CCASE:
DENVER COLLINS V. ANDALEX RESOURCES
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DENVER COLLINS,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. KENT 92-877-D
	:	MSHA Case No. BARB-CD-92-21
ANDALEX RESOURCES, INC.,	:	
Respondent	:	No. 23 Mine

DECISION

Appearances: Phyllis L. Robinson, Esq., Hyden, Kentucky, for the Complainant; Philip C. Eschels, Esq. Greenebaum, Doll and McDonald, Louisville, Kentucky, and Marcus McGraw, Esq., Greenebaum, Doll and McDonald, Lexington, Kentucky, for Respondent

Before: Judge Melick

This case is before me upon the complaint by Denver Collins, under Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. Section 801, et seq., the "Act" alleging unlawful discharge under Section 105(c)(1) of the Act by Andalex Resources, Inc. (Andalex).(Footnote 1) In his

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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 a 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 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 miner, representative of miners of applicant for employment has instituted or caused to be instituted any proceeding 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.

original complaint filed with the Mine Safety and Health Administration, Collins alleged that he was fired "for keeping notes of unsafe acts at the underground mine." Mr. Collins' complaint filed before this Commission on July 24, 1992, presents essentially the same allegation. Subsequently, in an amended complaint filed on October 29, 1992, Collins further alleged that he had "voiced repeated safety complaints during the two years of his employment with Andalex Resources, and that management ignored said complaints to the point that the making of said complaints was futile."

In order to establish a prima facie violation of section 105(c)(1) the Complainant must prove by a preponderance of the evidence that he engaged in an activity protected by that section and that his suspension was motivated in any part by the protected activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (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 803 (1981). The operator may rebut the prima facia case by showing either that no protected activity occurred or that the adverse action was not motivated by the protected activity. Failing that, the operator may defend affirmatively against the prima facia 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. Pasula, supra; Robinette, supra (the so-called Pasula-Robinette test). See also Donovan v. Stafford Constr. Co., 732 F.2d 954, 958-59 (D.C. Cir., 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983).

The credible evidence in this case clearly supports a finding that the Complainant engaged in protected activities in the two years preceding his discharge on January 21, 1992. Collins testified that over the course of his employment at the Andalex No. 23 Mine, from August 5, 1991 through the day of his discharge, he reported to Andalex management various safety and health problems, including those involving coal dust in the mine atmosphere, the need for rubber gloves to handle a power cable, and about taking deep cuts with the continuous miner. While Andalex officials apparently disagree with the characterzation that such reports constituted health and safety "complaints," I find that within the meaning of Section 105(c)(1) of the Act, they were indeed protected complaints.

In the absence of evidence of contemporaneous adverse action (except for the January 16, 1992 incident discussed infra) against Collins in response to these protected activities, however, and indeed in the absence of any discriminatory action against him even after a fatal roof fall incident to which company officials believe Collins as the continuous miner operator himself contributed by having taken an illegal deep cut, I find it highly

unlikely that Andalex would have retaliated against him for any health or safety complaints" reported before the January 16, 1992 incident. Moreover, these prior "complaints" by Collins were not extraordinary in nature, but rather the type of reports to be expected from miners to their foreman in the day-to-day operation of an underground coal mine. Indeed, even after these prior "complaints" had been made, it is undisputed that Collins was being considered for promotion to the position of foreman and was told of those plans. For the above reasons and because of the swift and severe action by Andalex officials on January 21, 1992, in clear response to Collins activities on Thursday, January 16, 1992, I conclude that his discharge on the latter day was solely the result of his activities on the former date.

The critical issue to be decided at this point in the analysis then is whether Collins' discharge on January 21, 1992, was motivated in any part by protected activities on January 16, 1992. In this regard, significant evidence is undisputed. For example, it is not disputed that on Thursday, January 16, 1992, Collins, while operating the continuous miner, knowingly took at least two illegal and admittedly dangerous deep cuts (of 55 feet each) -- well in excess of the 30 foot cuts permitted under the applicable roof control plan. It is further undisputed that Collins initiated and completed these deep cuts without any specific order or direction from his foreman, Charles Smith, or from anyone else. It is also undisputed that Collins then knew that at least the upper management of Andalex, including Division Manager Clifford Berry, General Manager Brian Anderson and Safety Director Harry Philpot, would not tolerate the taking of such illegal deep cuts and that if any of them knew he was taking deep cuts he would be no doubt fired. It is further undisputed that the illegal and dangerous practice of taking deep cuts is not in itself a protected activity.

Collins has alleged, and it is undisputed, that his foreman, Charles Smith, and Mine Superintendent Willie Sizemore (the person who notified Collins of his discharge) knew at the time of his discharge that he had been maintaining a personal daily log, including, among other things, a notation in that log of the illegal deep cuts he had taken on Thursday, January 16, 1992. Whether or not these officials had actually seen this entry or any other log entry regarding the lost pages from his notebook, it is clear that these persons had knowledge that he was

maintaining such a log. Under the particular circumstances of this case, I find that this was a protected activity. That Collins may not have intended the contents of his log be reported to MSHA or to Andalex officials or that the entry regarding the deep cuts on January 16 was only inadvertently disclosed to company officials is immaterial. Even where a miner has not actually engaged in a protected activity he is nevertheless protected under Section 105(c) if the mine operator retaliates based even on the erroneous belief that the miner did engage in protected activity. See Elias Moses v. Whitley Development Corp., 4 FMSHRC 1475 (1982). In addition, the mere threat of disclosure is sufficient to trigger the protections of Section 105(c).

Serious allegations have been made in this case by a number of witnesses that while it was known that upper management would not tolerate deep cuts some foremen not only did not discourage deep cuts but actively encouraged and overlooked such practices at the Andalex Mine. These allegations were made too many times by too many credible witnesses to find them without merit. The fact that continuous miner operators other than Collins were also apparently performing the same illegal acts as he under some implicit approval by the section foremen, but only Collins was discharged, suggests that adverse action against Collins was in fact initiated not merely for taking illegal deep cuts, but rather for maintaining a written record of the practice.

Regardless of Smith's motivation, however, I find that the officials responsible for Collins discharge, namely Sizemore and Berry, acted, in discharging him, solely upon the evidence that Collins had taken illegal deep cuts on January 16, 1992. I find credible Berry's testimony that had no knowledge of Collins' log entry on the Sunday before the discharge when he told Sizemore to verify the facts and if they proved to be true that Collins did indeed take the deep cuts then to fire Collins. In any event, even had he such knowledge, it is undisputed that Berry, as well as General Manager Brian Anderson and Safety Director Harry Philpot would not tolerate deep cutting and would fire anyone who did so. It may therefore reasonably be inferred that Berry would have directed Collins' discharge in any event based solely on his unprotected and illegal deep cutting alone.

While Sizemore had knowledge of Collins log entry (regarding his deep cuts on January 16), I find credible his testimony that he declined to look at the log entry and indeed would have taken the same action regardless of his knowledge of any such log entry. The only suggestion that Sizemore may have ever approved of deep cutting was Collins' claim that Sizemore was once present near an entry that had been deep cut. Without additional evidence however I cannot infer that Sizemore therefore in fact condoned or encouraged deep cutting. Even if Collins' testimony was true in this regard there are a multitude of reasons why Sizemore may not have had knowledge that he was near a deep cut. In addition, if Sizemore had in fact condoned the practice of deep cutting, as Collins seems to suggest, it would have been reasonable for Collins to have raised that in his defense when Sizemore told him he was being fired for that identical practice. The fact that Collins did not raise that claim suggests that Sizemore did not in fact condone such a practice and Collins knew that.

Finally, I find Sizemore to be a credible witness when he testified that he did not, and would not, tolerate deep cutting and had no knowledge other than the fatality in 1990 and the instant case where a deep cut had been taken. Under these circumstances there would be little reason for Sizemore to retaliate against Collins based on his log entry. I therefore conclude that his decision to discharge Collins was also based solely on Collins' unprotected illegal activity of taking deep cuts. Thus, I conclude that the persons responsible for Collins discharge, namely Berry and Sizemore, were in no way motivated by his protected activities, but based their decision solely on his unlawful conduct on January 16, 1992, in taking illegal deep cuts with the continuous miner. Under the circumstances the captioned complaint must be dismissed.

ORDER

The captioned discrimination proceeding is hereby dismissed.

Gary Melick
Administrative Law Judge

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