CCASE:
MELVIN BURKHART v. FOSSIL FUEL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
2 Skyline, 10th Floor
5203 Leesburg Pike
Falls Church, Virginia 22041

MELVIN BURKHART, COMPLAINANT
v.
FOSSIL FUEL, INC., RESPONDENT

DISCRIMINATION PROCEEDING

Docket No. KENT 90-184-D

BARB CD 90-13

No. 2 Mine

DECISION

Appearances: Mr. Melvin Burkhart, Kenvir, Kentucky, pro se; Otis Doan, Jr., Esq., Harlan, Kentucky, for the Respondent.

Before: Judge Maurer

STATEMENT OF THE CASE

This proceeding concerns a discrimination complaint filed by the complainant, Melvin Burkhart, against the respondent pursuant to Section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. Mr. Burkhart filed his initial complaint with the Secretary of Labor, Mine Safety and Health Administration (MSHA). Following an investigation of his complaint, MSHA determined that a violation of Section 105(c) had not occurred, and Mr. Burkhart then filed his pro se complaint with the Commission. A hearing was conducted in London, Kentucky on February 14, 1991.

Essentially, the complainant maintains that he was hired to operate the continuous miner machine and that the respondent's request for him to go and muck the mainline belt was in retaliation for him making safety-related complaints about conditions in the mine. Mr. Burkhart quit his job rather than perform this admittedly "dirty" job. He now seeks reinstatement and back pay.

Mr. Burkhart's discrimination complaint states as follows:

> I operated the miner at Fossil Fuel, Inc. During the last three (3) months, I have complained numerous times about failure to take CH4 checks, cutting without line curtains, roof control plan not being conformed to, and methane monitor being bridged out during operating. These were safety hazards to myself and fellow

> employees. These hazards was not corrected. On January 31, 1990, I complained to Tony Bailey about the above mentioned conditions. I was then instructed to go muck the main belt heading and the miner helper was going to operate the miner. I was told he could cut cleaner coal. The miner helper has approximately 12 hrs. experience operating the miner. I then stated I would just go home. Therefore, I feel I have been discriminated against for complaining about my rights to a safe work area.
>
> I request my job back as a miner operator, and any backpay due me.

The complainant testified at length at the hearing. He began work at Fossil Fuel as a miner operator in April of 1989. Between then and January 31, 1990, he alleges there was no effort made on the part of mine management to fix anything. Things just kept building up and building up until finally on January 31, 1990, the situation had gotten to the point where he complained to Tony Bailey, the assistant superintendent, about the conditions he felt were unsafe. More specifically, he testified he had complained about loose and inadequate (short) roof bolts, cutting coal without line curtains to get fresh air to the face, a malfunctioning methane monitor, and basically his feeling is that management thought he was instigating trouble and holding up production. And that is the reason he believes he was told to go and muck the belt line.

As further evidence of this, he points out that the man who was going to replace him on the miner, while he went to muck the mainline belt, had only 12 hours of experience running this type of continuous miner.

In a nutshell, complainant felt he was being punished because he wanted a decent place to work. He maintains that an assignment to muck the belt line is well recognized in the coal mining industry as a punishment tour, and he feels in this particular case, it constitutes harassment.

After complainant balked at mucking the belt line, Mr. Bailey then offered him a chance to run the roof-bolting machine instead, but Mr. Burkhart didn't feel like he was qualified to do that so he declined. At that point he quit and never went back. It was his last day working for Fossil Fuel.

In order to establish a prima facie case of discrimination under Section 105(c) of the Mine 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 Company,

1981); Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981); Secretary on behalf of Jenkins v. Hecla-Day Mine Corporation, 6 FMSHRC 1842 (1984); 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 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 in any event for the unprotected activity alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Company, 4 FMSHRC 1935 (1982). The ultimate burden of persuasion, however, does not shift from the complainant. Robinette, supra. See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983); and Donovan v. Stafford Construction Company, No. 83-1566 D.C. Cir. (April 20, 1984) (specifically approving the Commission's Pasula-Robinette test). See also NLRB v. Transportation Management Corporation, 462 U.S. 393, 76 L.Ed.2d 667 (1983), where the Supreme Court approved the NLRB's virtually identical analysis for discrimination cases arising under the National Labor Relations Act.

It is clear that Mr. Burkhart has a right to make safety complaints about mine conditions which he believes present a hazard to his health or well-being, and under the Act, these complaints are protected activities which may not be the motivation by mine management for any adverse personnel action against him; Secretary of Labor ex rel. Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981), and Secretary of Labor ex rel. Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981). Safety complaints to mine management or to a section foreman constitute protected activity, Baker v. Interior Board of Mine Operations Appeals, 595 F.2d 746 (D.C. Cir. 1978); Chacon, supra. However, the miner's safety complaints must be made with reasonable promptness and in good faith, and be communicated to mine management; MSHA ex rel. Michael J. Dunmire and James Estle v. Northern Coal Company, 4 FMSHRC 126 (February 1982); Miller v. FMSHRC, 687 F.2d 194, 195-96 (7th Cir. 1982); Sammons v. Mine Services Co., 6 FMSHRC 1391 (June 1984).

Mr. Bailey testified that Mr. Burkhart was hired by Fossil Fuel on April 24, 1989, at a starting pay of $9.00 per hour. He was hired primarily to run the continuous mining machine, and he did run it until January of 1990, when he quit. At that point in time, he had progressed to making $12.00 per hour.

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Mr. Thomas J. Davis owns a coal business associated with Fossil Fuel. They contract mines from him. There came a time in January of 1990, when he had a problem with quality control of the coal they were producing. He wanted "blockier" coal and he discussed this with Tony Bailey. Mr. Bailey then decided to try an "experiment." He would put a different operator on the mining machine. He and Mr. Davis happened to notice that on January 29, 1990, a day that Mr. Burkhart was off, the coal run that day was "blockier." It was more lumpy. Ed Napier and Terry Wells were running the miner that day. So, on January 31, 1990, the decision was made to have Terry Wells run the miner that day and Mr. Burkhart was asked to go to the No. 2 belt head, service it, service the tailpiece, and then start mucking the mainline belt.

Bailey states he fully explained the reason for this job change to Burkhart at the time, and told him they were merely trying something new to try to improve the quality of the coal for Mr. Davis. If it didn't work after 2 or 3 days, he might put Burkhart back on the mining machine. There was no loss of pay involved. His same rate of pay ($12.00 per hour) applied to either job.

Mucking the belt line is a disagreeable, dirty job in the mine. There is no dispute about that. But even Mr. Burkhart admits that "somebody had to do it." Mr. Bailey testified that he has done it himself. "Everyone does," he added.

In any event, when Bailey saw that Burkhart was getting upset about the mucking assignment, he offered him something else. As Mr. Davis testified at Tr. 117-118:

> Q. Did you hear Tony [Bailey] offer Mr. Burkhart the job on the roof bolter?
>
> A. I sure did.
>
> Q. And what did Mr. Burkhart say?
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> A. He said, "No, I ain't no bolting machine man."
>
> Q. Did he offer him any other job?
>
> A. Yes. He said, "Why don't you be a helper?" He said, "No, they don't like my kind of work."
>
> Q. What kind of helper?
>
> A. Bolt machine helper.
>
> Q. Okay. He was offered the bolt machine helper job?
>
> A. Yes, he was.

Q. Did he turn that down?

A. Yes, he did.

Q. Did he ever say he quit?

A. No. He said he believed he was going to the house. That's what he said.

Q. Why did he say he was going to the house?

A. He said something about if they didn't like the way he was running the miner or didn't like his work, he'd just go to the house. I told him--I said, "Melvin, why don't you think about it before you quit?" He said no, he'd just go home.

Q. Did Mr. Bailey also ask him to stay?

A. Yes, of course he did.

Importantly, if Mr. Burkhart had done the mucking of the belt or running the roof bolter or being a roof bolt helper, his pay would have remained the same as if he were operating the miner.

Even more importantly to his case here, I believe that Mr. Burkhart brought up the majority of his complaints to Bailey after he was told to go and muck the belt line. I believe his pride was wounded and he was hurt by what he perceived to be "harassment." However, even giving him the benefit of the doubt as to the existence of some prior protected activity, as the complainant in this case, Mr. Burkhart has the burden of establishing by a preponderance of the evidence that he not only communicated safety complaints to mine management, or that management knew or had reason to know about safety complaints to MSHA, but that the adverse action he complains of was the result of the complaints and therefore discriminatory. In essence, Mr. Burkhart must prove a connection between the complaints and the adverse action complained of.

I conclude that the required connection has not been proven. I find the testimony of Bailey and Davis to be credible on the "quality of the coal" issue and furthermore, the Company's offer of other coal mine employment at no loss of pay demonstrates good faith in my opinion. Complainant was not given a "take it or leave it" ultimatum to muck the belt line. He was offered not one, but two alternatives to mucking the belt line. He chose to avail himself of neither and quit his job.

Whether the respondent wisely chose to replace a more experienced miner operator with a less experienced one is not an issue properly before me in this case. My jurisdiction is limited to considering whether the respondent discriminated against the complainant for activity protected under the Federal Mine Safety and Health Act of 1977. I conclude that the evidence before me establishes that it did not. An employee's mere conjecture that the employer's explanation is a pretext for intentional discrimination is an insufficient basis upon which to base a successful claim of discrimination.

ORDER

In view of the foregoing findings and conclusions, and after careful consideration of all of the evidence and testimony adduced in this case, I conclude and find that the complainant here has failed to establish a prima facie case of discrimination on the part of the respondent. Accordingly, the Complaint is DISMISSED, and the complainant's claims for relief are DENIED.

Roy J. Maurer
Administrative Law Judge