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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
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RICHARD ALLEN PLASTER,
COMPLAINANT

v.

FALCON COAL CORPORATION,
RESPONDENT

DISCRIMINATION PROCEEDING

Docket No. VA 91-449-D

NORT CD 91-02

Mine No. 1

DECISION

Appearances: E. Gay Leonard, Esq., Copeland, Molinary & Bieger,
Abingdon, Virginia, for Complainant;
Thomas R. Scott, Jr., Esq., Street, Street, Street,
Scott & Bowman, Grundy, Virginia, for Respondent.

Before: Judge Maurer

STATEMENT OF THE CASE

This proceeding concerns a discrimination complaint filed by the complainant, Richard Allen Plaster, against the respondent, Falcon Coal Corporation (Falcon), pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. Mr. Plaster filed his initial complaint with the Secretary of Labor, Mine Safety and Health Administration (MSHA). His complaint alleged:

On January 27, 1991 (sic), I was section electrician at Falcon Coal Corporation. My battery light went out at the beginning of the shift (at approximately 3 p.m.). I made a couple of attempts to have one brought to me by Mr. Hackney and after he declined to do so and after talking to the section foreman, I removed myself from what I considered a hazardous working condition (no light) and removed myself from the mine to obtain another light. While I was obtaining another light, a verbal confrontation occurred between Rick Hackney and myself because I had removed myself from what I felt like was a hazardous condition.

During the verbal confrontation with Mr. Hackney, I was discharged by him. Mr. Hackney just slapped his hands and said, "You're gone." I then requested him to have a Federal inspector come to the mine site and I received no response from him.

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Following an investigation of his complaint, it was found by MSHA to lack merit because a violation of section 105(c) had not occurred. Mr. Plaster then filed his complaint with this Commission.

Pursuant to notice, a hearing was conducted in Abingdon, Virginia, on February 13, 1992. Subsequently, both parties filed post-hearing briefs and/or proposed findings and conclusions, which I have considered along with the entire record of proceedings in this case in making the following decision.

The complainant originally alleged that he was illegally discharged from his job with Falcon on January 28, 1991, when he was fired after leaving his work place to come outside the mine to get a cap light. Complainant also now alleges that he had several prior confrontations with Falcon management because of unrelated safety violations in the mine and he believes that his discharge on January 28, 1991, was motivated at least in part by these previous safety complaints. Respondent, on the other hand, insists that Plaster was quite properly discharged from his job solely for insubordination--- the admitted use of abusive language directed towards his supervisor during a work-related discussion with that supervisor.

DISCUSSION

Plaster began his employment at Falcon as an electrician/mechanic on December 4, 1990. He was fired on January 28, 1991.

In the intervening 2-month time period, Plaster now claims to have had several confrontations with the mine foreman, Ricky Hackney. Hackney was, like Plaster, also a certified electrician, and the subject of these "confrontations" purportedly was electrical hazards that Plaster was finding in the mine. Hackney, however, flatly denies that there were ever any confrontations or discussions with Plaster about any unsafe electrical conditions. I do believe Plaster found and repaired several unsafe electrical conditions during his short tenure at this mine, but I do not find credible his allegations that he had any trouble with Hackney because of it. I note that there is no mention made of this in his complaint to MSHA filed January 30, 1991. My considered opinion after reading this entire record again is that whatever happened to cause Plaster to be discharged on January 28, 1991, played out on that day. Hackney had no preexisting agenda to get rid of Plaster. Therefore, I will turn now to the important events of January 28, 1991, in some detail.

When Plaster went into the mine on January 28, 1991, his cap light was apparently operating normally. However, in a short time, it began to go dim even though he claims to have charged it for 11 hours preceding that shift.

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Plaster also claims that the only other prior incident involving his cap light was resolved virtually without incident before he went underground. This testimony differs considerably from that of his section foreman, Allen Perkins and mine foreman Hackney. They both recall numerous occasions during his 2-month employment that Plaster had problems with his light. The resolution of this discrepancy in the testimony is probably not too important except perhaps as it bears on the frustration level of Perkins and/or Hackney if it is true that this was a frequently recurring situation.

At any event, shortly after arriving at the section on January 28, Plaster called Hackney on the surface and told him about the problem with his light. Hackney told Plaster that he would get him a new light as soon as possible. Plaster also went to his section foreman, Perkins, and told him that his light was going out and that he had already called Hackney and that Hackney was going to send him one in. Perkins told Plaster to go back to the feeder area, where another miner was stationed who had a light, and stay there until Hackney called and said that he was coming in with his light; then he (Perkins) would send somebody to the end of the track to get it.

When the replacement light was not forthcoming, Plaster called outside to Hackney a second time, telling him that his light had now gone completely out and asking him again to send in a light as well as a part needed for repair of a shuttle car. Hackney again told Plaster that he still could not deliver the light because he was alone outside. Federal regulations and Virginia state law require that a responsible person be on duty at all times outside the mine in case of an emergency. Therefore, Hackney was waiting for Jerry Shortridge to arrive at the mine office so he could take the light to Plaster. Hackney seemingly was unaware of it, but Shortridge arrived in the office area in time to hear Hackney tell someone [probably Plaster] on the telephone that "[t]here is nobody out here but me. I have no way of getting you one." (Tr. 259).

After the second telephone conversation with Hackney, Plaster requested that his foreman allow him to go out and get his own light. Perkins told him to go ahead. Plaster's subsequent unlit trip to the surface was undertaken in at least as hazardous a condition and probably more so than the situation he was in at the feeder. He went out of the mine with neither a cap light nor an operable light on the mantrip. He himself admits it was hazardous to come out that way but states that "it was either that or stay in there the entire shift without a battery light." It seems to me that a third option, i.e., waiting for someone else to either bring one in, or getting someone else who had a light to come out would have been preferable. But, in any event, he did successfully make it outside without incident.

After arriving on the surface, he went to the supply shed and was in the process of obtaining a light when he encountered Hackney. Hackney asked "[W]hat in the hell are you doing?" or words to that effect. He was angry that Plaster had come out of the mine. Plaster replied, according to Shortridge, who overheard this exchange, and essentially corroborates Hackney's version, with words to the effect that he was getting a light. Hackney responded by berating Plaster: "No, you didn't have to come outside to get a light. You could have gotten someone else to have gotten a light." Additionally, Plaster testified that he added on: "Your job is up there [indicating inside on the section]. If you stay here, you will stay on the section where your job is at." Plaster then said: "You'll have to take that up with Perkins." Intimating I suppose that Perkins had ordered him to go outside and get his own light. Perkins denies this, but he did allow him to go as opposed to ordering him to go. Anyway, Hackney replied: "I will, but right now you're standing in front of me and I'm taking it up with you." At this point, Plaster was now angry about being brought up short by Hackney. According to Shortridge, he is now talking louder than Hackney, who is also angry. Plaster replies with: "Fuck you, I ain't staying in there without no light." (Plaster's version) or "Fuck you, you can't tell me what to do." (Hackney's version). After some more disputed conversation which could more properly be called angry argument, Plaster tells Hackney "fuck you" twice more, at least according to Hackney and Shortridge. At the third repetition of this offensive phraseology, Hackney fired Plaster on the spot. Two days later Plaster filed the complaint at bar.

The general principles governing analysis of discrimination cases under the Mine Act are well settled. In order to establish a prima facie case of discrimination under section 105(c) of the Act, a complaining miner bears the burden of production and proof in establishing that (1) he engaged in protected activity and (2) the adverse action complained of was motivated in any part by that protected 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 (3rd Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 817-18 (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 nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. Pasula, supra; Robinette, supra. See also Eastern Assoc. Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987); Donovan v. Stafford Construction Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's Pasula-Robinette

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test). Cf. NLRB v. Transportation Management Corp., 462 U.S. 393, 397-413 (1983) (approving nearly identical test under National Labor Relations Act).

Of particular importance in this case is the second part of the complainant's burden of proof. He must make an initial showing that his discharge was motivated at least in some part by his protected activity. If he fails to establish a causal connection between his protected activity, and the adverse action taken against him, he has failed to prove an essential element of his case and his complaint is subject to dismissal.

If going outside to get his own light was protected activity, and arguably it was, the adverse action must still be proven to have been taken as a result of that protected activity in order to be found discriminatory under the Mine Act.

It seems clear to me from the record in this case that going outside to get the light wasn't what got him fired. Hackney wasn't real happy to see him out there by any means, but had he just gotten the light and kept his mouth shut, I'm convinced he wouldn't have gotten fired. It was solely the insubordinate and abusive language that got him fired and that is not protected activity. Plaster himself testified that Hackney told him just minutes or even seconds before he was fired: "If you stay here, you will stay on the section where your job is at." (Tr. 58). This statement is attributed to Hackney by Plaster before he uttered his insubordinate response. At that point in time he still had a job. And it is my impression that had he said nothing further or simply said "OK, I've got the light, I'm going back in now," that would have been the end of it. He would not have been fired. He wasn't in fact fired until after he said an angry "fuck you" to Hackney either once or three times, depending on whose version of the argument you believe. But, no matter how many times it was, it is undisputed that only after that exchange was he fired. That appears to me to be a justifiable firing that was the immediate and direct result of his insubordinate language.

Complainant attempts to justify his outburst by showing that virtually all the miners, including Hackney himself, use this type of language with each other on a daily basis, and I accept that as true. However, all the witnesses who testified in this case, save the complainant, also very clearly stated that this type of language is not directed at one's supervisor during a serious business discussion, and if it was, they would expect repercussions.

Perhaps as an illustration of that principle, after Plaster had departed, Hackney purportedly remarked to Shortridge: "Nobody is going to stand and cuss me like that." (Tr. 269).

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In summary, complainant has most definitely not shown by a preponderance of the reliable and probative evidence that his discharge was motivated in any part by protected activity. He has therefore failed to meet his burden of proof in this regard.

I concur with the respondent that insubordination, i.e., this type of verbal abuse by an employee directed towards his supervisor, need not be tolerated by any company, and is certainly not protected activity under section 105(c) of the Mine Act.

ORDER

In view of the foregoing findings and conclusions, and after careful consideration of all of the credible evidence and testimony adduced in this case, I conclude and find that the complainant has failed to establish a violation of section 105(c) of the Act. Accordingly, the complaint IS DISMISSED, and the complainant's claims for relief ARE DENIED.

Roy J. Maurer
Administrative Law Judge