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CHARLES T. SMITH V. KEM COAL
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

CHARLES T. SMITH,
COMPLAINANT

DISCRIMINATION PROCEEDING

v.

Docket No. KENT 90-30-D
MSHA Case No. BARB CD 89-27

KEM COAL COMPANY,
RESPONDENT

No. 25 Prep Plant

DECISION

Appearances: Michael S. Endicott, Esq., Ed Spencer's Law
Offices, Paintsville, Kentucky, for the
Complainant;
Timothy Joe Walker, Esq., Reese, Lang & Breeding,
P.S.C., London, Kentucky, for the Respondent.

Before: Judge Fauver

Complainant brought this action under 105(c) of the
Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et
seq., alleging a discriminatory discharge.

Having considered the hearing evidence and the record as a
whole, I find that a preponderance of the substantial, reliable,
and probative evidence establishes the following Findings of Fact
and further findings in the Discussion below:

FINDINGS OF FACT

1. Respondent operates a coal washing facility, known as No.
25 Preparation Plant, where it processes coal for sale or use in
or substantially affecting interstate commerce.

2. Complainant was employed at the plant as a bulldozer
operator from October, 1988, until July 17, 1989, when he was
discharged.

3. His principal duty was to push piles of coal into feeders
at the bottom of tall stacking tubes. Coal was carried by
conveyor belts into the stackers, 20 to 25 feet high, each having
windows at various levels. The coal would fall through the
stacker to the lowest window and from there out onto a cone shape
pile that would form on the ground. Feeders at the base of the
stacker vibrated the material through a hopper and onto a
conveyor belt leading to the washing plant.

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6. Ordinarily, a cone of coal would form at the base of a stacker and above the feeder, so that the system would mechanically feed the coal through the hopper onto the conveyor belt to the washer. The bulldozer operator was there to push coal into the feeders as needed, e.g., when there was spillage or when the cone of coal on the ground had not accumulated enough for the system to feed itself.

7. At times the lower windows or the chutes inside the stacker would become clogged by wet coal or mud. Instead of falling from the lower windows and directly onto the coal pile, the coal would then fall from the higher windows, creating a potentially dangerous situation for the bulldozer operator. Because the bulldozer operated at irregular and steep angles, falling coal could strike its windows, headlights, and other equipment. Depending upon the angle of exposure of the bulldozer, the height and quantity of falling coal, the bulldozer operator could be severely injured by falling coal, e.g., if coal broke a window and either entered the cab or sent flying glass into the cab.

8. When a stacker became clogged, it was necessary to unclog the material. This was accomplished by shooting high pressure water into the stacker from the top, or if this did not work, by suspending a worker down into the stacker on ropes, to dig out the obstruction manually.

9. In mid-June, 1989, Complainant was operating a bulldozer, when the stacker became clogged. Coal was falling from the top windows striking the bulldozer, beating against its windows. Complainant was concerned for his safety, and used his CB to call the control room operator in the plant. He reached Tim Miller and told him about the safety problem and asked him to ask Complainant's foreman, Henry Halcomb, what he should do. Miller did so, and told Complainant that Halcomb said, "Go ahead and run it." Tr. 14. Then falling coal broke a window next to Complainant. He became more frightened and told Miller, "Tell him [Halcomb] that this dozer is getting the windows knocked out of it and we don't have enough coal to push." Miller spoke to Halcomb again, and told Complainant that Halcomb said, "Go ahead and run it." Complainant continued to run the bulldozer. Then its lights went out, because falling coal broke the lighting wires. He called Miller again, to tell him the wires were broken, and asked him what Halcomb wanted him to do. Miller told Complainant that Halcomb said if he did not want to run it, park it, go home, and he would have a mechanic fix it. This would have meant a loss of pay. Complainant pulled the bulldozer out of the coal, fixed the lights, drove back, and continued pushing coal. When asked at the hearing why he repaired the lights and resumed pushing coal, Complainant testified, "Henry [Halcomb] was in a hurry to push coal. He wanted me pushing coal." Tr. 14.

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10. Later in June, 1989, Complainant complained to the foreman, Halcomb, face to face, stating that he was putting his life in danger by having him push coal when coal was striking the bulldozer. The foreman replied that Complainant's job was to push coal.

11. During the time that Halcomb was Complainant's foreman on the second shift, about 2 months, Halcomb harassed Complainant in many ways. He made him the butt of joking and teasing over a married woman who worked in a nearby grocery store, he ordered him to make coffee, which was not his job, he denied him a lunch break a number of times, and once when Complainant was accompanied in his truck by a boy who got fishing bait for him, Halcomb, mistaking the boy for a girl, asked Complainant who was the girl in his truck, implying he was seeing a girlfriend although he was married. Complainant complained to the mine superintendent about Halcomb's harassment.

12. On July 14, 1989, the incline belt broke, shutting down plant operations. The plant superintendent supervised the job of installing a new belt section. Everyone on the crew was allowed a lunch break except Complainant. The superintendent told Complainant that Halcomb would have someone relieve him for lunch, but when Complainant called Halcomb, about 1-1/2 hours before the end of the shift, for relief so he could have lunch, Halcomb told him, "It's too close to quitting time now, you don't get to eat." Tr. 184-185.

13. The July 14 incident -- the latest of many -- took Complainant to a turning point in his relationship with his foreman. The next day, Saturday, June 15, Complainant arrived early and went to the superintendent's office, hoping to lay out his complaints about Halcomb's mistreatment of him, including endangering him in the operation of the bulldozer, harassing him, embarrassing him, and discriminatorily denying him lunch breaks. The superintendent was not there.

14. Complainant then went to the training room, where the employees usually gathered before beginning their workshift. This was shortly before 3:00 p.m., the starting time of Complainant's shift. Complainant met Halcomb there and told him that his harassing of him would have to stop, and that he was going to see the superintendent about Halcomb's mistreatment of him. He told him about being denied a lunch break the night before. Halcomb said the superintendent had supervised the crew that night, and any complaint about lunch should be made to the

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superintendent, not Halcomb. After the crew members left the room, Complainant told Halcomb: ". . . [t]hat this putting me in a unsafe condition was going to stop, and he said it wasn't unsafe. That's when I told him that I was going to have . . . to let the Mine Safety and Health Administration find out what he was doing." Tr. 35. Halcomb told him not to threaten him. Complainant told Halcomb about the coal striking his dozer and that Halcomb had told him to keep pushing coal. Halcomb said that was "hearsay," and he had not said that. Complainant said, "What do you mean you didn't say that?" and added, "I told that control room operator what was going on and he told you, then he come back and told me what you said." Halcomb repeated, "That's hearsay." Complainant said, "That can't be hearsay, it's his job." Halcomb said, "No, it didn't happen that way," and Complainant called him a "lying son of bitch." Tr. 24. Complainant immediately apologized: ". . . [J]ust when the words left my mouth, I said, 'I apologize,' I said, 'I shouldn't have said that.' He said, 'It's already been said now'" Tr. 24.

Halcomb then told Complainant, "You can go to the house" (Tr. 27), meaning that he was suspended without pay, and that he would have to see the superintendent the following Monday.

15. Halcomb then contacted the plant superintendent, Roger Cox, concerning the incident.

16. Roger Cox is an ordained minister who held two positions, i.e., mine superintendent and pastor of a local church.

17. Halcomb was aware of, or could reasonably expect, the superintendent/minister's sensitivity to profane language and his philosophy of supporting his supervisors. Halcomb shaped his factual account to Cox concerning the argument with Complainant, to injure Complainant in Cox's eyes. The account that Halcomb gave Cox was that (A) Complainant cursed him in front of the crew, and (B) Complainant called Halcomb a "God dam son of a bitching liar." Halcomb's account was inaccurate as to points (A) and (B) in that: he and Complainant were alone when Complainant swore at him and in that Complainant called Halcomb "a lying son of bitch," not "a God dam son of a bitching liar." Halcomb omitted the fact that Complainant had immediately apologized to Halcomb. Halcomb told Cox that, in the argument Complainant complained about losing a dinner break on Friday, and complained about danger in being required by Halcomb to run the bulldozer under falling coal. Halcomb did not tell Cox that Complainant had said he was going to complain to MSHA concerning his safety complaints about Halcomb.

18. On Monday morning, July 17, 1989, Complainant saw Cox, who "asked him what the problem was and why the incident took place" (Tr. 46). Cox testified that Complainant told him that Halcomb was endangering his life by forcing him to push coal

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under falling coal, that he was harassing him, denying him lunch breaks, and that Complainant "couldn't take it anymore." Tr. 45-46. Cox asked Complainant whether he had sworn at Halcomb and Complainant said he had. Cox fired him at that meeting.

19. To Cox, cursing a foreman in front of his crew was a dischargeable offense. He testified that, if Halcomb and Complainant had been alone, "just between him and Henry, it could have probably been resolved," that is, without discharging Complainant. Tr. 65.

20. Cox did not question any of the crew members about the incident before he fired Complainant. He did not know that Complainant and Halcomb were alone when Complainant swore at him.

21. Cox had known Complainant for 8 or 9 years, had hired him in another plant where Cox worked, and hired him to work for Respondent. He regarded him as a good employee, and had no reason to discipline him before the incident on July 15, 1989.

DISCUSSION WITH FURTHER FINDINGS

Section 105(c) of the Act² was enacted to ensure that miners will play an active role in the enforcement of the Act by protecting them against discrimination for exercising any of their rights under the Act. A key protection for this purpose is the prevention of retaliation against a miner who brings to an

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operator's attention or the attention of MSHA hazardous conditions in the workplace.³

Generally, in order to establish a prima facie case of discrimination under 105(c) of the Mine Act, a miner must prove that (1) he or she engaged in protected activity and (2) the adverse action complained of was motivated in any part by that activity. Consolidation Coal Company, 2 FMSHRC 2768 (1980), rev'd on other grounds sub nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Hecla-Day Mines Corporation, 6 FMSHRC 1842 (1984); Phelps Dodge Corp., 3 FMSHRC 2508, 2510-2511 (1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no way motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it may nevertheless affirmatively defend by proving that it was also motivated by the miner's unprotected activities and would have taken the adverse action on those grounds alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Company, supra. The ultimate burden of persuasion does not shift from the complainant. United Castle Coal Company, supra. See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983); and NLRB v. Transportation Management Corporation, 462 U.S. 393 (1983) (where the Supreme Court approved the NLRB's virtually identical analysis for discrimination cases arising under the National Labor Relations Act).

Applying these principles, I find that Respondent violated 105(c) of the Act by discriminatory adverse action, i.e., suspending Complainant without pay on July 15, 1989, and discharging him on July 17, 1989.

Complainant's safety complaints to his foreman, about being required to operate a bulldozer under falling coal, were protected activities. These included his safety complaints through the control room operator to his foreman in mid-June, 1989, his face-to-face complaint to his foreman after that, in June, 1989, and, on July 15, 1989, his reiteration of these complaints to his foreman and his statement that he would complain to MSHA about the foreman's endangering him by having him run the bulldozer under falling coal.

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The foreman's suspension of Complainant without pay on July 15, 1989, was adverse action by management and led to further adverse action. I find that the foreman was motivated in part to retaliate against Complainant because of his safety complaints and his statement that he intended to complain to MSHA about his safety complaints against the foreman. The foreman's discriminatory conduct against Complainant included:

- (1) suspending him without pay; and
- (2) giving a distorted factual account of the incident to the mine superintendent with the intention or expectation of influencing the superintendent to discharge Complainant.

Halcomb's distorted version to the superintendent was that Complainant had called Halcomb a "God damn son of a bitching liar" in front of his crew. Complainant did not use a religious epithet, or the language attributed by Halcomb, and he swore at Halcomb (calling him "a lying son of a bitch") when they were alone, and immediately apologized. Halcomb's account to the superintendent omitted the fact that Complainant immediately apologized to Halcomb and the fact that Complainant said he would report Halcomb's unsafe practices to MSHA.

Halcomb knew, or could reasonably expect, that the superintendent, who is a practicing pastor, would be offended by the religious epithet he substituted for Complainant's actual language, and that the superintendent would consider cursing a foreman in front of his crew a dischargeable offense.

The impact of the foreman's distorted account to the mine superintendent is clear from the superintendent's testimony:

- (1) The superintendent fired Complainant "for insubordination and for cussing Mr. Halcomb out" (Tr. 63).
- (2) The superintendent believed that Complainant "called Henry these names in front of Henry's people he had to manage, and . . . it placed him in a very bad position" (Tr. 63); "I think, you know, you can't get any lower as far as wording is concerned and the names he called him. It was just very degrading to Henry as a foreman, or as a man, and I don't think it left me any choice" (Tr. 44).
- (3) Had the superintendent known that Complainant swore at Mr. Halcomb when they were alone -- "just between him and Henry, it could have probably been

resolved," that is, without discharging Complainant (Tr. 65).

(4) The superintendent did not know that Complainant had immediately apologized to Mr. Halcomb.

The fact that the superintendent was deceived by the foreman does not alter the fact that management, through its foreman, took discriminatory action against Complainant that resulted in his discharge.

I therefore hold that Respondent violated 105(c)(1) of the Act by suspending and discharging Complainant.

CONCLUSIONS OF LAW

1. The judge has jurisdiction over this proceeding.
2. Respondent violated 105(c)(1) of the Act by suspending Complainant without pay on July 15, 1989, and by discharging him on July 17, 1989.
3. Complainant is entitled to reinstatement with back pay, interest, and his litigation costs, including a reasonable attorney fee.

ORDER

WHEREFORE IT IS ORDERED that:

1. Respondent shall, within 30 days of this decision, reinstate Complainant in its employment, at the same position, pay, assignment, and with all other conditions and benefits of employment that he would have received had he not been suspended on July 15, 1989, and discharged on July 17, 1989, with no break in service concerning any employment benefit or purpose.
2. Within 15 days of this decision, counsel for the parties shall confer in an effort to stipulate the amount of Complainant's back pay, interest, and litigation costs, including a reasonable attorney fee. Such stipulation shall not prejudice Respondent's right to seek review of this decision. If the parties agree on the amount of monetary relief, counsel for Complainant shall file a stipulated proposed order for monetary relief within 30 days of this decision. If they do not agree on such matters, counsel for the Complainant shall file a proposed order of monetary relief within 30 days of this decision, and Respondent shall have 10 days to reply to it. If appropriate, a further hearing shall be held on issues of fact concerning monetary relief.

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3. This decision shall not be a final disposition of this proceeding until a supplemental decision is entered on monetary relief.

William Fauver
Administrative Law Judge

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FOOTNOTES START HERE

1. A bulldozer was needed whenever the stackers were in operation. Complainant could not take a lunch break unless Halcomb sent a bulldozer operator to relieve him.

2. Section 105(c)(1) provides:

"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 miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding 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."

3. S. Rep. No. 95-181, 95th Cong., 1st Sess., at 35-36 (1977), U.S. Code Cong. & Admin. News 1977, pp. 3401, 3435-3436, reprinted as Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess. Legislative History of the Federal Mine Safety and Health Act of 1977 (1978).