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KELLY L. DIEDE v. SUMMIT
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
The Federal Building
Room 280, 1244 Speer Boulevard
Denver, CO 80204

KELLY L. DIEDE,
COMPLAINANT

v.

SUMMIT INCORPORATED,
RESPONDENT

DISCRIMINATION PROCEEDING

Docket No. CENT 90-160-DM

RM MD-90-09

Anne Creek Mine

DECISION

Appearances: Kelly L. Diede, Pro Se
for Complainant;
Ronald W. Banks, Esq., Banks, Johnson, Johnson,
Colbath & Huffman, P.C.
for Respondent.

Before: Judge Cetti

This case is before me upon the Complaint by Kelly L. Diede 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 discriminatory discharge on June 9, 1990, by Summit Incorporated ("Summit") in violation of Section 105(c)(1) of the Act.
(Footnote 1)

Mr. Diede was hired by Summit on June 2, 1990, and was discharged eight days later, on June 9, 1990. At the time Summit was doing a small project for Wharf Resources at their Annie Creek Mine.

Mr. Diede, in pertinent part in his complaint, alleges as follows:

I went to work for Summit Construction. I worked a week and one day. I had been putting down on my time card that the emergency brakes on my loader didn't work. I told Loyd they didn't work. He did nothing about it. They had to shut the loader down to fix the boom cylinder because it was leaking. I told Loyd I would like to get the brakes fix at that time. They did not get fixed. On my last sift (sic) Loyd told me that he would not be needing me on Monday. I asked why, he did not say anything, but that I was laid off. I called later in Rapid City I asked him where he needed me Monday. He said he did not need me at all. I asked why he said there were problems with my work. I asked what was wrong he said he couldn't say just that he didn't need me. So I started looking for another job right away. So the Tuesday after my laioff (sic) I went to Summit Construction to find out a little more about what was going on. Tom Lester said he didn't have to give a reason for firing me, at that time a (sic) said I have a right to now

(sic) why I was let go. He said it was because I was unsafe in the loader. I said if I was so unsafe then why was the company running that loader without brakes. He asked me if I put that on my time card. I said Yes. I also told the sift (sic) boss nothing was done about the brakes.

At the hearing Mr. Diede admitted that he was told at the outset when he was interviewed for the job at Summit, that his "hire was going to be temporary." On the last day he worked for Summit, the Mine Superintendent, Mr. Nordstrom told him that the other loader operator was coming back to work and that they didn't need him (Diede) anymore. After telling him that he was "laid off," the Superintendent suggested he call the main office and see whether or not they could use him at "another place." (Tr. 13)

Mr. Diede testified that when he operated the loader for Summit he "noticed that the brakes weren't all that good." He started putting down on his time card that "the brakes needed to be looked at." After he was laid off, Mr. Diede called MSHA regarding the brakes on the loader.

After Mr. Diede's phone call (made after his discharge), MSHA in response to the call sent a Federal mine inspector to inspect the loader and specifically its brakes. The inspector found that no work had been done on the brakes but nevertheless found that the brakes of the loader were not in violation of any safety standard. The inspector filed a Notice of Negative Findings (Ex. R-1) which stated in relevant part: "Application of braking power was demonstrated to be sufficient. . . ." The "alleged hazard did not exist."

Mr. Diede stated that he asked Tom Lester (Summit's present Superintendent) why he "was let go." Diede testified that "basically he (Lester) really couldn't tell me." (Tr. 13).

Mr. Diede testified as follows (Tr. 14):

He (Lester) had told me at one time after I kind of pinned him down he says, well, you were unsafe in the loader and we don't think that you've got any experience. At that time I asked him if he had called any of the people on the application and he said no, that it's not a practice at Summit Construction to do that.

~1158

Mr. Diede continued as follows (Tr. 15):

I had asked Tom Lester why they took the man that was running the loader out of the loader and put me in it. Tom Lester said that he wasn't running the loader to production standards. At that time I asked him, I says, well, why didn't you let him go? Well, at that time he said well, we had another job for him and they put him in the roller. And I thought, well, that's fine and dandy. And then I asked him why I wasn't given the jobs that the other two guys that had just been hired, why I wasn't let to at least try those jobs. And at that time he told me that I was too inexperienced to do those jobs. Well, one the jobs is shoveling and stemming. Now I don't know how many people are dumb enough not to know how to run a shovel, but apparently I am. And one of the other people that was hired was put on the loading crew for loading the rounds. I asked him at that time why I wasn't at least given the chance to do that. He also said I was inexperienced. At that time I asked him if he did any follow-up on it, on my application, and he said no. And that's when I explained to him that I'd been mining for eight and a half years.

* * *

I asked Tom Lester. I believe the safety man was in the office and so was Chuck Rounds at the time when I was talking to all of them. At that time I had given them basically a way out of this, and that was to put me back on in one of those jobs or that we were going to go to court because they tried to tell me that I was unsafe in the loader. Well, I don't doubt that. Anybody would have been unsafe in a loader without any brakes on it. After I was let go, I called MSHA.

On cross-examination, Mr. Diede again admitted that when he was hired, he was told that his "hire was going to be temporary" and admitted that he anticipated that he "wouldn't be there long." But that after he found out Summit had hired two other people after they terminated his employment "he kind of wondered what the reason was." He stated "most companies would hire back

~1159

whoever they had laid off before they are going to hire anybody else." Asked if that would be true "if they were not satisfied with your work performance," Diede replied "I guess the only question that I had on that was that I was wondering why they weren't satisfied." (Tr. 27).

Mr. Diede also stated "when I worked for Homestake there was a production standard, but it was never shoved down your throat like supposedly these people tried to do to me, saying that that was the reason I was let go was because I couldn't meet production standards."

II

Mr. Thomas Lester, General Superintendent for Summit, testified he observed Mr. Diede operating the loader in a "jerky erratic manner." He had heard reports of Mr. Diede's "bumping the trucks, dumping in a jerking motion into the trucks, which is hard on equipment, and hard on truck drivers also, and trucks."

Mr. Lester, who was present during Mr. Diede's exit interview, testified as to what occurred at the interview as follows (Tr. 72-73):

- A. It got quite heated about mid-point. Kelly was using quite extreme language and our secretary was seated in the next room and taking all of this in. And John Ross told him several times to hold it down, knock off the profanities, and John even got up once and closed the window between the offices. And Kelly promptly rose and opened it back up in a forceful manner and continued his spiel of profanities, and said I'm going to sue you for everything you got!
- Q. Did he say what he would use as a basis for the suit?
- A. Discrimination, which I found to be unbelievable.
- Q. Did he ever define what discrimination was? Did he have any definition in mind?
- A. Yeah. I guess the way Kelly thinks he was discriminated against because he was not given a job that someone else--some other new hire had.
- Q. Did he explain to you that it was the law that you had to take him back rather than to hire new hire?

~1160

A. Well, yes, but we don't interpret the law that way.

Q. But did he tell you that?

A. Yes.

Mr. Diede in cross-examining Mr. Lester asked him "Was there a reason given to me why I was discharged?" Mr. Lester replied, "I told you that we didn't find your performance adequate for our company." Mr. Diede then asked Mr. Lester why he was not "fired sooner" if management was "fearful that I was going to hurt myself or somebody else if I was supposedly a safety hazard?"

Mr. Lester replied as follows (Tr. 74):

A. I suppose at that time I was looking at things from a production standpoint. We were short on help, which is the reason that you were hired in the first place, the reason for several hires right then. Don't get me wrong, right then, in the first place, I knew that our loader operator would be back Monday. We figured that if you were watched close enough and talked to enough, we were hopeful that there wouldn't be an accident between Wednesday and Friday, Saturday.

Lloyd Nordstrom called by Summit stated he was Summit's Superintendent in charge of construction at the time Diede was employed by Summit. On the day he hired Diede, his main loader operator just left for a vacation. He put Diede on the loader more or less on a trial basis to see how he worked out. He observed that Diede had trouble keeping his loading area (pad) level enough so he could speed up his production. Diede started improving, "but he was awful wild with the loader, he was careless. He would jerk and jam and then when he'd dump his bucket he'd always try to catch the load instead of letting it try to drop into the truck. He would always stop the bucket. And I was on him, I think I told him about that every day, sometimes three times a day that that was hard on those load cylinders."

Mr. Nordstrom explained that when the operator stops the bucket abruptly from tilting, it builds up tremendous pressure in the hydraulic cylinder which causes the weakest point, the seals, to go out. The cylinders went out twice the week Diede operated the loader. Respondent had repacked one cylinder once and replaced that same cylinder later on in that week.

~1161

Mr. Nordstrom testified that he heard complaints from truck drivers that Diede in loading a truck was "awful rough on the truck." (Tr. 98) It got to the point that the three truck operators that hauled for Respondent didn't want to continue hauling because of the way Diede operated the loader while loading the trucks.

On cross-examination by Mr. Diede, Mr. Nordstrom stated: "I really wasn't happy with your performance. And talking it over with Tom, we decided to let you finish out the week, hoping that your performance would get better, which it didn't, and your attitude seemed to be getting worse." (Tr. 99)

Mr. Nordstrom concluded from what he considered Mr. Diede's inadequate performance in operating the loader that Mr. Diede had falsified his experience on his job application and for this reason alone he would not want to keep Mr. Diede on the job. He admitted, however, he had no proof of such falsification other than his observation of Mr. Diede's inadequate performance in operating the loader.

Two truck drivers, Charles White and Bill Shepperson, testified on behalf of Summit. Mr. White testified he observed Mr. Diede continue to load wet material even though he had been specifically instructed by Mr. Nordstrom not to do so.

Bill Shepperson testified that he observed Mr. Diede load his truck many times each day. Mr. Diede's operation of the loader was "jerky," he didn't keep his pad level and he ran into his truck frequently.

On cross-examination by Mr. Diede, Mr. Shepperson testified as follows (Tr. 136-137):

Shepperson: The pad wasn't level, you ran into my truck frequently, not with the loader, with the bucket, not only hooking the tooth on the tire but then when you'd pull into the truck you'd hit the truck. And you'd hit the truck with the bucket on the loader I would say at least once in the five dumps that was there, on the average. I don't mean just touch the truck, I mean hit the truck enough so it jarred it and shook the truck around.

~1162

Diede: As far as bumping into a piece of equipment down there when you had been operating that truck before, was there ever a time that the loader operator ever even came close to your truck at all?

Shepperson: It happens occasionally.

Diede: So it can happen. Not everybody is perfect is what I'm trying to get at, right?

Shepperson: In the ordinary course of a week of work maybe a loader operator will bump the bucket against the truck box once. And that's somewhere around 200 load. (Tr. 136-137)

FINDINGS AND CONCLUSION

It is undisputed that Mr. Diede was told at the time he was hired that he was a "temporary hire;" that the job would be a temporary one. It is also undisputed that Mr. Diede was laid off at the end of the eighth day he worked for Summit. The crucial question is whether Mr. Diede was let go on the eighth day he worked in retaliation for having engaged in protected activity or because Summit management believed that he lacked the skills and/or attitude needed to perform the work in a competent manner. There is no question that a miner's safety complaints, such as a reasonable good faith safety complaint of inadequate brakes on a loader, are a protected activity. The fact that there may have been no objective underlying safety problem would not invalidate a miner's good faith reasonable safety complaint.

If Mr. Diede had proved his employment was terminated in some part because he engaged in protected activity, a prima facie case for unlawful discharge in violation of 105(c) of the Act would have been established. If on the other hand, Summit discharged Mr. Diede because of management's belief that he lacked the skills needed to competently perform the work in a satisfactory manner, his discharge would not constitute a violation of 105(c) of the Act.

Mr. Diede has the burden of proof. Upon careful evaluation of all the evidence, I find that he failed to establish the necessary causal connection between his discharge and his safety complaints. I find no persuasive evidentiary support for Mr. Diede's contention that his termination was motivated in any part by the operators intention to retaliate against him for any safety complaints. I credit the testimony of Respondent's wit

~1163

nesses and find that Mr. Diede was "let go" solely because management believed he did not have the skill to competently perform the job. I do not find that Mr. Diede was or was not a competent miner. That is not the question before me. Neither is the question of whether Summit was fair or accurate in its evaluation or its perception of Mr. Diede's skill or competence in performing the work. I find only on the basis of the evidence presented that it was management's honest belief that he did not have the ability to perform the work that was available in a competent manner and for this reason alone terminated his employment.

In sum, Mr. Diede failed to carry his burden of proof that his discharge was motivated in any part by his protected activity.

ORDER

Based on the foregoing findings and conclusions, and on the preponderance of the evidence adduced in this case, I conclude and find that the Complainant has failed to establish a violation of section 105(c) of the Act. He has not proven a discriminatory discharge within the meaning of section 105(c) of the Act. Accordingly, the complaint is DISMISSED.

August F. Cetti
Administrative Law Judge

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.