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

RICHARD R. MAYNES,
COMPLAINANT

v.

PHELPS DODGE CORPORATION,
RESPONDENT

DISCRIMINATION PROCEEDING

Docket No. CENT 89-132-DM

MD 89-35

DECISION

Appearances: Michael J. Keenan, Esq., Ward, Keenan & Barrett, Phoenix, Arizona, for Complainant; Michael D. Moberly, Esq., Ryley, Carlock & Applewhite, Phoenix, Arizona, for Respondent.

Before: Judge Lasher

This proceeding arises under Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., (1982) (herein "the Act"). Complainant's initial complaint with the Labor Department's Mine Safety and Health Administration (MSHA) was dismissed. Both parties were well represented at the hearing.1

CONTENTIONS OF THE PARTIES

Complainant contends that when he became unit chairman for the Steelworkers Union in 1988, he became involved in efforts to resolve a dispute over certain protective equipment at the Ivanhoe concentrator and that, because of this and his engaging in various safety-related issues as well as non-safety related issues which he engaged in as a union representative, he was retaliated against by Respondent. (I-T. 22-23). Specifically, Complainant alleges that the disciplinary action (discharge) taken by Respondent against him was due to his pursuit of an MSHA complaint over safety equipment, various safety complaints he lodged in his capacity as union representative, and his pursuit of safety-related grievances. (I-T. 24).

Respondent contends that it is engaged in a dangerous mining operation and has concern for the safety of its employees and that in furtherance thereof it has implemented a rule that an employee may be discharged for reporting to work under the influence of alcohol. Respondent points out that it has implemented a specific drug and alcohol policy which includes testing of employees who are suspected of being under the influence. Specifically, Respondent contends that when Complainant Maynes arrived at work on November 23, 1988, his supervisor Israel T. Romero suspected him to be under the influence because of his actions, his characteristics, his appearance, and the fact that he was chewing a large wad of chewing gum. According to Respondent, Mr. Romero asked a fellow supervisor Monty Wilson to confirm his conclusion and Mr. Wilson stepped close to the Complainant and smelled alcohol on the Complainant's breath. After Mr. Wilson reported this to Mr. Romero, Romero contacted his supervisor who shortly thereafter questioned Mr. Maynes and also observed unusual behavior and smelled alcohol.

Respondent contends (1) Mr. Maynes was asked to undergo a drug and alcohol test at this point, in accordance with its policy; (2) Mr. Maynes, after initially agreeing to take the test, refused to take the test; and (3) Maynes was thereafter discharged on two independent grounds, first for refusal to submit to the drug and alcohol test, and secondly for reporting to work under the influence. (I-T. 25-31; II-T. 223; III-T. 13; Ex. R-6).

FINDINGS

Respondent's mine is located at Santa Rita, New Mexico, where it operates an open pit operation together with a concentrator and a smelter (I-T. 33) with a total payroll of 1600 employees. In November 1988, 125 employees were employed at the concentrator where Maynes primarily worked. (II-T. 98, 104, 166). Respondent has a collective bargaining agreement with the Steelworker's Union, as well as with other unions. (I-T. 34).

Complainant, a 16-year employee of Respondent and Steelworkers member, was a concentrator maintenance mechanic since approximately 1983. (I-T. 114, 115, 117; II-T. 98). Complainant, who worked around "moving parts" and electricity (I-T. 116), described his work functions this way:

> Besides compressors, I have worked on mobile equipment, operating mobile equipment, preventive maintenance, lubrication, which I would--I would

> get oil samples. I perform--change oils on the bearing units in the pump, bearing units in various conveyors, working on conveyors and feed pumps, water pumps. (I-T. 116).

Mr. Maynes conceded at the hearing that his job had the potential to be dangerous. (II-T. 73, 74).2

Complainant engaged in various mine safety (protected) activities prior to his discharge:

1. In early 1988, he assisted Manuel T. Serna, a Steelworkers' Safety Committeeman and MSHA designated representative, to obtain the signatures of other employees in the mechanical department on a petition initiated by the Steelworkers and filed with MSHA regarding Respondent's alleged failure to provide safety equipment (protective clothing). (I-T. 34, 37, 39-42, 46, 120-121).3

2. One of Mr. Mayne's union positions (which he assumed on August 24, 1988) was that of unit chairman. (I-T. 122). Samuel Silva, who like Maynes was a maintenance mechanic, held at different times the union positions of shop steward and unit chairman. Mr. Silva described the duties of unit chairman as follows:

> A unit chairman is the person responsible for all of the stuff that goes on within the union. That means appointing safety reps, job evaluation, shop stewards, grievance committees, setting up grievance committees, setting up safety meetings,

> educating people on safety, just over all, you know, the people that are there, that work for him. (I-T. 55).

3. In September 1988, Complainant, as Unit Chairman, participated in processing grievances (Exs. C-8, C-9,; I-T. 57) involving safety matters, which activity was known to Respondent's management personnel. At one of the meetings held with company management attended by Tony Altringham, General Superintendent of the Ivanhoe concentrator (I-T. 41, 64), Mr. Maynes mentioned that he had contacted MSHA with respect to the matter. (I-T. 60-63).

Respondent concedes that Complainant participated in making safety complaints (Respondent's Brief, p. 26). The record is clear, and I infer from the public nature of Mr. Maynes' activities, that Respondent was aware that Maynes held a position with the Steelworkers (II-T. 109), that he engaged in various mine safety activities and voiced safety concerns. (I-T. 66-69, 120, 124, 126; II-T. 4, 7-10, 15-18, 20, 24, 40, 147).

On November 23, 1988, Mr. Maynes' shift was to commence at 7:30 a.m. (II-T. 117). His immediate supervisor was Israel T. Romero, maintenance supervisor at the Chino concentrator. (II-T. 92, 98, 105, 165). Romero customarily met with his crew in the lunchroom shortly before 7:30 a.m. each day to give them their assignments. At this time, Sam Bencomo, a pipefitter in the maintenance department, told Romero that Maynes wanted him (Romero) to know that he (Maynes) was going to be a few minutes late. Maynes was not in the lunchroom when Romero gave out the work assignments. Romero then waited a few minutes in his office and started to leave when he observed Maynes coming toward him. Maynes came up to Romero and tried to stand next to him. (II-T. 118-119, 166). Maynes told Romero at about 7:40 a.m. (II-T. 124) that he was late because he had forgotten his keys and then said that, if it was okay with Romero, he wanted to leave early that afternoon to go check his children out of school and get them hunting licenses. (I-T. 119; II-T. 78).

Romero noticed something wrong with Maynes, stating in his testimony that ". . . I was attempting to face him and he kept sort of turning away from me." (II-T. 119). Maynes had a "big wad of gum" in his mouth. Romero observed that Maynes' face was "kind of flushed," or semi-swollen, and that his eyes were quite red. Romero also detected the smell of alcohol on him. (II-T. 120). Romero credibly testified that this was the "smell of fresh alcohol." (II-T. 121-125, 148, 150, 151, 152). Romero, although concerned, gave Maynes his work assignment but then,

because he had so many prior problems with Maynes, started to look for another supervisor to confirm his suspicion that Maynes was either very hung over or still drunk. (II-T. 120-124). He asked Monty Wilson, a front-line foreman, i.e., concentrator maintenance foreman (II-T. 165, 179), to talk to Maynes and come back and tell him what he thought. Romero did not tell Wilson the nature of his suspicion, i.e., alcohol. (II-T. 123-124, 173). Wilson then approached Maynes, who was in the locker room, and noticed that Maynes had a "wild expression" on his face, his "eyes were big," his face "was red and flushed," and that he had an enormous wad of gum in his mouth. (II-T. 174, 183-186). Wilson also detected the strong smell of alcohol on Maynes' breath. (II-T. 175-176, 184).

Wilson then returned a short time later and told Romero:

> I think you have a problem with Richard Maynes. I think he's under the influence, and I think, for his sake and everybody's sake, you better do something. (II-T. 124). See also II-T. 153, 176, 186.

Wilson testified that he had the impression that Romero was going to do something about the situation and that, if he had not had such impression, he "would have definitely called Richard in the office right then on the spot." (II-T. 178).

Romero then proceeded to the office of his supervisor, maintenance Superintendent Jim Crowley, and advised him of the problem. (II-T. 125). Crowley told Romero to get Maynes and take him to his (Romero's) office. (II-T. 126). Romero did so. Maynes still had the wad of gum in his mouth and he had a can of soda in his hand. (II-T. 128). When they arrived at Romero's office, Tony Mendoza, the Respondent's plant safety inspector (II-T. 189), was there. (II-T. 203-206; III-T. 6). At this point, Mr. Mendoza had no knowledge that Maynes had made safety complaints or that he initiated safety grievances. (II-T. 203). Mendoza observed that Maynes' face was flushed and that he was ravenously chewing a large wad of gum. (II-T. 204-205). Maynes would look away from Mendoza when Mendoza asked him questions. (II-T. 205-206). Mendoza could smell alcohol even through the odor of the chewing gum. (II-T. 206). Maynes was also smoking heavily, according to Mendoza, and drinking "a lot of soda pop. (II-T. 207). Mendoza felt that Maynes was trying to mask the smell of alcohol (II-T. 207, 208, 231-232). Maynes, in his testimony, denied he was under the influence. (III-T. 63).

Mendoza conducted a conversation with Maynes, who admitted drinking a six-pack the night before (II-T. 50, 130, 157, 205). Maynes said he had the last one at 1:30 in the morning. (Maynes' version of what he had to drink on the evening of November 22, 1988, is set forth at II-T. 40-43, 52). Mendoza asked Maynes if he would submit to an alcohol and drug test and Maynes said that he would. (II-T. 50, 131, 206, 208). Mendoza went out to his van to obtain a consent form (II-T. 207). Maynes asked Romero if he could use the phone and asked for Tony Trujillo's number. Trujillo is Respondent's Personnel Safety Supervisor. Romero gave him the number of Gwen Hansen, industrial relations representative, who works for Trujillo. Mendoza walked back into the office and he gave Maynes Mr. Trujillo's phone number. Maynes told Trujillo in Spanish that he was being asked to take a drug and alcohol test and that Romero was harassing him again (II-T. 51, 131-133, 207, 234; III-T. 5). Trujillo advised Maynes to take the test after Maynes admitted drinking the night before. Trujillo advised Maynes the penalty for not taking the test was "probable termination." (III-T. 7, 38).

Romero, being needed elsewhere, left his office a few minutes after 8 a.m. At this juncture, as far as Romero knew, Maynes was going to take the test (II-T. 133-134, 165).4 Mr. Maynes then made another phone call, apparently to his union president and, after hanging up, he requested to see his shop steward, Samuel Silva, who was summoned. Silva and Maynes stepped out of the office and conferred. After five minutes, Mendoza called Maynes back in (II-T. 207-209).

Mr. Mendoza then produced the drug and alcohol consent form. (Ex. C-5) and read and explained it to Mr. Maynes.

Mr. Mendoza persuasively testified as to the efforts he then went through to advise Mr. Maynes concerning the test and, after Maynes protested, concerning the effect of taking the test "under protest,"

I began reading this authorization, explaining the program as I was reading it. When we got down to the last two lines where it states, "I voluntarily submit to the test and desire those results to be released to Chino Mines security personnel,' he asked me how much alcohol a persoon had to have in his system to come out positive. I advised him it depended on several areas. How much sleep, how much food and liquids, and I advised him I was in no position to make a determination on his case.

I advised him, by submitting to the test, that it was not going to incriminate if it was negative. If his test was negative, he would be returned to work with no loss in pay or benefits. At that point, he indicated that he would take the test, but under protest.

I advised him that the standing rule in the medical community is, if an employee, an individual, goes into a clinic for any type of service and he protests it, that the medical community will not withdraw the sample or subject him to any type of treatment in that respect. He again indicated that he would protest it. I explained the program again. I advised him, essentially three times, if he fails to submit to the test, he would be suspended pending a hearing or probable termination.

Q. Do you recall saying that to him on three occasions?

A. Yes, sir.

Q. Why so many times?

A. I like Richard. I didn't want him to get in that situation.

Q. Do you recall explaining to him taking the test under protest was the same as a refusal?

A. Yes, sir.

Q. How many times did you explain that?

A. At least three times.

Q. For the same reason?

A. Yes, sir. And he continued his statement about taking it under protest. Finally, I just advised Mr. Maynes, I said, "Well, if you would not take it voluntarily, then it's under protest, and I have no choice but to suspend you, pending a hearing for termination."
He said, "Well, that's fine. I understand." I said, "For your sake and my sake, indicate that you--you're protesting it." At that point, he made his statement, "I, Richard R. Maynes, protest--."

Q. Okay. You're reading, when you say this statement, you are referring to the handwritten notation on the consent form?

A. Yes, sir.

Q. He wrote that in your presence?

A. Yes, he did. (II-T. 210-212). (Emphasis supplied).

It is clear, and I find that (1) Tony Mendoza, Respondent's Plant Safety Manager, advised Complainant at the meeting on the morning of November 23, 1988, that Complainant could not take the alcohol test "under protest" because it would not be administered, and that "under protest" was the same as refusal. (I-T. 87-88, 106; II-T. 54, 219-212, 222); (2) Mendoza told Complainant at this meeting that if he refused the test he would be suspended pending a hearing to determine what further discipline would be implemented (I-T. 106; II-T. 211-212, 222), and (3) Complainant refused to take the alcohol test (I.T. 87-89, 105, 106, 107; II-T. 54, 71, 210-212; IV-T. 15).5

After Maynes refused to take the test, he was suspended (II-T. 216) by Mendoza (II-T. 225).6 The procedure implemented

by Mendoza, of which Mr. Maynes was specifically advised, was consistent with Respondent's drug and alcohol policy and rules of conduct. (Exs. R-2 and R-4; II-T. 216, 230-231, 247).

After being suspended by Mendoza, Mr. Maynes was driven home by Steven Escobar, a security guard for Burns Security Service, who was employed at the mine. (II-T. 56).7

At approximately 11:15 a.m., Mr. Maynes went to the Grant County Sheriff's Department and took a breathalyzer test; the test results were negative - there was not a detectable amount of alcohol in Mayne's system. (E. C-7; II-T. 58-62). Maynes then drove to the Gila Regional Medical Center for a blood test, which was administered at approximately 12:12 p.m. (Ex. C-6; II-T. 62-66), the results of which were also negative (II-T. 64-65). These tests were administered approximately 3.5 to 4 hours after Maynes was asked to take the test by Respondent (II-T. 69), were arranged for by Maynes, on his own, and were not taken pursuant to Respondent's drug and alcohol policy (II-T. 69).

On November 28, 1988, a hearing was held at which management and union representatives, among others, were present. (III-T. 8-10). Both sides were permitted to present evidence and to ask questions. (I-T. 66-67; III-T. 9-11).

After the hearing was concluded, Mr. Trujillo, Jim Crowley, Concentrator General Maintenance Superintendent, and John Strahan, mechanical superintendent, jointly concluded that Mr. Maynes should be discharged (III-T. 11, 12, 45)8 and presented their recommendation on November 29, 1988, to Duke Milovich, manager of the mine (III-T. 11, 12) who concurred in the decision to discharge Maynes. (III-T. 12-13).

By letter dated December 1, 1988, from Mr. Crowley, Maynes was advised of his discharge. (Ex. R-6; III-T. 13).

Mr. Maynes was discharged for two separate and independent reasons:

1. For reporting to work under the influence of alcohol, and

2. For failure to comply with Respondent's drug/alcohol policy. (Ex. R-6; II-T. 81; III-T. 13, 14, 15, 44; IV-T. 15).9

One of various contentions raised by Complainant is that Respondent had no "formal" drug and alcohol testing program (Complainant's Brief, p. 4). The record clearly reveals, however, that Respondent had in place on November 23, 1988, clear-cut rules and policy (1) prohibiting a miner's reporting to work under the influence of intoxicants and (2) requiring an employee suspected of being under the influence to submit to "medical" testing under penalty of disciplinary action for refusal. Thus, its Rules of Conduct (Ex. R-4; II-T. 230-231; III-T. 14-16) provide inter alia

COMPLIANCE WITH RULES OF CONDUCT

> The company expects all employees to observe common sense rules of conduct based on honesty and common decency. Employees who violate these widely accepted industrial rules of conduct may be disciplined including discharge, depending upon the seriousness of the offense. Following are examples of the most frequently encountered violations of the rules of conduct.
>
> 1. Insubordination.
>
> 2. Drinking, possession, or furnishing drugs to others.
>
> 3. Unlawful possession, use of, or furnishing drugs to other employees.

4. Reporting to work under the influence of intoxicants or drugs.

* * * * *

Respondent's drug and alcohol policy (Ex. R-2; II-T. 191-196) provides in part:

DRUGS/ALCOHOL ABUSE

During the 1985 calendar year, Chino has experienced an increase of apparent drug usage. There have been several occasions when marijuana has been found on the property.

To assure all employees a safer working area and to be in complete compliance with MSHA Standard 56.2001, which states intoxicating beverages and narcotics shall not be permitted or used in or around mines, persons under the influence of alcohol or narcotics shall not be permitted on the job.

The Chino Mines Rules of Conduct lists the following violations:

* * * * *

4. Reporting to work under the influence of intoxicants or drugs.

THE FOLLOWING STEPS WILL BE IMPLEMENTED TO CURB SUSPECTED USAGE OF ILLICIT DRUGS AND ALCOHOL

Searches

a. Change Rooms: Dogs trained to detect drugs will be utilized to conduct searches in the change rooms. Employees will not be required to be present during this tour. If detection occurs, then the employee will be required to open his/her locker and allow a search of his/her locker and allow a search of his/her belongings. If the employee is not at work and cannot be reached, his personal lock will be removed and replaced with a Company lock. This Company lock will remain in place until such time as the employee is physically present to conduct a search of the locker contents. (A shop steward, if requested by the employee, may be present.) The Company will replace locks that it re

> moves at no cost to the employee. If an employee refuses to allow a search of his/her locker, the lock will be cut off (and replaced) by the Company. Refusal to open a locker will be considered a disciplinary matter.
>
> b. Lunchboxes: As employees are entering the clock station, they may be asked to open lunchboxes, purses, bundles, etc. If an illicit substance is found, the employee will be escorted to a neutral area for further investigation. Failure to comply will be considered under the disciplinary policy.
>
> c. Testing: If the Company has reasonable cause to suspect an employee is under the influence of drugs or alcohol, that employee will be requested to submit himself/herself to a medical test. If the employee refuses to take such a test, appropriate action will be taken.

The record establishes that Mr. Maynes, prior to November 23, 1988, knew or should have been aware of these rules and policies (II-T. 191, 193, 194-196; III-T. 14).

In an effort to establish that Respondent's application of its drug/alcohol policy to Maynes was disparate and thus discriminatory, Complainant introduced evidence that another employee, Robert Maldonado, who was involved in a truck accident in June 1987, and also completed his testing authorization form "under protest" was not discharged. (Ex. C-17; III-T. 48). The form first executed by Maldonado on June 20, 1987 (Ex. C-17), was altered to strike through the printed phrase: "However, I voluntarily submit to the test and desire those results be released to Chino Mines Security personnel," and initialed by Maldonado. Also, after Maldonado's signature appear the words "Under Protest." (III-T. 59; IV-T. 57).

Respondent, however, established that Maldonado subsequently authorized release of the test results to the Respondent without indication of protest. (Ex. R-8; III-T. 49; IV-T. 7-9, 21-24, 29, 46, 48). He passed the test (III-T. 60; IV-T. 49).

The record is not contradictory that, if the authorization form indicates that an employee is taking the test under protest, that neither testing facility, Gila Regional Medical Center or Med Square, would both perform the test and release the results to the Company. (II-T. 54; III-T. 49, 59; IV-T. 10-13, 22-24, 51, 52, 70).

DISCUSSION AND ADDITIONAL FINDINGS

In order to establish a prima facie case of mine safety discrimination under Section 105(c) of the Act, a complaining miner bears the burden of production and proof to establish (1) that he engaged in protected activity, and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981); and Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-818 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it may nevertheless affirmatively defend by proving that (1) it was also motivated by the miner's unprotected activities, and (2) it would have taken the adverse action in any event for the unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Co., 4 FMSHRC 1935, 1936-1938 (November 1982). The ultimate burden of persuasion does not shift from the complainant. Robinette, 3 FMSHRC at 818 n. 20. See also Boich v. FMSHRC, 719 F.2d 194, 195-196 (6th Cir. 1983); Donovan v. Stafford Const. Co., 732 F.2d 954, 958-959 (D.C. Cir. 1984) (specifically approving the Commission's Pasula-Robinette test); and Goff v. Youghiogheny & Ohio Coal Company, 8 FMSHRC 1860 (December 1986).

In terms of the required prima facie case in discrimination, Complainant clearly established the first elements thereof, i.e., that he had engaged in protected safety activities and that Respondent's management was aware thereof prior to the time he was suspended on November 23, 1988, and subsequently discharged.

The first of the two decisive issues posed are whether the adverse action taken by Respondent against Complainant was "in any part" motivated by Complainant's protected activities.

The affirmative defense provided under the Commission's discrimination formula raises the second issue: Even assuming arguendo that Respondent was in part motivated by Complainant's protected activities, was it also motivated by his unprotected activities and would it, in any event, have discharged him for his unprotected activities alone.

Under the 1977 Mine Safety Act, discriminatory motivation is not to be presumed but must be proved. Simpson v. Kenta Energy,

Inc. and Jackson, 8 FMSHRC 1034, 1040 (1986). Here, the Complainant, in order to carry his burden of establishing discriminatory motivation, seeks to have an inference thereof drawn from various circumstantial factors.

Respondent's management witnesses, however, have convincingly testified that they were not motivated by Complainant's protected activities in discharging, or recommending the discharge of, Mr. Maynes.

The evidence introduced by Complainant to establish a motivational nexus between the allegedly discriminatory adverse action (discharge) taken against him and his mine safety activities was not convincing.10 For example, Mr. Maynes contended that his supervisor, I.T. Romero, was harassing him because Romero once told him that he'd be "watching him." Romero's explanation, however, was plausible:

> Mr. Maynes had been working in the crusher the day before and had an accident, if I remember correctly, he had strained his back. The next morning, he came to work for me and I told him, in front of the mechanics, I told the other mechanic to watch out for him, and I told him I would be watching him. It was out of concern for the injury that he had before, not because I was harassing him. (II-T. 136-137).

Mr. Maynes also complained that, at certain five-minute safety meetings, he had been prohibited from raising specific safety concerns. Romero, satisfactorily explained what had occurred:

> Q. With respect to the five-minute safety meeting, you heard Mr. Maynes testify he had occasionally been precluded from raising specific concerns in some of those meetings. Do you remember that testimony?
>
> A. Yes, I recall that testimony.

Q. Do you remember any incident of that nature?

A. No. I recall having told Mr. Maynes that, when it came to safety malfunctions out there, okay, that I expected him to go out into my area, and if he's found something like that, I expected him to come and report it to me on that day or then; that I did not want somebody coming into my five-minute talks and trying to report to me something that he discovered three or four days earlier. Because it's a safety concern we need to address it then.

Mr. Maynes, on a couple of occasions, wanted to do exactly that, and so I repeated myself to him. (II-T. 115).

The testimony of Respondent's witnesses was credible and convincing in establishing that the various management personnel who observed Maynes on November 23, 1988, were reasonable in their belief that his unusual behavior was due to his being under the influence. Thus, in addition to the smell of alcohol on his breath and the various types of unusual behavior described in detail above, Mr. Maynes had come in late that morning and immediately asked to leave early. I find no basis in the evidentiary record in this matter, including the non-authorized breathalyzer and alcohol tests obtained by Mr. Maynes on his own several hours after he reported to work, to conclude that Mr. Maynes was not under the influence withn the meaning and proscription of Respondent's Rules of Conduct. The tests obtained by Mr. Maynes himself later in the day do not excuse his refusal to take the tests required by the Respondent's alcohol/drug policy. Respondent established by the clear preponderance of the credible evidence that a miner's agreement to take such tests "under protest" is equivalent to refusal and Mr. Maynes was so advised and given every opportunity to take the tests required under the company's policy.

As Respondent points out in its Brief:

> No one from the Company told Maynes that he was free to undergo an alcohol test several hours later at a place of his own choosing and have that test satisfy his obligation to undergo an alcohol test pursuant to the Company's drug and alcohol policy. The Company was entitled to a timely alcohol test performed by its carefully selected medical facility that was certified to perform such tests. If the Company cannot require its employees under circumstances such as those present here to undergo an

> alcohol test when requested to do so, and discharge those employees who refuse to take the test, then the Company's ability to comply with regulations promulgated under the Act, to insure that its employees are not under the influence of alcohol, and to promote the safety of its employees and operations, is severely damaged, if not destroyed. Cf., Mullen v. Jim Walter Resources, Inc., 3 MSHC (BNA) 1635, 1636 (1984) (reasonable for company to require employees to submit to prompt alcohol test at medical facility of the company's choice because, by refusing and later obtaining a test from a private physician on her own, employee "caused a lower showing of blood alcohol content").

Direct evidence of actual discriminatory motive is rare. Short of such evidence, such illegal motivation may be established if the facts support a reasonable inference thereof. Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510, 2511 (November 1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d (D.C. Cir. 1983); Sammons v. Mine Services Co., 6 FMSHRC 1391, 1398-1399 (June 1984). The weight of the evidence in this record is not probative that Respondent was illegally motivated in whole or in part, nor is there support for drawing an inference of such discriminatory intent.

In reaching the conclusion that Complainant failed to establish that his suspension and discharge were discriminatorily motivated, consideration also has been given to the fact that the instant record does not reflect a disposition on the part of Respondent's management personnel, individually, or collectively, to engage in such conduct. A history of, or contemporary action indicating, antagonism or retaliatory reaction to the expression of safety complaints, was not persuasivley shown. Complainant points out several instances of what he considered hostile words or action taken by management personnel toward him. Yet, such were not demonstrated to be beyond normal workplace occurrences or, more to the point, were not shown to be attributable to his protected activities. There was no evidence of retaliation against other employees who had engaged in safety activities or who expressed safety complaints. Thus, other employees besides Maynes handled safety grievances and were not disciplined or discharged. For example, Samuel Silva, as shop steward, did so. (I-T. 51, 95-96; II-T. 135; III-T. 25-26). Further, other employees of Respondent who either refused to take the required blood alcohol test or failed it were terminated. (II-T. 216, 217, 223-224, 236-239, 241; IV-T. 9, 21, 28, 32, 35, 58).

CONCLUSIONS

Respondent's motivation in suspending and then discharging Complainant was for his two independent unprotected activities (reporting to work under the influence and refusing to comply with Respondent's drug/alcohol policy) and the decision to take such adverse actions was justified. These adverse actions were not wholly or in part discriminatorily motivated. Thus, Complainant has failed to establish a prima facie case of discrimination under Section 105(c) of the Mine Act.

Even assuming arguendo, that it were established by a preponderance of the reliable probative evidence, that Complainant's suspension and discharge were motivated in part by his protected activities, Respondent established by a clear preponderance of such evidence that it was also motivated by Complainant's unprotected activities and that it would have taken the adverse action in any event for such.11

ORDER

Complainant, having failed to establish Mine Act discrimination on the part of Respondent, the Complaint herein is found to lack merit and this proceeding is DISMISSED.

Michael A. Lasher, Jr.
Administrative Law Judge

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FOOTNOTES START HERE

1. The hearing was held on four hearing days over a two-term hearing period, i.e., February 7, 8, and 9, 1990, and May 8, 1990. For each of the four days of hearing there is a separate transcript beginning with page one. Accordingly, transcript citations will be prefaced with "I", "II", "III", and "IV" for February 7, 8, and 9, and May 8, respectively.

2. In the summer of 1988, several months before Maynes was discharged, Respondent had a fatal accident at its Tyrone plant, which resulted in its receiving a penalty of approximately $6000 from MSHA for allowing an employee to operate equiment while under the influence. (II-T. 196-197). Respondent also established, relevant to the necessity for its drug/alcohol testing policy, that it had a high accident rate in its concentrator maintenance department where Mr. Maynes was employed (II-T. 146, 167-168). I infer, as Respondent contends, that it would have been sensitive to enforcement of its alcohol policy on November 23, 1988, as a result of those two factors.

3. Other miners circulated these petitions without being discharged or disciplined. (I-T. 51, 95-96).

4. Romero had no further involvement with Maynes on November 23, 1988, and he testified that, other than testifying at a subsequent hearing, he had nothing to do with any decision in connection with Maynes (II-T. 134), specifically indicating he

played no part in the decision to discharge Maynes either by recommending such, or by being consulted with regard to such (II-T. 164).

5. Mr. Maynes wrote on the consent form (Ex. C-5; II-T. 71) as follows: "I Richard R. Maynes, protest takeing (sic) this test and refuse to take it. Because I am working under protest with foreman I.T. Romero."

6. While Mr. Mendoza made the decision to request that Maynes take the drug and alcohol test and the decision to suspend Maynes, he played no part in the subsequent decision to discharge Maynes (II-T. 225). Such decision, after a hearing on November 28, 1988 (II-T. 225-226), is more fully detailed subsquently herein.

7. Escobar did not testify during the Commission hearing. He did testify at an arbitration hearing to the general effect that he did not smell alcohol on Maynes or detect other indications that Maynes was under the influence (Court Ex. 1, pp. 162-170).

8. At the hearing, Mr. Maynes presented the breathalyzer results from the sheriff's office and admittance report from the Gila Regional Center. Trujillo's view was, "I really wasn't interested in those documents. The fact remained, as was discussed during that hearing, that he had refused the company drug and alcohol test and the merits of his going out four - five hours later and taking that test on his own had no merit, as far as I was concerned, in accepting those documents." (II-T. 41). (Emphasis added).

9. Agreeing to take the test "under protest" is the same as refusal to take the test. (II-T. 54-56; IV-T. 9, 10, 11, 15, 28, 46, 50).

10. Complainant's contention that the Respondent's handling of Mr. Maynes' "under protest" alcohol testing situation was disparate and discriminatory when compared to the Robert Maldonado situation has been evaluated previously herein and is rejected.

11. See Gravely v. Ranger Fuel Corp., 6 FMSHRC 799 (1984).