

CCASE:
IRENE TONEY V. IMC FERTILIZER
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IRENE TONEY, : DISCRIMINATION PROCEEDING
 Complainant :
 v. : Docket No. SE 92-318-DM
 : MSHA Case No. SE MD 92-04
 IMC FERTILIZER, INC., :
 Respondent : Kingsford Mine/Mill

DECISION

Appearances: Irene Toney, Bartow, Florida, pro se;
 John E. Phillips, Esq., Holland and Knight,
 Tampa, Florida, for Respondent

Before: Judge Melick

This case is before me upon the complaint by Irene Toney pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," alleging that IMC Fertilizer, Inc. (IMC) discharged her on December 5, 1991, in violation of Section 105(c)(1) of the Act.(Footnote 1)

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 miner, representative of miners or 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."

More particularly, Ms. Toney alleges that her discharge was the result of her persistent complaints to IMC management about the unsanitary condition of the field toilet facilities and, on at least one occasion, the absence of such facilities. In her complaint pursuant to Section 105(c)(2) of the Act to the Mine Safety and Health Administration (MSHA) and in her testimony at hearing, Ms. Toney cited particularly an incident in August or September 1991 when she purportedly found maggots on the toilet and floor of the portable toilet facility, and reported this condition to her foreman at the time, James Pate. She testified that she told Pate that if the toilet was not cleaned by 3:00 p.m. that day she would report the condition to the Polk County Health Department. Ms. Toney maintains that when the condition was not thereafter corrected she in fact then did call the Polk County Health Department and was referred to the local MSHA office. She subsequently reported those conditions to MSHA through a toll free telephone number and an MSHA inspector thereafter appeared at the mine site.

Ms. Toney's complaint to the Secretary, providing the jurisdictional basis for this case, is set out in full as Appendix A to this decision. This complaint was thereafter denied by the Secretary by letter dated May 21, 1992, and Ms. Toney then filed the instant case with this Commission on June 4, 1992.

Ms. Toney began her employment with IMC in January 1981, as a laborer and was promoted to dragline oiler in 1988. She thereafter commenced a training program for dragline operator and in 1990 became an assistant dragline operator and dragline operator. Ms. Toney recalls that her first complaint at the Kingsford Mine regarding the absence of any toilet facility was made to her then foreman, Jerry Wells. Following her request, a toilet was provided and apparently that was the end of the incident. Other than this first complaint at the Kingsford Mine, which apparently occurred in 1988 and the August or September 1991 complaint to James Pate, previously noted, Ms. Toney did not specify dates or particular circumstances regarding her other complaints about toilet facilities. She testified, however, that she complained about these facilities weekly to a number of management officials, including Mine Superintendent Ron Hartung, and Foremen Jerry Wells, Bonnie Bailey, Darold Weichman and Tom David. She also recalled that on at least one occasion, either due to a lack of toilet facility or unsanitary conditions, she had to go around the dragline and "use the ground." She observed that, in general, for the first day or two after the toilets were serviced they would be clean but that they would thereafter "get dirty fast."

The Commission has long held that a miner seeking to establish a prima facie case of discrimination under section 105(c) of the Act bears the burden of persuasion that he engaged in protected activity and 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 (1980), rev'd on other grounds, sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); and Secretary of Labor on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (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 any protected activity. If an operator cannot rebut the prima facie case in this manner, it may nevertheless defend affirmatively by proving that it would have taken the adverse action in any event on the basis of the miner's 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 test). Cf. NLRB v. Transportation Management Corp., 462 U.S. 393, 397-413 (1983) (approving nearly identical test under National Labor Relations Act).

I find in this case that Ms. Toney established a prima facie case that she engaged in protected activities by making health related complaints to IMC management regarding the absence of sanitary toilet facilities and, on at least one occasion, the absence of any toilet facilities. In addition, I find that she has established by undisputed evidence that she engaged in protected activity when she filed a complaint regarding unsanitary toilet facilities to MSHA in August or September 1991. Ms. Toney has also presented evidence which, when considered alone, might suggest that her discharge may also have been motivated by her protected activities. She testified that following her complaint to Foreman Pate in August or September 1991 about the unsanitary toilet facility, Pate was so angry that he almost ran her down with his pickup truck. She also maintains that following this incident and her reporting of the same conditions to MSHA she received eight disciplinary points for leaving the job site early, was given two disciplinary points when

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she was late for a safety meeting and was called into the superintendent's office "almost daily."(Footnote 2)

While this evidence, along with the relatively close relationship in time between her complaints to Pate and MSHA in August or September 1991 and her discharge on December 15, 1991, would tend to support a finding that her discharge may have been based, at least in part, upon her protected activities I find, in any event, that IMC has rebutted such evidence by clearly demonstrating that her discharge was not motivated by her protected activity. Pasula, supra, Robinette, supra.

Doug Wampole has been a personnel supervisor for IMC for 18 years. His job includes reviewing all disciplinary matters for consistency under the IMC point system. The IMC disciplinary program, in effect since January 1, 1986 and about which all employees are notified, provides in pertinent part as follows:

Three-Day Disciplinary Layoff

9 Points - 12 Month Period	12 Points - 12 Month Period
13 Points - 18 Month Period	15 Points - 18 Month Period
15 Points - 24 Month Period	18 Points - 24 Month Period

The IMC Disciplinary Program allows employees to personally make positive inputs to their own record. Specifically :

. . .

3a. If any employee has over 10 years of continuous service ... - delete 1 point from disciplinary record

. . .

2 While Ms. Toney also testified that she complained about the lack of sanitary toilet facilities to the Equal Employment Opportunity Commission in October 1991, on cross examination she acknowledged that the complaint did not relate to the cleanliness of the toilet facilities (See also Exhibit C-1). On cross examination Ms. Toney also acknowledged that the two disciplinary points she received for failing to attend a safety meeting occurred in April 1991, prior to her complaint to MSHA about unsanitary toilet facilities.

RULE INFRACTIONS

Discipline Points	Title of Discipline	Discipline/ Reference Code
...		
3	Reporting Late for Company Required Meeting	03-06
...		
4	Carelessness in Performing Duties (minimal to moderate loss of product or damaged equipment)	04-01
...		
9	Leaving the Job or Plant Without Permission and/or Proper Relief (has left Company premises)	09-07

(Exhibits R-2 and R-3).

Wampole testified that his role in the disciplinary action against Toney was to determine consistency. The foreman ordinarily initiates the disciplinary action through a "notice of discipline" (R-4) form and classifies the violation while Wampole looks to a computerized history of similar violations to determine whether the same type of violation has received the same penalty. Wampole himself is the official who assesses the disciplinary points.

In reviewing Toney's disciplinary history, Wampole noted that she received two disciplinary points for a violation on April 29, 1991, for being late for a scheduled monthly safety meeting. Ms. Toney acknowledges that she was indeed late for the safety meeting and did not challenge this disciplinary action through the company grievance procedures. Wampole noted that this was a minor infraction for which she received only two points and, considering credit given for one positive point, she was left with only one disciplinary point at that time. (See Exhibit R-5).

Wampole noted that Toney was subsequently disciplined for leaving the job without permission and/or proper relief on September 8, 1991 and received nine disciplinary points.

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The disciplinary report regarding this incident reads, in pertinent part, as follows:

At 6:40 am on Sunday 9/8/91 the Page 3 dragline was called by the day shift foreman in order to have the crews work over. There was no reply to the repeated efforts to contact the dragline and pit. A roving HOH was sent to the area at 6:45 am and found no personal vehicles and the D/L house interior, exterior and boom lights still on, on the machine. It is standard procedure that you cannot leave our assigned work station until properly relieved. On this machine, you were specifically instructed on 9/6/91 to call your foreman as your primary relief. No call was received.

An hour's production was lost because of the delay in manning 3 stations. (Exhibit R-6).

Ms. Toney admits that she did in fact leave her job site early without receiving direct permission from her foreman as charged in the disciplinary notice and acknowledges that she did not challenge this action through the company grievance procedures. Wampole noted that following the issuance of this disciplinary notice Ms. Toney had ten cumulative disciplinary points and received a 3-day layoff. It is not disputed that the two other employees on Toney's work crew who also left early on September 8, 1991, also received the same nine point disciplinary action.

Wampole observed, finally, that as a result of a notice of IMC discipline on December 5, 1991, assessing four disciplinary points, Ms. Toney had, as of that date, accumulated 14 points and, under the IMC disciplinary program, was subject to discharge.

The notice of disciplinary action dated December 5, 1991, reported, in part, as follows:

On Saturday 11/30/91 you failed to ensure the proper placement of the P-5 power cable which is one of the job duties you are responsible for as a dragline operator. You then got into the cable with the D/L bucket blowing it up causing three hours downtime and on the D/L and two hours down on the pit. (Exhibit R-8)

This disciplinary action was challenged by Ms. Toney through the IMC grievance procedures, including arbitration at which she was represented by the International Chemical Workers Union, Local No. 35. With respect to the factual findings and appropriate disciplinary points charged for the infractions by Ms. Toney, I give the arbitrator's decision significant weight. See Pasula, supra, 2 FMSHRC at 2795. The arbitrator thoroughly analyzed the factual setting given rise to the December 5, 1991, disciplinary action and found just cause for her discharge. (See Exhibit R-1). There is no challenge to the procedural fairness of these proceedings and Ms. Toney was represented by the union. It is also noteworthy that the same number of disciplinary points charged in this incident to Ms. Toney had also been issued to at least three other dragline operators between January 1991 and August 1991 for the same offense, i.e., cutting the dragline power cable with the bucket (See Exhibit R-9). I further find credible Mr. Wampole's testimony that at the time he evaluated the issuance of disciplinary points to Ms. Toney he was unaware of her complaints regarding the lack or the unsanitary condition of the toilet facilities.

Under the circumstances I conclude that in issuing disciplinary points against Ms. Toney, leading to her discharge on December 5, 1991, IMC was not motivated in any part by activity protected by the Act. Accordingly, this case must be dismissed.

ORDER

Discrimination Proceeding Docket No. SE 92-318-DM is hereby dismissed.

Gary Melick
Administrative Law Judge
(703) 756-6261

Distribution:

Ms. Irene Toney, 2962 Morris Drive, GH, Bartow, FL 33830
(Certified and First Class Mail)

John E. Phillips, Esq., Holland and Knight, P.O. Box 1288,
Tampa, FL 33601 (Certified Mail)

/lh

APPENDIX A

I called your office to report bathroom condition in field. I tried to call Safety Personnel first but he did not return call. Within two weeks of that time I received 8 points for so called leaving job site to [sic] early 4 more points were given for a cable that was buried under ten or more feet underground. This cable should have been moved by two earlier shifts. When I told James Pate about bathroom problem he said there was nothing he could do about bathrooms which had maggots on floor on toilet itself and crawling all about the whole bath. I had complained to all said foremen about bathrooms and to no avail did I get any results. There were up to 15 men around the day I complained to James Pate. He even almost ran over me he was angry at me. Will give more details.