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JOSEPH WIETHOLTER V. QUALITY READY MIX  
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)  
Office of Administrative Law Judges

JOSEPH WIETHOLTER,  
COMPLAINANT

DISCRIMINATION PROCEEDING

Docket No. LAKE 90-17-DM

v.

MD 89-69

QUALITY READY MIX, INC.,  
RESPONDENT

Quality Pit & Mill

DECISION

Appearances: Joseph Wietholter, Celina, Ohio, pro se,  
Robert J. Brown, Esq., Thompson, Hine and  
Flory, Dayton, Ohio for Respondent.

Before: Judge Melick

This case is before me upon the Complaint by Joseph Wietholter 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 discharge by Quality Ready Mix, Inc., (Ready Mix) in violation of section 105(c)(1) of the Act.1 More particularly the Complainant alleges that he was unlawfully discharged on July 10, 1989, for the following reasons:

I was fired on July 10, 1989, as the result of an accident involving a Euclid haul truck that had no brakes. I had been informed by another employee at the mine that the truck had no brakes and that the trucks [sic] transmission was to be used to control it. While operating the truck on July 10, 1989, the engine stalled on a ramp and the truck started rolling. The trucks [sic] starter was inoperative and could not be started. From within the trucks

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[sic] cab I jumped from the truck and the truck came to rest at the bottom of the steep ditch. I sustained [sic] injuries [sic] to my neck and I'm under medical care. A previous incident also contributed to my firing. On July 8, 1989 I was instructed to operate a dragline. After observing water bleeding from the ground where I had been instructed to move the dragline [sic] to, I protested to Robert Hirschfeld [sic], supervisor, that the ground was unstable. He replied that it was stable ground, and ordered [sic] me to operate the dragline from that site. After moving the dragline, the ground beneath it failed and the crane [sic] fell [sic] forward. (Complaint of Joseph Wietholter filed July 18, 1989 with the Federal Mine Safety and Health Administration).

Joseph Wietholter testified at hearing that on July 8, 1989, while he was operating the dragline at the Ready Mix mine, Superintendent Hirschfeld directed him to pull the dragline into a waterlogged area which Wietholter considered to be unsafe. According to Wietholter, Hirschfeld directed him to either get into the dragline and follow instructions or leave. As he proceeded to move the dragline into the area it leaned forward and sunk approximately 3-feet on one side. Wietholter later met Hirschfeld on the job site and Hirschfeld "started yelling, screaming and threw his hat up in the air". Wietholter acknowledges that he was not disciplined for the incident and, indeed, following the meeting did not feel that Hirschfeld blamed him for the dragline sinking.

On July 10, 1989, Wietholter was operating the Euclid truck hauling gravel. According to Wietholter the union shop steward, Mark Marshall, showed him how to drive it and warned him that if it stalled to jump out. Wietholter observed that the truck had no seat belts, no windshield and no brakes. He did not

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complain however about these alleged safety defects nor did he refuse to drive the truck. Later that day the truck stalled on a hill and he could not restart it. Apparently Wietholter could not stop it without power and, as the truck began to roll he jumped off. The truck went out of control and into a ditch. When Hirschfield arrived at the scene he refused to hear Wietholter's explanation and told him he was fired. It was then, upon the shop steward's advice, that Wietholter called the Federal Mine Safety and Health Administration and reported what he considered to be a number of safety violations at the mine site and filed his complaint under section 105(c) of the Act.

Robert Hirschfield, owner and President of Ready Mix, testified that he hired Wietholter on June 6th or 7th and that Wietholter worked only about a month before he fired him. He purportedly fired Wietholter because of Wietholter's inability to operate the dragline. Hirschfield testified that Wietholter destroyed 3-lift and 2-pull cables on the dragline, damaged a fuel tank, and proved that he was not capable of operating the machine. According to Hirschfield he gave general instructions to Wietholter on July 8, 1989, to remove overburden in an area 150 feet to 200 feet long and about 50 feet wide. At about 12:00 or 1:00 that afternoon he observed that Wietholter had removed an area 70 feet long by 50 feet wide and had moved the machine into an area where the machine was not level. Hirschfield maintains that he then directed Wietholter to stop working that area even though Wietholter was willing to continue operating the dragline in that position. Hirschfield denied that Wietholter had previously complained about the ground conditions. Hirschfield was not aware of any safety complaints by Wietholter either to MSHA or to himself but acknowledged that Wietholter did make routine requests for repairs on the dragline.

According to Hirschfield, about mid-day on July 10 he asked Wietholter to haul sand in a truck. Wietholter performed this for about 3 1/2 hours before the accident. Hirschfield did not see the accident but in light of all of the problems he felt Wietholter was "not the man for the job" and fired him.

In order to establish a prima facie violation of section 105(c)(1) of the Act Mr. Wietholter must prove by a preponderance of the evidence that he engaged in an activity protected by that section and that his discharge was motivated in any part by that protected activity. Secretary

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on behalf of 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); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981).

In this regard, in reference to the July 10, 1989, accident on the Euclid haul truck which Wietholter maintains was the precipitating incident leading to his discharge, there is no evidence of any protected activity. Before the accident Weitholter admittedly never complained of any safety defect on the truck nor did he refuse to work on it.

With respect to the dragline sinking incident on July 8, 1989, Wietholter maintains that he forewarned superintendent Hirschfield about operating the dragline in the waterlogged area before it sank. While this warning might be construed as a safety complaint Wietholter not only did not refuse to operate the dragline in the waterlogged area but indeed went ahead and moved the dragline into that area. It is not reasonable to infer therefore that any anti-safety animus would have resulted from this activity. Under the circumstances, Wietholter has failed to sustain his burden of proving that Hirschfield retaliated against him for his alleged prior warnings about operating the dragline in the waterlogged area.

Under the circumstances the Complainant herein has failed to sustain his burden of proving that he was discharged in violation of Section 105(c)(1) of the Act and accordingly his Complaint herein must be dismissed.

ORDER

Discrimination case Docket No. LAKE 90-17-DM is hereby 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.