credible evidence was presented that Mr. Rubash gave up the job at the concentrator in an effort to upgrade his pay scale.

3. Mr. Gibson offered certain evidence that Cyprus did not have a policy on drug and alcohol abuse. The credible testimony was that a policy existed and was enforced and that a new policy had been in the process of development for a considerable period before Mr. Gibson even claimed to make any complaints about the lack of such a policy. Moreover, the tesimony about specific incidents of discovery of drugs on the property is irrelevant because there is no credible evidence that Mr. Gibson ever discussed these incidents with Messrs. Walz, Rising, Morris, Cosner, or Lampard.