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

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF MICHAEL L. PRICE AND JOE JOHN VACHA, COMPLAINANTS	DISCRIMINATION PROCEEDING Docket No. SE 87-128-D No. 4 Mine
AND	
UNITED MINE WORKERS OF AMERICA (UMWA), INTERVENOR	
v.	
JIM WALTER RESOURCES, INC., RESPONDENT	

DECISION ON REMAND

Before: Judge Broderick

STATEMENT OF THE CASE

On July 13, 1988, I issued a decision on the merits in this case in which I concluded (1) Section IIE of JWR's Drug Abuse and Rehabilitation Control Program was on its face in violation of section 105(c) of the Act. I further concluded (2) that the discharge of Price and Vacha was motivated in part because of activity protected under the Act, but that JWR established that they would have been discharged for unprotected activity alone and that the drug testing program was not discriminatorily applied to Price and Vacha. 10 FMSHRC 896 (1988). On August 20, 1990, the Commission reversed my determination that the drug program was facially discriminatory under the Mine Act. It affirmed my conclusion that Price and Vacha established a prima facie case of discriminatory discharge. However, the Commission determined that my decision did not fully examine and explain the impact on JWR's affirmative defense of the evidence concerning the pre-testing supervisory joking directed at Price and Vacha, and the differences in procedures followed in testing Price and Vacha from those followed at other mines. The case was therefore remanded to me to analyze and explain the impact of this evidence. 12 FMSHRC 1521 (1990). On August 27, 1990, I issued an order to the parties to file briefs directed to the question whether JWR's drug program was discriminatorily applied to Price

and Vacha. In the meantime, JWR filed a Motion for Reconsideration of the Commission's decision which was denied by order issued November 28, 1990. All parties have now filed briefs in response to my order of August 27, 1990.

FACTUAL ANALYSIS

I

JWR instituted its Substance Abuse Program on January 1, 1987. By its terms it applied to all hourly and salaried employees in JWR's Mining division. However, the drug testing aspect of the program was directed first to (a) employees demonstrating a reasonable cause for testing and (b) employees whose duties, "whether by job title or by reason of elected office," involve safety. In my decision of January 13, 1988, I concluded that the program was not designed or intended to interfere with safety committee members including Price and Vacha, even though it impinged particularly on such miners' representatives. JWR's motive in setting up the program was not to retaliate against Price and Vacha or other safety committee persons, or to limit their safety rights and responsibilities.

II

The evidence shows that Price and Vacha were, and had the reputation of being, safety activists. Both filed a number of safety grievances, and both have had serious disputes with JWR management over safety issues. 10 FMSHRC 903. In the opinion of the International Health and Safety Representative of the UMWA, the No. 4 Mine Safety Committee was the "most active committee" in the State of Alabama, which includes other Jim Walter mines.

III

Prior to the date that paragraph IIE was implemented (March 2, 1987), Price and Vacha were subjected to kidding and joking by supervisory employees in the mine safety office about the impending drug testing. In part this apparently resulted from the fact that Price told the JWR safety inspectors that he had difficulty urinating in front of others. Rayford Kelly, JWR's industrial relations supervisor at the subject mine, was aware of some of this. 10 FMSHRC 900. This joking was directed at Price and Vacha because they were going to be tested. They were going to be tested because they were safety committee members. Whether or not the joking was intended to affect their ability to submit the requested urine samples, the evidence establishes that it had such an effect. There is no evidence in the record as to any joking or harassment directed to other safety committee members on other shifts or in other mines.

IV

The urine samples program at the No. 4 Mine where Price and Vacha worked was conducted under the supervision of the mine safety department--by Wyatt Andrews and Bob Hendricks. Andrews and Hendricks were of course involved in mine safety matters with Price and Vacha in the normal course of their duties. Andrews and Hendricks had been involved in the pre-testing joking directed at Price and Vacha related to their claimed inability to urinate in public described in III, above. In the other JWR mines, the samples were taken under the direct supervision of the industrial relations office, and not by JWR safety personnel. The record does not indicate the reason for this difference.

V

On March 2, 1987, Price and Vacha were informed that they would have to provide urine samples at the end of the shift, which extended from 7:00 a.m. to 3:00 p.m. Price was told at about 8:00 a.m. and Vacha at about 11:30 a.m. Andrews and Hendricks accompanied Price and Vacha to the bathroom as they were instructed to do, to witness the collection of the samples. This procedure was not followed in all the other mines, in some of which those tested were permitted to produce specimens without an observer being present. Price and Vacha attempted to produce a specimen on a number of occasions between 3:00 p.m. and 7:00 p.m. Price offered to go into the bathroom naked if he could go alone, but this offer was refused. Price and Vacha asked whether they could return the next morning to give the samples, but JWR refused. At 7:30 p.m., they were formally suspended with intent to discharge because of insubordination. In another mine, a committeeman who was unable to produce a sample when requested was permitted to return at the end of his shift to do so. In another instance, a miner being tested for cause was permitted to return the next day to give a sample.

VI

Price and Vacha were made to feel nervous and upset by the manner in which the testing was conducted. They did not refuse to submit the samples but were physically or psychologically unable to do so. I conclude that the fact that the procedure was supervised by those who often had an adversarial relation to them in safety disputes, contributed to their discomfort. I also conclude that the past safety activities of Price and Vacha were part of the motivation of these supervisers in their conduct of the drug testing program.

VII

The evidence establishes that JWR's drug testing program included a specific proviso that failure to submit urine samples

when requested would result in discharge. This proviso applied to all who came under the program.

VIII

Price and Vacha were discharged by Rayford Kelly, Industrial Relations Supervisor. Kelly believed that Price and Vacha deliberately refused to provide the specimens--that they were "playing games." Kelly was aware of the fact that the testing was conducted by safety department supervisors, and that both Price and Vacha claimed inability to produce specimens while being observed. Kelly refused to permit Price to attempt to provide a specimen without being observed by going into the bathroom naked. He refused to accept the offer of Price and Vacha to return the following morning to give the samples. He was aware of at least some of the prior joking and harassment of Price and Vacha in which Andrews and Hendricks were involved.

ISSUE

Whether the JWR Substance Abuse Program as applied to Complainants Price and Vacha resulting in their discharge was in violation of their rights under section 105(c) of the Mine Act?

CONCLUSIONS OF LAW

I

My conclusion in the decision issued July 13, 1988, that Price and Vacha established a prima facie case of discriminatory discharge was based in part on the fact that JWR sought to test Price and Vacha because they were safety committeemen and therefore representatives of miners, and in part on the evidence of disparate treatment in the testing procedures shown in the Findings of Fact III, IV, V and VI above. My conclusion that a prima facie case of discrimination was made was affirmed by the Commission.

II

The evidence does not establish that the pre-testing joking and harassment directed toward Price and Vacha were related to their safety positions or safety activities. The joking and harassment did result in part from their claimed inability to urinate in public, and in turn contributed to their inability to produce the urine samples involved in this proceeding.

III

The procedures followed in testing Price and Vacha which differed from those followed in other mines contributed to their inability to comply with the request for urine samples. They

were in part related to Price and Vacha's prior safety activities in that they were conducted by those who bore an adversarial relationship to Price and Vacha in mine safety matters.

IV

There is no evidence of a motive for the challenged discharges unrelated to the drug testing matter involved in this case. Therefore, this is not a truly "mixed motive" case. Cf. Eastern Assoc. Coal v. Federal Mine Safety and Health Review Commission, 813 F.2d 639, 643 (4th Cir. 1987). My prior decision erroneously treated the case as a mixed motive case when I concluded that JWR would have discharged Price and Vacha "for violating a work order (not protective activity) in any event." 10 FMSHRC 910. My conclusion that the drug testing program was not discriminatorily applied was contrary to the evidence and erroneous. Price and Vacha were discharged for failing to comply with JWR's drug testing program. The implementation of that program was discriminatorily applied to Price and Vacha in part because of their prior safety activities. JWR has not established that it would have discharged Price and Vacha for unprotected activity alone, i.e., without reference to the implicated drug testing program. Therefore their discharges were in violation of section 105(c) of the Mine Act.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED:

1. Respondent shall permanently reinstate Michael L. Price and Joe John Vacha to the positions from which they were discharged on March 2, 1987.

2. Respondent shall pay Complainants Price and Vacha within 30 days of the date of this decision all back wages and other benefits from March 3, 1987, until the date of their reinstatement, with interest thereon in accordance with the Commission decision in Local Union 2274, UMWA v. Clinchfield Coal Co., 10 FMSHRC 1493 (1988) calculated proximate to the time payment is actually made.

3. Respondent shall expunge from its personnel records all references to the discharges of Price and Vacha on March 2, 1987.

4. Respondent shall restere to Price the three days of graduated vacation pay he took to attend the hearing.

5. Respondent shall pay to the Secretary within 30 days of the date of this decision the sum of $500 as a civil penalty for the violation found herein.

James A. Broderick
Administrative Law Judge