

CCASE:
CHARLES SMITH V. KEM COAL
DDATE:
19920428
TTEXT:

CHARLES T. SMITH,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. KENT 90-30-D
v.	:	BARB CD 89-27
	:	
KEM COAL COMPANY,	:	
Respondent	:	

DECISION ON REMAND

Before: Judge Fauver

The Commission has remanded this case "for further credibility findings and for analysis and explanation of the bases for [the judge's] ultimate conclusions regarding the nexus between Smith's protected activity and his discharge by Kem Coal."

The Commission directs the judge "to resolve the factual issues we have raised and to determine anew, by applying the Pasula/Robinette test, whether Smith has established a prima facie case of discrimination" and if so, to "determine whether Kem Coal has rebutted that case, or has affirmatively defended against it by demonstrating that it would have discharged Smith, in any event, for his unprotected activity alone."

In particular, the Commission directs the judge to "set forth the evidentiary bases for the first three elements of Halcomb's distorted account," as found by the judge. 1

1 The Commission describes the four elements of my finding that Halcomb gave a distorted account of the facts to Cox as follows:

"(1) that, knowing Cox to be a practicing pastor, Halcomb told him that Smith had used a religious epithet;

"(2) that Halcomb failed to tell him that Smith immediately apologized;

"(3) that Halcomb told Cox that Smith swore at him in front of the crew; and

"(4) that Halcomb failed to inform Cox that Smith had threatened to take his complaint to MSHA."

The Commission states that there are "several possible explanations" for Cox's mistaken belief that others were present when Smith swore at Halcomb and, although it does "not second-guess the judge as to the most plausible explanation ... , it is necessary for purposes of 'meaningful review' to know the reasons or bases for the judge's conclusion on this critical issue." The Commission also states that there are "critical differences in the testimony of Smith and Cox" that should be resolved.

The parties have filed proposed findings of fact, conclusions, and supporting briefs based on their understanding of the remand issues raised by Commission.

It appears from the parties' submissions that they may be assuming that the Commission exercises de novo review of the factual findings of an administrative law judge. It is therefore important to clarify, at the outset, the standard for agency review under this statute.

As stated by the Court of Appeals in *Simpson v. FMSHRC*, 842 F.2d 453, 461 (D.C. Cir. 1988):

The Mine Act denies the Commission (and on judicial review, this court) authority to overturn an ALJ's fact determinations ... when those determinations are supported by substantial evidence.

Thus, agency review of an administrative law judge's decision under the Federal Mine Safety and Health Act is not de novo. *Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 533 (1991); *Simpson v. FMSHRC*, 842 F.2d 453, 461 (D.C. Cir. 1988); *Donovan v. Phelps Dodge Corp.*, 709 F.2d 86, 90-92 (D.C. Cir. 1983). A Commission judge's factual findings are binding if supported by substantial evidence, and the Commission may not substitute a competing version of the facts, "even if the Commission's own view [also finds] support in the evidence." 709 F.2d at 92. Findings covered by this rule include not only past actions, but "predictions about operator conduct" (842 F.2d at 461).

Demeanor Evidence

There are, of course, many things that a trial judge observes that do not appear on the printed record. The appearance of witnesses and their manner of testifying greatly aid the judge in determining the credibility of witnesses and the weight to be given to competing versions of the facts.

Beyond the printed words of a transcript, the value of

~611

physical and behavioral clues should not be minimized. Printed words, unaccompanied by observation of the witnesses, can be very misleading. The truthfulness or deception of a witness may be indicated by well recognized physical and behavioral clues, as well as by changes in meaning due to phonetic emphasis, sarcasm, or other nuances.

Such clues include changes and contradictory signs in facial expressions, the eyes, the voice, and body language which may be perceived by an observer at the subconscious as well as the conscious level. They also include "microexpressions":

Some of the most reliable clues to emotion thus come from the so-called "microexpression." This is a complete facial expression that correctly conveys the underlying emotion, but only for a fleeting instant. As soon as it appears it vanishes, replaced by some other expression more nearly in accord with the emotion the subject wishes to portray. Microexpressions, or fragments thereof, do not always occur when someone is trying to mask an emotion. But when they do, they are extremely reliable. (Footnote 2)

As a general matter, it does not seem practical or desirable for trial judges to try to specify the observations and impressions of a witness' appearance or demeanor, or other physical and behavioral clues to truth or deception that influenced their factual findings. Such findings are based on observations at the subconscious (intuitive) as well as the conscious level, and involve many impressions that could never be fully articulated. However, since the Commission has pointed to my finding of Cox's sensitivity to the words "God damn" as requiring more explanation, I discuss some of my observations of Cox under the first issue below.

My findings and conclusions are included in the discussion of each issue.

Cox's Mistaken Belief that Smith Used a Religious Epithet

My impressions and observations of Cox as a witness, including his words, the inflection of his voice, changes in the speed of his speaking, his facial expressions, posture, and his general body language - - in short, the totality of his impressions on me during his examination as a witness - - persuade me that this plant superintendent who was also an active ordained minister found particularly objectionable the words "God damn." I observed him carefully as he testified, and I

2 Passions Within Reason, Robert H. Frank (W. W. Norton and Company, Inc. NY 1988), 125-126.

particularly noted his voice tone, facial expressions and body language as he used the initials "G.D." instead of repeating Halcomb's actual words and explained his use of initials by saying, "I hope you'll respect me for that" (Tr. 71). I do not find in any sense that Cox viewed these words as just "garden variety" miners' talk. Many aspects of his verbal and non-verbal behavior convinced me that Cox viewed those words as blasphemous, and thus particularly insulting and offensive. I find that the two and a half years' association between Cox and Halcomb was ample time for Halcomb to have come to know this aspect of Cox, and to believe, or reasonably expect, that Cox would consider a miner's use of the words "God damn" highly objectionable, especially in a public insult or rebuke of his foreman.

I give full weight to Smith's testimony, as opposed to that of Halcomb and Cox, as to what was said between Smith and Halcomb and between Smith and Cox. There are no conflicts between the testimony of Cox and that of Smith that I resolve in favor of Cox. (Footnote 3) Indeed, when Cox testified that he thought Collins had said he heard Smith swear at Halcomb (Tr. 64), I find that Cox was mistaken. The reliable evidence shows that Smith and Halcomb were alone when Smith swore at Halcomb, and that no one else heard them.

I do not find that Smith "admitted" to Cox that he had used the words "God damn." If Cox thought that, I find this was a miscommunication or one-sided interpretation by Cox and was not so understood by Smith. I credit Smith's testimony that he had not used those words (Tr. 182) and that the first time he learned that the words "God damn" had been attributed to him was when he saw the company report of his discharge after he was fired. Tr. 27-28. Cox's misunderstanding of Smith on this point does not detract from the significance of Halcomb's false account. Halcomb added the words "God damn" to the remarks he attributed to Smith. This false addition was detrimental to Smith. Its effect on the discharge is discussed under "Nexus," below.

Cox's Mistaken Belief that Others were Present When Smith Swore at Halcomb

Cox believed, based solely on Halcomb's account, that Smith had sworn at Halcomb, invoking God, in front of members of Halcomb's crew. Cox did not derive this belief from anything said by Smith, because Cox had already decided, after talking to Halcomb and to Cox's supervisor before he saw Smith, that if Halcomb's account of the incident were true, Cox "had no choice

3 I reconcile the difference in their testimony as to whether Cox was told by Smith that Smith had apologized to Halcomb, under the "Apology" issue, below.

~613

but to let him go" (Tr. 44) and the reason for that decision was that Smith had "called Henry [Halcomb] these names in front of Henry's people that he had to manage and ... it placed him in a very bad position." Tr. 63. Cox testified that the only thing left to do -- after he talked to Halcomb and Cox's supervisor -- was to see if Smith denied Halcomb's account: "if he denied it, then we would have brought in the other guys and discussed the situation" (Tr. 45). This plainly shows that Cox believed, solely from Halcomb's account, that there were "other guys" present when Smith swore at Halcomb. Also, Cox told Smith that Smith's brother (who actually was nowhere in the area) heard Smith swear at Halcomb. Tr. 28. Since Halcomb was the only witness Cox spoke to before he saw Smith, Cox had to have gotten this false account from Halcomb. Finally, Cox was asked these simple and direct questions:

Q. 36 You went under the opinion that this argument that transpired between Tom and Henry, when the words were spoken, there were other people present at that time?

A. Yes

Q. 37 Is that what Henry told you?

A. Later on, other people came to me and rehearsed to me the seriousness of the situation, yes.
[Tr. 63-64.]

Considering the way in which this last answer was delivered, as well as the total impressions made by Cox as a witness, and the record as a whole, I find that the "yes" in his answer refers to Halcomb -- that is, Cox's answer meant "Yes, Halcomb told me Smith had cursed him in front of others." Cox never contended otherwise. Halcomb's false account to Cox that others were present when Smith swore at Halcomb was detrimental to Smith.

Halcomb's Failure to Tell Cox that Smith Stated He Would Report Halcomb's Unsafe Practices to MSHA

In the safety dispute with Halcomb, Smith told him he would take his complaint to MSHA: "I told Henry that this putting me in a[n] unsafe condition was going to stop, and he said it wasn't unsafe. That's when I told him that I was going to have to let the Mine Safety and Health Administration find out what he was doing." Tr. 35. Halcomb angrily told Smith not to threaten him.

In Halcomb's account to Cox, he omitted the fact that Smith said he would report Halcomb's unsafe practices to MSHA.

Respondent contends that since Halcomb told Cox that Smith had raised a safety complaint, there was no discriminatory motive

~614

in this omission. However, a foreman's personal liability for safety violations cannot be dismissed. Such penalties can be substantial, and MSHA has prosecuted many cases against foremen under 110(c) of the Act. Halcomb's anger over Smith's statement that he would report him to MSHA was an animus factor that Cox did not know about in accepting Halcomb's account of the facts. Concealing this factor had the effect of concealing from Cox an illegitimate motive for Halcomb's adverse actions, and of trying to minimize the weight of Smith's safety complaint, which was another illegitimate motivating factor. This omission contributed to Halcomb's overall "laundering" of his account to Cox in order to achieve Smith's dismissal.

Halcomb's Failure to Tell Cox that Smith Apologized

Smith immediately apologized to Halcomb after swearing at him, but Halcomb responded, "It's already been said now" (Tr. 29), and suspended Smith without pay with referral to Cox for further discipline. Halcomb's report to Cox omitted the important fact that Smith had immediately apologized for his outburst. Smith testified that he told Cox that he had apologized to Halcomb (Tr. 36), but Cox did not recall hearing this (Tr. 63). The testimony of both Smith and Cox on this point is reconciled by the fact, which I find, that Smith made the statement to Cox that he had apologized but his statement did not register in Cox's attention or memory. Halcomb's omission of the apology was detrimental to Smith.

The Nexus Between Smith's Protected Activities and His Suspension Without Pay and Discharge

Under the Commission's Pasula/Robinette (Footnote 4) test, a miner has the burden to prove that he was engaged in protected activity and that the adverse action complained of was "motivated in any part" by that activity.

Smith's safety complaints to Halcomb before July 15, 1989, and on that date, including his statement that he would report Halcomb's unsafe practices to MSHA, were all protected activities.

I find that Halcomb was angered at Smith's safety complaints, and Smith's statement on July 15, 1989, that he would report Halcomb's unsafe practices (endangering Smith's life) to MSHA. Halcomb angrily told Smith not to threaten him, before

4 Secretary o.b.o. Pasula v. Consolidation Coal Co., FMSHRC 2786, 2797-2800 (1980) rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary o.b.o. Robinette v. United Castle Coal Co., 3 FMSHRC 817-18 (1981).

~615

Smith swore at him. Halcomb first tried to dodge the truth of the complaint with a "hearsay" device. When that failed, he flatly contradicted Smith's truthfulness. In effect, Halcomb was calling Smith a liar; and Smith, knowing the truth of his complaint, took great offense and swore at Halcomb, although he immediately apologized. Halcomb refused to accept his apology. This series of events was immediately and intimately connected with Smith's safety complaint. (Footnote 5)

Halcomb had a disposition to bully, taunt and abuse Smith. (Footnote 6) This showed a readiness to retaliate against Smith should Smith anger him or challenge his orders or actions on any basis. I find that Halcomb was angered by Smith's safety complaints and his statement that he would take his safety complaint about Halcomb to MSHA, as well as by Smith's swearing at him. Because of his anger, Halcomb retaliated by suspending Smith without pay and referring the matter to Cox for further discipline. Halcomb's retaliation was motivated by Smith's protected activities as well as by Smith's swearing at Halcomb.

5 Smith swore at Halcomb because Halcomb upset him by first confounding Smith with a "hearsay" device to evade his safety complaint and then flatly contradicting the truthfulness of the complaint. The heart of Smith's safety complaint was that Smith had told Halcomb, through the radio operator, of his dangerous situation (working under falling coal) but Halcomb ordered him, through the radio operator, to "go ahead and run it" (Tr. 187). On July 15, 1989, Halcomb answered Smith's safety complaint by raising a "hearsay" technicality to evade the complaint - - contending that Halcomb's words conveyed through a radio operator were only "hearsay" and could not prove a safety complaint against him. Smith countered with the point that it was not "hearsay" because the radio operator had the job duty of transmitting orders from Halcomb to Smith. Halcomb seemed to be troubled by Smith's removal of the "hearsay" claim, and decided to end the complaint by contradicting Smith's truthfulness altogether, saying, "No, it didn't happen that way" (Tr. 24). This was the final straw for Smith, who blurted out, "You're a lying son of a bitch", and then immediately apologized (Tr. 24). But for Smith's protected activity of raising the safety complaint, and Halcomb's conduct in dodging the complaint and then flatly contradicting Smith's truthfulness, it cannot be reasonably inferred that the safety dispute would have reached the point of Smith swearing at Halcomb.

6 Halcomb had a practice of bullying Smith and an abusive, retaliatory attitude toward him. He taunted and belittled Smith on a frequent basis -- ordering him to make coffee, accusing him, a married man with children, of flirting with a married cashier at a grocery store and taking a young girl in his truck implying improper motives, depriving him of lunch breaks, ignoring his safety complaints, and subjecting him to danger.

I find, from the totality of Halcomb's distortions of the incident he reported to Cox, that he discriminated against Smith, and this discrimination resulted in Smith's discharge. These distortions were: (1) that Smith used the words "God damn," (2) not telling Cox that Smith had immediately apologized, (3) that Smith swore at Halcomb in the presence of members of Halcomb's crew, and (4) not telling Cox that Smith stated he would report Halcomb's unsafe practices to MSHA.

Wholly apart from Halcomb's giving a discriminatory, distorted account to Cox, I find that Halcomb discriminated (Footnote 7) against Smith by suspending him without pay and referring the matter to Cox for further discipline. These acts in themselves were retaliatory, motivated in part by Smith's protected activities, and they led to his discharge. By refusing to accept Smith's apology and suspending him without pay with referral to Cox for further discipline, Halcomb acted from an animus toward Smith motivated both by Smith's protected activities and by Smith's swearing at him. I do not accept Halcomb's testimony that he was not motivated in any part by Smith's protected activities.

I find that a preponderance of the substantial, reliable, and probative evidence established a prima facie case of discrimination by Respondent against Smith, in violation of 105(c) of the Act, based on the following elements: (1) Motivated in part by Smith's protected activities, Halcomb discriminated against Smith (A) by suspending him without pay and referring the matter to Cox for further discipline and (B) by giving a distorted account to Cox of what had occurred between Smith and Halcomb; (2) Halcomb's discriminatory acts led to Smith's discharge; (3) since Halcomb was a supervisor, his discrimination is imputed to Respondent; (4) wholly apart from element (1)(B), above, Halcomb (and therefore Respondent) discriminated against Smith by suspending him without pay and referring the matter to Cox for further discipline, because these acts were motivated by Smith's protected activities as well as by Smith's swearing at Halcomb, and they led to Smith's discharge.

Respondent did not rebut Smith's prima facie case by any reliable evidence that there was no protected activity or that Halcomb's retaliatory actions were not motivated in any part by Smith's protected activities.

7 "Discrimination" includes adverse action and any other conduct detrimental to the miner's employment relationship, if motivated in any part by protected activity. Hecla-Day Mine Corp., 6 FMSHRC 1842 (1984).

Affirmative Defense

Under the Pasula/Robinette test, if the operator fails to rebut a prima facie case, it may still affirmatively defend against the prima facie case by proving that it was also motivated by unprotected activity and would have taken the adverse action in any event for the unprotected activity alone.

The Commission's test of an affirmative defense is adopted from an NLRB construction that the Supreme Court has found to be a permissible agency rule. *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975). To establish the affirmative defense, the employer has the burden of proving "by a preponderance of the evidence" that "absent the improper motivation he would have acted in the same manner for wholly legitimate reasons." *NLRB v. Transportation Management Corp., Inc.*, supra, 462 U.S. at 401.

In approving assigning the burden of proof to the employer, the Supreme Court stated:

The employer is a wrongdoer; he has acted out of a motive that is declared illegitimate by the statute. It is fair that he bear the risk that the influence of legal and illegal motives cannot be separated, because he knowingly created the risk and because the risk was created not by innocent activity but by his own wrongdoing. [462 U.S. at 403.]

The affirmative defense adopted by the Commission, like the NLRB test, is not required by the anti-discrimination provision of the statute, but is a permissible agency rule. As the Supreme Court stated concerning the NLRB rule:

We also assume that the Board might have considered a showing by the employer that the adverse action would have occurred in any event as not obviating a violation adjudication but as going only to the permissible remedy The Board has instead chosen to recognize . . . what it designates as an affirmative defense that the employer has the burden of sustaining. We are unprepared to hold that this is an impermissible construction of the Act. '[T]he Board's construction here, while it may not be required by the Act, is at least permissible under it . . . ,' and in these circumstances its position is entitled to deference. [462 U.S. 402-403; citations omitted.]

The affirmative defense in Mine Act cases must be applied with care, to ensure that it operates in harmony with the intent of the Congress. Application of the defense must not undermine either the miner's right to raise safety complaints freely,

without fear of reprisal, or the operator's right to discipline for legitimate reasons.

In the case at hand, the swearing incident was immediately and intimately connected with Smith's safety complaint and the foreman's hostile reaction to it. Halcomb first tried to dodge the safety complaint with a "hearsay" device. When that failed, he flatly contradicted the truthfulness of Smith's complaint. In effect, he was calling Smith a liar. Smith became upset and swore at Halcomb, and then immediately apologized. Halcomb refused to accept the apology and retaliated because of mixed motives - - discrimination against Smith for his safety complaints and anger for Smith's act of swearing at him.

(Footnote 8) To establish an affirmative defense, Respondent had the burden of proving by a preponderance of the evidence that, "absent the improper motivation [it] would have acted in the same manner for wholly legitimate reasons." *NLRB v. Transportation Management Corp., Inc.*, supra, 462 U.S. at 401. However, Cox's testimony shows that if Halcomb had told him the truth about what had occurred between Smith and Halcomb, Smith would not have been discharged. (Footnote 9) This is the opposite of an affirmative defense. Also, based on the evidence it cannot be reasonably assumed that but for the safety complaint and Halcomb's improper response to it, Smith would have sworn at Halcomb. That is, Smith's act of swearing cannot be reasonably isolated as an independent, legitimate motive for the adverse action. (Footnote 10) Respondent's difficulty in trying to prove it would have fired Smith for a "wholly legitimate" reason is due to Halcomb's (and thus Respondent's) own wrongdoing - - his discrimination and improper response to the safety complaint. As the Supreme Court stated, "it is fair that he bear the risk that the influence of legal and illegal motives cannot be separated, because he knowingly created the risk and because the risk was created not by innocent activity but by his own wrongdoing." 462 U.S. at 403. On balance, I find that Respondent did not meet its burden of proving an affirmative defense.

8 The incident is discussed in more detail in Fn. 5, above.

9 Cox testified that if he had known that Complainant swore at Mr. Halcomb when they were alone -- "just between him and Henry, it could have probably been resolved," that is, without discharging Complainant (Tr. 65).

10 This is not to say that misconduct by a miner in a safety dispute could not meet the test of an affirmative defense, e.g., if a miner strikes a foreman out of anger because of the foreman's improper response to his safety complaint. However, the affirmative defense places the burden on the employer to separate the legal from the illegal motive in a convincing way, by a preponderance of the evidence.

ORDER

1. To avoid duplication, my Decisions and Orders of October 31, 1990, and January 31, 1991, in all parts not inconsistent with this Decision on Remand, are hereby incorporated by reference as if they were written in this Remand Decision.

2. Respondent is ORDERED to comply with this Order which incorporates by reference the language of my prior Order to reinstate Complainant (October 31, 1990) and my Order for monetary relief (January 31, 1991).

3. IT IS FURTHER ORDERED that the parties shall confer within 15 days of the date of this Decision, in an effort to stipulate the back pay, interest, attorney fee and other litigation costs that have accrued since the computation period in my Order of January 31, 1991. If they are unable to do so, Complainant shall submit, within 20 days of the date of this Decision, his statement of the amounts due. Respondent may respond within 10 days thereafter.

4. This Decision will not become final until a subsequent order is issued awarding monetary relief and declaring this Decision to be final.

William Fauver
Administrative Law Judge

Distribution:

Michael S. Endicott, Esq., L.E., "Ed" Spencer and Associates, 83 Main Street, P. O. Box 1176, Paintsville, KY 42140 (Certified Mail)

Timothy Joe Walker, Esq., Reece, Lang & Breeding, P.S.C., London Bank & Trust Building, 400 South Main Street, P. O. Drawer 5087, London, KY 40745-5087 (Certified Mail)

/fas