CCASE:
TOM K. SPERRY v. AMES CONSTRUCTION
DDATE:
19920406
TTEXT:

~555

Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
The Federal Building
Room 280, 1244 Speer Boulevard
Denver, CO 80204

CCASE: DISCRIMINATION PROCEEDING
TOM K. SPERRY,
COMPLAINANT Docket No. WEST 91-473-DM
v.
WE MD 91-12
AMES CONSTRUCTION, INC.,
RESPONDENT

DECISION

Appearances: Tom K. Sperry, pro se, Nephi, Utah,
for Complainant;
Lawrence R. Dingivan, Esq., Jill Dunyon-Hansen, Esq.,
Salt Lake City, Utah,
for Respondent.

Before: Judge Lasher

This matter was initiated by Mr. Sperry's complaint filed with the Commission on July 8, 1991, pursuant to 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"). His initial Sectio 105(c)(2) complaint was, on June 13, 1991, found by the Federal Mine Safety and Health Administration (MSHA) to lack merit. Complainant then filed the instant action with the Commission. Mr. Sperry's complaint with MSHA alleged:

> I was promised in October of 1990 to be rehired around February of 1991. I talked to this Company several times through the winter of 90-91 with no problems at that time. On February 4, 1991, I was told by Russ that I would not be rehired, that he had talked to Pete Smyle and Leon DeWitt and they had changed there [sic] mind about putting me back to work this season.
>
> I am sure that this action is because of a discrimination complaint I brought against them through your office.
>
> I have been in touch with my Labor Union in Reno. They said that if they put me back to work that they would find some way to get rid of me at a later date. The person at Reno is Chuck Billings Bus. Agent.

Contentions

Complainant contends that after being laid off in a reduction in force on October 19, 1990 (Ex. C-2), he was not thereafter rehired by Respondent because of his protected activities in filing an MSHA complaint on September 26, 1990 (Ex. C-4) (Footnote 1) and making other on-the-job safety complaints to his employer. Complainant also alleges that his layoff was discriminatory. (T. 20).

Respondent contends it laid off Complainant for lack of work and that it did not rehire him because he was an unsafe employee.

Findings and Conclusions

Based on the preponderance of the reliable and probative evidence introduced on the record at the hearing in this matter, the following findings of fact are made:

Respondent at material times was a contractor for Newmont Gold Company. (Ex. C-4). Its work was seasonal - depending on when various of its contracts would be completed and new contracts would commence. At times a reduction of force would be necessary and employees would be laid off. (T. 139, 149, 161-162).

Complainant (approximately 39 years old) commenced employment with Respondent at Newmont Mine No. 3 as an equipment operator (operating a No. 631 Caterpillar scraper) in the fall of 1989. His immediate supervisor most of the time thereafter was foreman (now Superintendent) Lavene "Pete" Smyle. (T. 25, 107-108). Complainant operated a "water wagon" for most of his employment beginning in approximately January 1990. (T. 27).

During his employment, Complainant engaged in various activities protected under the Act.

a. A discrimination complaint was filed under Section 105(c) by Mr. Sperry on September 26, 1990 (see MSHA Final Report; Ex. C-4). This complaint was voluntarily withdrawn on October 2, 1990 (Ex. C-4). As general information, it is noted that MSHA's "Final Report" states with respect to this complaint:

> The incidents took place over an extended period of time beginning approximately in October of 1989. The complainant was engaged in protected activity. The complainant did communicate his belief of a protected activity to mine management. The specific discriminatory act that the complainant alleges mine managemwent has undertaken is a failure to recognize his concern over his evaluation of possible maintenance problems associated with brakes on scrapers and water trucks as well as equipment for dust control.
>
> * * * * *
>
> Management and the complainant were instructed that MSHA would not be placed in a position to arbitrate controversy regarding labor disputes. Both parties were also instructed that any resolution of the complaint would have to be voluntary on the part of Mr. Sperry. (Footnote 2)

b. Complainant advised a fellow employee how to get in touch with the Nevada Mine Safety office in Reno, Nevada. Respondent's foreman, DeWitt, told Complainant he "was wrong" in doing this. (T. 51-52).

c. Complainant made various complaints to his supervision, such as for inadequate brakes on equipment. (T. 52). (Footnote 3)

It is not clear and was not established by Mr. Sperry that other alleged safety problems he observed were both (1) reported to management, and (2) actually unsafe or (3) reasonably

perceived by him to be unsafe. [See T. 27-28 (cut curtains); 31, 46-48 (dental appointment problem); 82-83].

d. Complainant himself apparently contacted the Nevada Mine Safety office (T. 27, 31). Whether Respondent was aware of these contacts by Mr. Sperry was not established, however. (T. 31).

It is clear that in filing the MSHA complaint and in advising a co-worker as to the whereabouts of Nevada's Mine Safety office, Complainant engaged in safety activities protected by the Mine Act, and that these activities were known to Respondent's management.

With respect to the layoff, the evidentiary presentation was limited. The record does clearly indicate that the employment expectations of Respondent's employees were not of a permanent nature since the work was seasonal. (T. 40, 139, 149, 161-162). Further, Respondent proved that 23 employees were laid off for lack of work in a reduction in force between September 20, 1990, and November 21, 1990. This group of 23 included Complainant who was laid off on October 19, 1990. (T. 92, 148-150, 152; Exs. R-2, R-6).

Complainant produced no probative or convincing evidence, that his layoff was discriminatorily motivated. (Footnote 4)

I am unable to conclude from the evidence of record that Respondent was in any way motivated by Complainant's protected activities in laying him off as part of the reduction in force in October 1990. Thus, no basis is found to conclude that the "discriminatory layoff" change of the Complainant has merit.

We turn now to Complainant's charge that Respondent's refusal to rehire him was discriminatory. As Respondent contends in its brief, the provisions of the labor agreement (see T. 50, 84-87, 91-92, 97-103, 105) between Complainant's employer and his union do not govern the determination whether discrimination occurred. The rules, remedies, burdens of proof, and analytical formulae for determining such are set forth in the Mine Act and specific precedents established by the Federal Mine Safety and

Health Review Commission and the federal courts. 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 States 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 (Dec. 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 the Respondent's management was aware thereof prior to the time he was laid off and subsequently not rehired. The first of the two issues posed is 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 (unsafe job performance) and would it, in any event, have not rehired him for this 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).

In this connection, Respondent's management witnesses convincingly testified that they were not motivated by Complainant's protected activities in laying him off and refusing to rehire him.

In contrast, the evidence introduced by Complainant failed to establish a motivational nexus between the allegedly discriminatory adverse actions taken against him and his mine safety activities was not convincing. (Footnote 5)

Direct evidence of actual discriminatory motive is rare. Short of such evidence, 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 (Nov. 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.

The record reveals that the decision not to rehire Complainant was effectively made by his foreman, Mr. Smyle. He credibly attributed this decision to the fact that he did not consider Mr. Sperry to be a safe employee. (T. 116-117, 164, 171-172). Respondent made out a relatively strong case that Complainant did not perform his duties in a safe manner. Thus, Complainant Sperry was shown to have been involved in an incident--in the Spring of 1990 when he was under the supervision of his first foreman--where he pulled his water wagon out in front of a large truck. (T . 110-155). (Footnote 6) He was being considered for discharge because of this incident when Foreman Smyle, who was short of help, said "Send him down to me, I can work with him." (T. 112). Complainant thereafter, in June 1990, received a verbal warning from Mr. Smyle for overwatering a curve which resulted in a truck sliding off the road. (T. 113-114). Significantly, after this, Mr. Smyle received complaints (T. 114, 168) from other drivers that Sperry was overwatering. He testified:

> Shortly after that, yes, we had some more complaints, and I don't recall the date, but I know it was on a Monday morning safety meeting, I went into the bus and told him specifically that he had to watch this, that the drivers were complaining. And he told me specifically, "Why don't they tell me?"
>
> And I said, "That's not their job. That is my job." (T.114). (Footnote 7)

Respondent also presented evidence that Complainant turned in front of another truck driver, Jay Pace, after which Mr. Smyle told Complainant that he would have "to start paying more attention and be more careful or we're going to have a fatality." (T. 115-116).

The preponderance of the reliable and probative evidence in this record indicates that Complainant was, as Respondent alleges, an unsafe employee in the performance of the duties he performed for Respondent and that this was its motivation in not rehiring him. (Footnote 8)

In reaching the conclusion that Complainant failed to establish that his layoff and not being rehired were discriminatorily motivated, consideration also has been given to the fact that the instant record overall does not reflect a pattern on the part of Respondent's management personnel to engage in such conduct. A history of retaliatory reaction to the expression of safety complaints was not persuasively 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. There was no evidence of retaliation against other employees who had engaged in safety activities or who expressed safety complaints.

ULTIMATE CONCLUSIONS

Respondent's motivation in laying off Complainant was economic and in not rehiring him was because he was unsafe and the decision to take such 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 if it were established by a preponderance of the reliable probative evidence, that Complainant's layoff and Respondent's refusal to rehire him were motivated in part by his protected activities, Respondent established by a clear preponderance of such evidence that it was also motivated by business reasons and Complainant's unprotected activities and that it would have taken the adverse actions in any event for such.

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

Footnotes start here:

1. Complainant voluntarily withdrew this complaint on October 2, 1990. (Attachment to Ex. C-4).

2. See also T. 61-63, indicating Complainant's reasons for withdrawing the complaint, such as his belief that "things were going to improve" and his belief that Russell Harvey (Respondent Project Director) would satisfactorily address his problems.

3. Complainant's testimony concerning a conversation with a foreman named Mike Beck concerning inadequate brakes on a CAT compactor has been scrutinized and is found not to constitute a safety complaint. (T. 55-58). Mr. Sperry's testimony frequently was unclear, irrelevant, disjointed, rambling, and speculative in nature. On cross-examination, at times he was hesitant. (T.65, 66, 67, 68-70).

4. It appears from the record that Complainant's primary--indeed, initial--intent in filing the instant complaint was to allege discrimination in Respondent's refusal to rehire him after the layoff.

5. Based on observation of the demeanor of the witnesses and Complainant, the various reasons appearing elsewhere in ths decision, and the relatively convincing testimony of Respondent's witnesses (Mr. Smyle, in particular, was closely cross-examined), the accounts of Complainant have been determined not to carry the same degree of reliability as those of Respondent's witnesses.

6. According to Complainant, he also was "accused" of "getting in the way of trucks"--in September 1990. (T. 51).

7. See T. 128-129.

8. As the Commission pointed out in Bradley v. Belva Coal Company, 4 FMSHRC 981, 991 (June 1982): "Our function is not to pass on the wisdom or fairness of such asserted business justifications, but rather only to determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed."