

CCASE:
ERNIE SPAULDING V. MADISON BRANCH
DDATE:
19930406
TTEXT:

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

ERNIE L. SPAULDING,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEVA 92-971-D
v.	:	
	:	HOPE CD 92-07
MADISON BRANCH MANAGEMENT,	:	
INC.,	:	
Respondent	:	

DECISION

Appearances: Thomas L. Woolwine, Personnel Management Consultants, Princeton, West Virginia, for Respondent;
Ernie Spaulding, Pro Se.

Before: Judge Maurer

This case is before me based on a Complaint filed by Ernie Spaulding, alleging that he was discriminated against by Madison Branch Management, Inc., (Madison), in violation of section 105(c) of the Federal Mine Safety and Health Act of 1977, (the "Act"), 30 U.S.C. 815(c). Pursuant to notice, the case was heard in Bluefield, West Virginia, on December 29, 1992. At the hearing, Mr. Ernie L. Spaulding appeared pro se and testified in his own behalf. David Collins also testified on behalf of complainant. At the conclusion of the complainant's case, respondent made a motion for summary decision, which I took under advisement at the time in order to hear their evidence. Messrs. Sturgill and Logan subsequently testified on behalf of respondent and were cross-examined by Mr. Spaulding. Finally, Mr. Spaulding made a closing statement on the record. Following that, I granted the respondent's motion for a summary decision.

Complainant, who has never worked for Madison, alleges basically that he was not hired to be a bulldozer operator at Madison in this instance because even though he professes to be "pretty good at it," he believes he was not given a fair tryout on the equipment. Furthermore, he believes that the reason for this "discrimination" was because of a previously poor work record with other employers when he was younger. He states he had a lot of "AWOLs" in those days, and thinks Madison might be aware of this along with the fact that he was a "union radical" in his previous coal mine employment. Madison's defense is essentially that they tried him out on the equipment and he performed poorly on the practical test.

As I explained to the parties at the beginning of this hearing (Tr. 15-16), in order to establish a case of discrimination under section 105(c) of the Act, the complainant has the burden of proving 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* test). Cf. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 397-413 (1983) (approving nearly identical test under National Labor Relations Act).

Complainant herein failed to demonstrate that he had engaged in any prior activity that would be considered "protected activity" under the Mine Act. Since this is a necessary element of any discrimination case, his case has failed of proof and must be dismissed.

ORDER

It is ORDERED that this case be DISMISSED.

Roy J. Maurer
Administrative Law Judge

Distribution:

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