CCASE:
WALTER McMICKENS V. JIM WALTER RESOURCES
DDATE:
19930504
TTEXT:

WALTER L. McMICKENS, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. SE 92-452-D
v.	:	
	:	BARB CD 92-29
JIM WALTER RESOURCES, INC., Respondent	:	No. 7 Mine

DECISION

Appearances: Ralph E. Coleman, Esq., Coleman & Friday, Birmingham, Alabama, for the Complainant; David M. Smith, Esq., Mark Strength, Esq., MAYNARD, COOPER, FRIERSON & GALE, R. Stanley Morrow, Esq., Jim Walter Resources, Inc., Birmingham, Alabama, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a discrimination complaint filed by the complainant Walter L. McMickens against the respondent Jim Walter Resources, Inc. (JWR), pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c). Mr. McMickens filed his initial complaint with the Secretary of Labor, Mine Safety and Health Administration (MSHA), on April 15, 1992, and by letter dated July 17, 1992, he was advised by MSHA that after review of the information gathered during its investigation of his complaint, MSHA determined that a violation of section 105(c) of the Act had not occurred. Subsequently, on August 17, 1992, Mr. McMickens filed his complaint with the Commission.

The complainant alleges that the respondent discriminated against him when it laid him off from his employment as a foreman after he was examined by x-ray pursuant to section 203 of the Act and found to have evidence of category I simple pneumoconiosis. He further alleges that his layoff was the result of his having exercised his right to request a dust free environment, and that the respondent responded to his request by placing him on a job that subjected him to dust, and that during subsequent mine inspections, kept him away from his work area before the inspections in order to meet the requirements of MSHA's respirable dust regulations.

The respondent filed an answer to the complaint denying any discrimination and contending that the complainant was laid off during an approximate 25% reduction in its work force. A hearing was held in Birmingham, Alabama, and the parties filed post-hearing arguments which I have considered in the course of my adjudication of this matter.

Issue

The critical issues in this case are whether or not the complainant's termination was prompted or motivated in any way by his Part 90 miner status, and whether or not the respondent discriminated against the complainant by placing him on a job subjecting him to dust after he had requested a dust free working environment.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. 301 et seq.

2. Sections 105(c)(1), (2) and (3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c)(1), (2) and (3).

3. Commission Rules, 29 C.F.R. 2700.1, et seq.

4. Part 90, Title 30, Code of Federal Regulations.

Stipulations

The parties stipulated to the following (Tr. 17-21):

1. The respondent is a large operator covered by the Mine Act, and operates underground coal mines in Tuscaloosa County, Alabama.

2. The complainant was a salaried employee at the respondent's No. 7 Mine from January 3, 1980, to April 10, 1992.

3. When the complainant was laid off, the respondent laid off approximately 25 other salaried personnel and approximately 125 union personnel from the No. 7 Mine.

4. The complainant claimed Part 90 status on September 10, 1991, and after exercising his Part 90 rights, he continued to receive the same salary as he had before he exercised such rights.

> 5. At the time of his layoff, the complainant received severance pay equivalent to three and one-half months salary and all accrued vacation pay of fifteen days' salary.

Complainant's Testimony and Evidence

Walter L. McMickens testified that he previously worked for another mining company for 22 years as a union and salaried miner working in different jobs, and that he was hired by the respondent in 1980 as a salaried section foreman supervising a coal production crew. Within 13 months he was advanced to assistant mine foreman supervising other coal production supervisors. In approximately 1983, there was "a big layoff" and all union employees and 20 supervisors were laid off. Approximately 14 employees were called back and he supervised them in "setting timbers" to protect the beltline and "doing dead work". When the mine started up again, he was assigned as a construction foreman. No one complained about his work, and while serving as a construction foreman he became familiar with the other jobs in the mine, including production, blasting and shooting, and did "just anything they said to do". He remained a construction foreman for approximately seven years from 1984 to either 1990 or 1991, and shortly before he became a Part 90 miner he was assigned to a "setup crew". After he filed for a Part 90 Miner designation, general mine foreman Gerald McKinney spoke with him about the matter and "asked me what did I expect" (Tr. 22-33). Mr. McMickens stated that he responded to Mr. McKinney as follows (Tr. 33):

> THE WITNESS: I told him I didn't expect any difference whatsoever because I felt like that I was in about as good a -- as a setup foreman, out of the dust about as good as any place I could be in the mine because there's no really dust free atmosphere in the mine.
>
> And I told him the only thing I wanted was to get it on record that if I lived to retire, I might get black lung, or if I died maybe my wife would get black lung.
>
> I didn't expect to be changed from the job, even though I asked for dust free atmosphere. That was to comply with the Federal.

Mr. McMickens confirmed that a second mine layoff occurred in 1984 or 1985, and although he was retained on the job, several union employees and several foremen were laid off, and others were transferred to other mines (Tr. 51).

Mr. McMickens identified a copy of a September 6, 1991, statement he executed on that date exercising his option to transfer as a Part 90 Miner (Tr. 34; Exhibit C-4). He also

identified a copy of a September 10, 1991, letter from MSHA to the respondent informing it of the fact that his medical examination reflected that he was eligible for Part 90 miner's rights pursuant to the Coal and Mine Acts (Tr. 36; Exhibit C-1). Mr. McMickens confirmed that he had x-rays taken periodically, beginning in 1965, each time the mobile x-ray unit came to the mine (Tr. 36).

Mr. McMickens confirmed that in February, 1991, he was still working as a construction foreman, or on "general projects", or he would "fill in" and perform any job that he was assigned. He stated that he did not request the special projects job, and that other people also worked on special projects or on specific jobs, but that he was "kind of this special projects foreman night after night after I came off construction" (Tr. 38). He confirmed that after he requested Part 90 Miner status, the respondent was required to test him for dust exposure and obtain five samples. He identified Exhibit C-3, as the results of sampling during the period October 22, 1991, through April 6, 1992 (Tr. 40).

Mr. McMickens stated that during his dust sampling the MSHA inspector put the respirable dust testing pump on him at 11:00 p.m. before he went underground and instructed him to meet him "at the end of the track" at 2:30 a.m. Mr. McMickens explained that the track area in question was a "fresh air" area, and he stated that he was there with the inspector, a company representative, and a union safety man from 2:30 until 5:30. Mr. McMickens stated that "we sat there and talked till 5:30 in the morning", and he indicated that this was the last time he was tested by an MSHA inspector before his layoff on April 10, 1992, (Tr. 54-56). He confirmed that the inspector and company representatives do not accompany him during the entire shift. The inspector hangs the pump on him and starts it up before he goes underground, and the inspector removes the pump at the end of the shift (Tr. 74).

Mr. McMickens believed that he was the only salaried employee to ever file for that status at the mine. He stated that he did so because he was told he had black lung and should see his doctor. He identified two salaried employees with less seniority who were not laid off when he was (Tr. 57, 65-66).

Mr. McMickens confirmed that company safety inspector Bobby Taylor notified MSHA by letter dated October 1, 1991, that after his designation as a Part 90 miner, he would primarily be working as an outby labor foreman, and would also be subject to work as a face supervisor if so designated by management (Tr. 77; Exhibit C-2). Mr. McMickens confirmed that he did in fact work as an outby labor foreman after his Part 90 designation, and that he was qualified to do the work of a face supervisor, a job that is still open and being performed (Tr. 78).

On cross-examination, Mr. McMickens stated that he was a foreman or supervisor from 1980 until 1992, and at times had Part 90 miners under his supervision. He confirmed that he never harassed or intimated any miners because of their Part 90 status, that mine management never instructed or encouraged him to intimidate or discriminate against any Part 90 miners, and that during his 12 years of employment with the respondent he knows of no instances when a Part 90 miner was ever discriminated against because of his status (Tr. 81).

Mr. McMickens confirmed that he was already working outby when he was designated a Part 90 miner, and that before 1991 he worked at different jobs involving construction and special projects rather than coal production. He stated that he supervised a continuous miner section during his first 13 months of employment with the respondent, but after that he only supervised such a section "for part of a shift from one time to another" and not on a full time basis (Tr. 82). He confirmed that the volume coal production comes from the longwall and that he never worked on a longwall section or supervised such a section, and that as of the date of his layoff he was not qualified or trained to perform the duties of a longwall foreman (Tr. 83).

Mr. McMickens confirmed that he spoke with Mr. McKinney after MSHA informed him of his Part 90 status, and that he informed Mr. McKinney that he did not expect any work changes to be made and that he simply wanted to document the fact that he had black lung and to protect any future benefits that his wife might receive. Mr. McMickens acknowledged that there was no dust free atmosphere in the mine and that he expected no change. He stated that "I was . . . a setup foreman, which I think was in a less dusty atmosphere there on that than where I was put" (Tr. 85). In response to a question as to whether or not the respondent kept him in an environment that was generally less dusty than MSHA's regulations required after he was designated a Part 90 miner, Mr. McMickens responded as follows (Tr. 85-87):

> A. You never know what you're going to kick up. When you -- go from one section to another, you never know how much dust is going to be on the ground or how much the air volume is going to be after you get in there.
>
> There would be a brattice out. You might not have no ventilation. You never know until you go into an area how much dust you're gonna be kicking up in the air.
>
> Q. I understand that. My question is: Did Jim Walter seem to try and keep you in a less dusty environment generally?

A. Yeah.

Q. After you were Part 90, did Jim Walter or any management person above you at Jim Walter ever try to intimidate you about your Part 90 rights?

A. No, sir.

Q. Did they ever try to harass you about your Part 90 rights?

A. No, sir.

Q. Did they ever threaten you?

A. No, sir.

Q. Did they ever say, McMickens, you've declared this Part 90 status, and I guarantee it's going to come back to haunt you?

A. No, ain't nobody said nothing like that.

Q. Did anybody ever say to you or say anything to someone else that you heard about that was negative about your Part 90 status.

A. No, sir.

Q. Before you filed this complaint could you tell the Court any example any time in history when Jim Walter has taken negative action against a Part 90 Miner because of their Part 90 status?

A. They never did.

Mr. McMickens confirmed that he has stated under oath to the EEOC that his layoff was a result of his age and that his age was the determinative factor (Tr. 87). He believed that 137 union miners were laid off when he was laid off, and pursuant to the labor agreement, they were laid off by seniority. However, seniority did not apply to the layoff of salaried personnel (Tr. 88). Mr. McMickens stated that he was not aware of any economic condition that required a reduction in force in 1992, and he did not know that this was the case. He simply believed that someone else should have been laid off instead of him (Tr. 89).

Mr. McMickens stated that he was assigned normal and routine jobs to do during his respirable dust sampling period, and that there was no "hanky panky" in connection with the dust sampling (Tr. 90). He further stated that there was no avoidance of any

dusty conditions in an attempt to hide them from the inspector, and he confirmed that the respondent was never cited for assigning him work under conditions that were too dusty for Part 90 miners. He knew of no Part 90 miners ever being cited for working in a dusty atmosphere, and as far as he knew, the respondent was never cited for samples that exceeded MSHA's dust exposure regulations (Tr. 92).

Tommy R. Boyd, testified that he has worked at the mine since 1980, and that he is a longwall helper and serves as the union safety representative. On numerous occasions he has assisted MSHA inspectors and management in the taking of dust samples for Part 90 miners (Tr. 108). He explained the procedures followed at the time Mr. McMickens was sampled and tested, and he confirmed that a sampling pump can malfunction at any time. When this occurs, the miner is resampled in order to obtain a full eight-hour sample (Tr. 113-114). He confirmed that there were occasions when he was with an inspector during midshift to look at Mr. McMicken's sampling pump, and he explained the incident when the inspector met with Mr. McMickens at the end of the track as follows at (Tr. 115-116):

> A. We went down -- I know -- I remember the occasion you're talking of. We went down and met Mr. McMickens at the end of the track, Mr. Phillips, the inspector and myself. And we sat there for some three hours on the end of the track talking.
>
> Q. Do you generally make it a habit of sitting down at the end of the track talking three hours?
>
> THE WITNESS: No, sir. We usually don't do that because it ties the mine foreman up, and the mine foreman he oversees the whole mines.
>
> And for that reason -- I don't know why the inspector decided to sit and talk for three hours and joke and laugh and cut up, which it did interfere with mine operations.
>
> Mr. Phillips was just as astonished as I was because he asked me several times, reckon when he's going to leave. He said, we can't leave until the inspector gets ready to leave as part of our aid and assist.
>
> Q. (By Mr. Coleman) Would that, in fact, affect -- as far as the reading and the overall dust sample, would that affect the --
>
> A. Well, that's three hours.
>
> Q. -- liability?

A. That's three hours that he's in fresh air that he would have normally been in a possible more dusty area.

Mr. Boyd stated that the work performed by Mr. McMickens as a setup foreman on special projects was "outby work" away from the areas that were producing coal, and these areas were less dusty (Tr. 118-119).

On cross-examination, Mr. Boyd acknowledged that Mr. Wiggins was working as a rock foreman before Mr. McMickens was ever declared a Part 90 miner. He also acknowledged that during the three-hour conversation with the inspector at the end of the track while Mr. McMickens was being sampled, shift foreman Phillips wanted the inspector to leave so that Mr. McMickens could return to work. Mr. Boyd confirmed that the inspector was dictating the course of this event and "as long as the inspector sits there, we have to sit there with him" (Tr. 124).

Respondent's Testimony and Evidence

Richard A. Donnelly, mine manager, No. 7 Mine, testified that the workforce was reduced in April, 1992, because the world coal market had declined and the respondent had problems in selling its coal at a profit. It therefore became necessary to reduce costs and the amount of tonnage produced at all of its mines. He participated in the development of an operating plan to accomplish the reductions, and he explained the plan as follows at (Tr. 131-132):

A. The plan we came up with entailed running fewer miner sections, fewer long walls sections, just basically doing a lot less of everything that we normally do, thereby creating less tonnage.

At the same time, it reduced dramatically the number of people that were required to do these jobs. A lot of the expenses that we incurred were reduced.

So, in effect, we ended up eliminating -- I believe the number was 134 union jobs and it was 24 supervisors. We laid off 23 because one supervisor quit and went with another company right in the midst of that. So, it was actually a reduction of 24 jobs.

Q. And the reduction in force of the labor force is done by the collective bargaining agreement, right?

A. Yes, it is.

Q. How was the evaluation done of which salaried persons to lay off?

> A. What we did was look at what jobs had to be performed at the reduced levels, how many miner sections, how many long wall sections. Just, basically, how many jobs there were. And then we went through and looked at the people that were available, the people that we had on the payroll at the time and picked the best people to do those jobs until we filled every job. And once we filled each of the jobs, the people that were remaining were the people that got laid off.

Mr. Donnelly stated that he arrived at the No. 7 Mine in August, 1991, and that Mr. McMickens received his Part 90 status in September, 1991. Mr. McMickens was not involved in coal production work and he basically performed "outby dead work" as a special projects foreman (Tr. 134).

Mr. Donnelly confirmed that he participated in the final decision to lay off Mr. McMickens and he did not consider his Part 90 status to be a negative factor. He was not aware of anyone making any negative reference to Mr. McMickens' status. Mr. Donnelly confirmed that consideration was given to the fact that Mr. McMickens did not like to do production work at the face, and this was considered as part of his overall job abilities. Mr. Donnelly explained that Mr. McMickens had made statements that he did not want to work at the face, that he did not want the responsibility of dealing with MSHA and the regulations and the pressures involved and that he preferred to continue doing work outby. Mr. Donnelly confirmed that this was a factor in the decision to lay off Mr. McMickens (Tr. 135).

On cross-examination, Mr. Donnelly stated that he never observed Mr. McMickens at his job, but he was told by other mine foremen that Mr. McMickens was an "average" supervisor (Tr. 136). Mr. Donnelly stated that fewer longwall and miner unit shifts were going to be operated and the ability to operate each of these sections was a very important consideration in the layoff. Mr. Donnelly believed that the longwall faces were the dustier areas in the mine, and that he would probably not assign a Part 90 miner to those areas (Tr. 137).

Mr. Donnelly stated that at the time of the layoff he was the deputy mine manager and that Willis Coaxe was the mine manager. He confirmed that layoff meetings were held to identify and determine the jobs that were to be retained, and to begin to select the best people to fill those jobs. Mr. Donnelly confirmed that he relied on a large degree on Mr. Phillips or Mr. McKinney to tell him who was going to be retained, but he was not aware that anyone's personnel records were reviewed as part of the selection process. He further confirmed that he and the management officials making the selections were aware that Mr. McMickens was a Part 90 miner (Tr. 139).

Mr. Donnelly stated that during his 16 years in a supervisory capacity, Mr. McMickens was the only supervisor that he was aware of that had Part 90 status. Mr. Donnelly believed that such a status would not enhance Mr. McMickens' record with the Company (Tr. 139). He confirmed that mine manager Coaxe would be the final authority as to who would be laid off and who would stay (Tr. 140). Although seniority was considered, it was not the only consideration. He confirmed that Mr. McMickens had more seniority than Mr. Bo Wiggins, the person who replaced him, and he may have had more seniority than another supervisor (Parsons) (Tr. 140-141).

In response to further questions. Mr. Donnelly reviewed a list of names of supervisors who were laid off in April, 1992 (Exhibit R-1), and he stated that Mr. McMickens may have been retained if three more salaried people had been retained, but it was his opinion that if only one more person had been retained it would not have been Mr. McMickens. He believed that Mr. McMickens probably was among the top 10 or 11 people at the mine. Mr. Donnelly did not believed that Mr. McMickens was qualified for a communication supervisor's job which involved a TV computer network to monitor different mine work areas (Tr. 143).

Mr. Donnelly stated that during the layoff there was no particular list prepared of persons to be laid off in any particular order. He explained that management knew that a number of jobs would be retained and that a certain number of people would be laid off. He confirmed that prior to the layoff there were numerous jobs in the category of special projects outby foreman on all three shifts, but that after the layoff, there were very few of those jobs, and they were the majority of jobs that were eliminated from the operating plan (Tr. 144-145).

Mr. Donnelly stated that Mr. Wiggins and Mr. Parsons are presently working on construction foreman jobs, and that Mr. McMickens would only fill in temporarily on that job. He confirmed that Mr. McMickens performed outby special projects work, and that Mr. Wiggins and Mr. Parsons previously performed that kind of work on a very limited basis (Tr. 145).

Mr. Donnelly stated that for the last several years no written evaluations of supervisors were made, and he confirmed that he and Mr. Coaxe and Mr. McKinney were the main participants in the discussions as to who would be retained in the layoff (Tr. 147).

Mr. Donnelly stated that he would not hesitate to put a Part 90 miner to work at the face if the mine were in compliance with the 1.0 milligram respirable dust requirement. He confirmed that he was told that Mr. McMickens did not want to work at the face (Tr. 148).

Gerald E. McKinney, General Mine Foreman, No. 7 mine, testified that he has worked with Mr. McMickens and has given him work assignments. He stated that Mr. McMickens was a construction foreman for several years and changed to a special projects foreman in February, 1990, approximately 18 months before his Part 90 status, and he was one of many outby "dead work" foremen (Tr. 151).

Mr. McKinney stated that he was involved in the evaluation of salaried personnel in 1992, in connection with a reduction of the work force. He believed that he knew of the work that Mr. McMickens could do and not do. He stated that sometime after February, 1990, Mr. Phillips informed him that Mr. McMickens told him (Phillips) that he did not want to be on a coal production face because of the additional pressures and responsibility of that job. This occurred prior to Mr. McMickens' Part 90 status, and Mr. McMickens himself told him (McKinney) of his desire not to work at the face during a conversation in his office (Tr. 153).

Mr. McKinney reviewed a list of supervisory personnel, (Exhibit R-1), and he explained the consideration given to those listed during the layoff as follows at (Tr. 154-155):

> Q. All right. And in the context of deciding what miners to keep, what salaried personnel to keep, were there persons who would have been kept before Mr. McMickens on that list; that is, Exhibit 1?
>
> A. Just glancing over it, there's a couple of people that I know were ex-coal runners on the face that did produce coal at one time and a couple of long wall experienced people.
>
> I would probably myself -- and maybe even some of the maintenance people. There would be probably be four or five that I would probably -- would fall in line before Mr. McMickens would.
>
> Q. And you're referring to Exhibit 1?
>
> A. Right.
>
> Q. Did you at any time consider Mr. McMickens' Part 90 status?
>
> A. No, sir, I did not.
>
> Q. Did you in any way retaliate against Mr. McMickens for exercising his rights as a Part 90 Miner?

A. No, sir.

On cross-examination, Mr. McKinney stated that Mr. McMickens was his supervisor at one time in the past when he (McKinney) was first hired at the mine in 1982. Mr. McKinney recalled an incident in which Mr. McMickens was called on to assist in a rock fall situation and that he probably commended Mr. McMickens for doing a good job. He believed that Mr. McMickens was "a good company man" (Tr. 157).

Mr. McKinney confirmed that one of the criteria for retaining an employee during the reduction in force "was that everyone we kept we tried to have them where they could either fill in on the longwall face or be able to run a miner section " (Tr. 158). He denied that Part 90 miners cannot work at the face, but did not know where they are assigned on a regular basis. He was only familiar with Part 90 miners that operate dust pumps, and stated that there are many such miners that never invoke their rights. He confirmed that Mr. Mickens was the only supervisor in his mining experience that had Part 90 status and that he "was very surprised" at this because he believed that such a status was for union employees (Tr. 159).

Mr. McKinney confirmed that Mr. McMickens was retained during two prior layoffs in 1982 and 1985 prior to his Part 90 status (Tr. 162). He explained the work experience of Mr. Parsons and Mr. Wiggins and stated that "we had an opportunity to hire two ex-rock people and we did so. We felt that our mines may need them in the future" (Tr. 164). Mr. McKinney confirmed that safety director Taylor's letter of October 1, 1991, to MSHA, reflects that Mr. McMickens "will be on the owl shift working primarily as an outby laborer", and he stated that Mr. McMickens was already doing that work at that time and that he was also subject to working at the face (Tr. 165). However, due to low coal production, the salaried people doing the outby work were all former section foreman who were moved to outby jobs to fill in for people who were off (Tr. 166).

Paul A. Phillips, shift foreman, No. 7 mine, stated that Mr. McMickens worked under his supervision as a supervisory work foreman on the owl shift, and that in April, 1992, at the time of the reorganization Mr. McMickens was working as an outby foreman. He described his duties as "changing from night to night" depending on the work to be done, and that "it could go anywhere from setting timbers to building seals" (Tr. 168). He considered the position of special projects foreman to be the same as an outby section foreman. He explained that "outby" involved the maintaining of the rest of the mine away from where coal is being extracted from the face (Tr. 168).

Mr. Phillips stated that Mr. McMickens informed him on several occasions that "he did not want anything to do with the face work, the production of coal" and wanted to stay outby because there were less responsibilities, and that these statements were made prior to September, 1991 (Tr. 169). He confirmed that Mr. McMickens was a construction supervisor before he became a special projects foreman, and he considered him to be "an average construction foreman" (Tr. 170). He confirmed that he was aware that Mr. McMickens elected to exercise his Part 90 rights. He could not recall exactly when this was done, but confirmed that Mr. McMickens was already working in the outby area when he learned of his status (Tr. 171).

Mr. Philips stated that he was not directly involved in the decision-making process in connection with the reduction-in-force that resulted in Mr. McMickens' layoff (Tr. 171). He evaluated supervisors on a daily basis, and denied that anyone's Part 90 status had any part in his evaluations. He speculated that efforts were made to keep supervisors who were able to work in more than one mine area (Tr. 172).

Mr. Phillips described the supervisory duties performed by Mr. Parsons and Mr. Wiggins, and he believed that Mr. McMickens was able to "walk belts", but he would not use Mr. McMickens to work at the face on a regular basis and he did not believe he was qualified to install belts (Tr. 174-177).

Mr. Phillips explained what occurred at the time the MSHA inspector tested Mr. McMickens for exposure to respirable dust. He stated that after Mr. McMickens put the pump on he was sent to his job assignment and when he and the inspector went to check the pump "we did sit there longer than usual" and that "the inspector calls the shots when he's there" (Tr. 180).

On cross-examination, Mr. Phillips stated that he did not directly or indirectly have anything to do with the decisions to layoff or retain employees during the reduction in force which affected Mr. McMickens, and he had no knowledge of the management discussions which may have taken place concerning the reorganization (Tr. 182). In his opinion, individuals who could work at the face and "who could do everything" were retained (Tr. 183). He confirmed that Part 90 non-salaried miners have been assigned to work at the face as a matter of choice by bidding on certain jobs, and that the face, area is "a more dusty place" (Tr. 184).

Mr. McMickens was recalled by the presiding judge, and he stated that he could not recall ever stating that he did not want to work at the face. He stated that his job was mainly behind the longwall rockdusting the crosscuts and that he liked the work "because I could stay in the fresh air" and "kind of stay out of

it yourself and see that the work's done" (Tr. 198). He further stated he "might have made that statement for that effect" (Tr. 198). He confirmed that he does not deny making the statement about not wishing to work at the face, but that he could not recall doing so, (Tr. 200).

Complainant's Arguments

In his posthearing brief, complainant asserts that the respondent discriminated against him when it terminated his employment, after twelve years of service, in part because he exercised his Part 90 miner rights. Complainant maintains that the respondent's defense that he was laid off for economic reasons is merely a pretext for one of the primary reasons he was terminated during the layoff in question. Assuming that I accept the respondent's argument that it was going through a period of economic adjustment that required some layoffs, the complainant points out that he was a good and experienced employee who had survived two previous layoffs, and had seniority over some of the employees who were retained, and that in spite of these qualifications, he was laid off while others with less seniority, experience, and age, were retained.

In support of his conclusion that his Part 90 status was at least one of the underlying reasons why he was not retained during the layoff, the complainant asserts that deputy mine manager Richard Donnelly and mine foreman Gerald McKinney both testified that he was the only salaried employee or supervisor that they had ever known who had elected to exercise his Part 90 rights. The complainant points to the statement by Mr. Donnelly that a supervisor who elected part 90 status "would not enhance his status with the company" by doing so, and that mine foreman Gerald McKinney revealed his real opinion of his decision to elect Part 90 status when he stated "I was very surprised when I learned of it . . .I guess I just never . . . you just kind of get in your head. I just kind of thought it was for the union, the UMWA people really. And I just never . . . and it just kind of shocked me when I learned of it". The complainant concludes that these statements reveal bias against his decision to exercise his Part 90 rights and shows that the very people who made the decision about who was to be laid off took into account his Part 90 status in making that decision.

Citing Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3d Cir. 1981), and several other leading cases, the complainant argues that liability pursuant to section 105(c) of the Act is not dependent on whether or not an employe has been discriminated against solely because he has engaged in a protected activity, but rather, whether his engagement in a protected activity is at least part of the reason for the adverse discriminatory action

taken against him. The complainant concludes that because the evidence shows that the respondent's decision to lay him off was based in part on his Part 90 status, in direct violation of section 105(c) of the Act, he is entitled to reinstatement and back pay.

The complainant takes the position that the evidence presented in this proceeding supports a reasonable inference that the respondent's decision to terminate him during the 1992 layoff was motivated, at least in part, by the fact that he was a part 90 employee. Under the circumstances, and given the fact that the presiding judge refused to dismiss the matter at the close of his case, the complainant concludes that it has established a prima facie case. In support of this conclusion, the complainant states that it is undisputed that his election to exercise his Part 90 rights is considered a protected activity. The complainant asserts that the evidence establishes that he was a good, experienced and dedicated employee who had survived two previous layoffs involving a large number of people, and that he was experienced and qualified to work in a number of different areas in the mine. He cites the testimony of the miner's representative and safety committeeman, Tommy Boyd, attesting to his experience as a rock and pillar worker who was able to do "whatever it took", and Mr. Boyd's confirmation of the fact that the two employees (Wiggins and parsons) who took over his duties after the layoff were not Part 90 miners and were not laid off.

The complainant points out that he had seniority over some of the employees who were retained in the layoff, that seniority was a consideration during the layoff, and that prior to the layoff, he had never been told or informed in any way that his work needed improvement, and there was never any indication of any problem with his job performance at any time.

The complainant argues that even assuming that the respondent's contention that he was terminated as a part of a general layoff resulting from economic consideration is supportable, the respondent must still establish by a preponderance of the evidence that he would have been terminated during this general layoff even if he had not engaged in protected activity.

In response to the testimony of the witnesses who participated in the decision to terminate him (Donnelly and McKinney), the complainant points out that they produced no personnel records or any other business records substantiating that he would have been laid off under any circumstance, and that no records were kept regarding the discussions to determine who was to be laid off, and none have been introduced by the respondent. The complainant finds it "even more puzzling", that mine manager Willis Coaxe, one of the supervisors making the decision about who to retain and who to layoff, did not testify

in this case, and that his motive for the termination cannot be ascertained.

The complainant further points out that although deputy mine manager Donnelly, who participated in the layoff decision, admitted that he had only been on the job site a short time and knew nothing about his work or abilities, Mr. Donnelly did know that he was a Part 90 employee. The complainant finds it difficult to imagine that Mr. Donnelly could make any meaningful evaluation of his work without his personnel records or other information, except for the verbal input of foreman McKinney. The complainant concludes that the only thing Mr. Donnelly was sure of was that he was the only supervisor he ever knew of to exercise his Part 90 rights, and that the exercise of those rights would not "enhance his position with the company". (I take note of the fact that the actual statement made by Mr. Donnelly was that the complainant's status "would not enhance his record with the company" (Tr. 139).

The complainant asserts that mine foreman McKinney was the only witness who could testify about his true work skills and qualities, and that Mr. McKinney had good things to say about him, including selecting him to assist in the excavation of a trapped miner on one occasion, and commenting that he had done a "Good job" on another occasion. Complainant also makes reference to Mr. McKinney's testimony that he was "a good company man" and worked every day, and that these were his "strong points".

In response to the respondent's affirmative defense, the complainant asserts that in Simpson v. Kent Energy, Inc., 11 FMSHRC 770 (May 1989), the company alleged that economic considerations justified the layoff of an employee who had engaged in protected activity, but that "The Court" (Commission), rejected the argument after concluding that the company's failure to produce any records or written evidence explaining the layoffs was insufficient to prove the affirmative defense by a preponderance of the evidence. The complainant cites the following from the decision, at 11 FMSHRC 779:

> The judge weighed respondent's evidence and found it lacking. Jackson's testimony lacks specificity as to how seniority was calculated. It also lacks certainty as to the seniority of the two laid-off miners or the retained miners in relation to Simpson, and as to how "job qualification" and family considerations figured into Jackson's decisions regarding layoffs. Further, the respondents did not introduce seniority lists or business records explaining the layoff decisions or the effects of the alleged recession on the mine's operation.

The complainant concludes that the facts in his case and those presented in the Simpson case "are remarkably similar and command the same result". In support of this conclusion, the complainant asserts that in both cases the company was claiming that general economic conditions were the reason for the layoff, and in both cases the company produced no documentary evidence to substantiate their affirmative defense. In the instant case, the complainant points out that in the absence of any written documentation to support the respondent's claim, and the positive testimony of the only company witness (McKinney) who did have personal knowledge about Mr. McMickens' skills and experience, it is clear that the respondent has not proved by a preponderance of the evidence that Mr. McMickens was laid off as part of a general layoff. The complainant concludes further that the respondent's defense is a mere pretext for the primary reason he was chosen over other employees to be laid off -- his Part 90 status.

The complainant takes note of the fact that it appears from "Exhibit E", a copy of which was attached to its brief, that a number of Part 90 employees were affected by the April, 1992 layoff, although their names do not appear on the Exhibit produced at the hearing in this matter. The complainant concludes that if, in fact, a number of Part 90 employees were terminated during the layoff, the case for discrimination against him would be that much stronger. The complainant further notes that while there is a discrepancy in the testimony as to why he expressed a preference not to work at the face, (he said it was because he wanted to avoid the dusty conditions which might further exacerbate his pneumoconiosis and Mr. Donnelly and Mr. McKinney were under the impression it was because he did not want the responsibility), the testimony of all of the witnesses is consistent to the extent that he was merely stating a "preference" -- "if at all possible" not to work at the face, and he did not give any indication that he would not perform the work. In fact, the complainant points out that even after he elected Part 90 status, the respondent notified the Department of Labor that he would be subject to work at the face at the discretion of his supervisors and that foreman Phillips testified that he assigned him work on the face when necessary, although not regularly.

The complainant asserts that the impact of the testimony concerning his preference not to work at the face is significant only to the extent that both Mr. Donnelly and Mr. Phillips testified that "the face" probably would not be a suitable place for a Part 90 worker because of the dusty conditions, even though it may not be "forbidden" by the regulations. The complainant concludes that if Mr. Donnelly and Mr. McKinney decided to terminate him because they did not think that the face was an appropriate place for a Part 90 worker, even though it might technically qualify under Part 90, then they are, in effect, discriminating against him because of his Part 90 status, which

is still a violation of Section 105(c). The complainant further concludes that the fact that he also stated a "preference" not to work on the face "if at all possible" was not a statement that he would not do so, and he should not be penalized or discriminated against because he stated that preference, particularly in light of the fact that the supervisors also stated that they "preferred" that a Part 90 employee not work on the face. The fact that he had worked on the face at the direction of Mr. Phillips since he had elected Part 90 status is sufficient evidence of the fact that he was willing to do whatever was necessary, although it was not his preference.

Respondent's Arguments

Citing several appropriate decisions, including cases involving Part 90 miners, the respondent agrees that to support a prima facie discrimination case under section 105(c) of the Act, the complainant bears the burden of production and proof to establish that (1) he engaged in protected activity, and (2) that the adverse action complained of was motivated in any part by that activity. Hatter v. Franklin Coal Co., 8 FMSHRC 1374, 1383 (September 1986); Mullins v. Beth-Elkhorn Coal Corp., 9 FMSHRC 891, 895 (May 1987); Goff v. Youghiogheny & Ohio Coal Co., 8 FMSHRC 1860, 1863 (December 1986); Hall v. Clinchfield Coal Co., 8 FMSHRC 1624, 1628 (November 1986); McCracken v. Valley Camp Coal Co., 2 FMSHRC 928, 932 (April 1980). The respondent further agrees that it may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no way motivated by the protected activity, and that once it establishes a legitimate cause for the discharge, the complaining miner must then show by affirmative and persuasive evidence that the invocation of such cause was merely a pretext for unlawful motive, and that the ultimate burden of persuasion does not shift from him.

The respondent asserts that in order to establish a prima facie case of discrimination, the complainant in this case has the burden to show that he engaged in protected activity by exercising his rights as a part 90 miner and that his termination during the April 1992 reduction in force was motivated by the exercise of those rights. The respondent takes the position that the complainant has not established a prima facie case, and in support of this conclusion cites the testimony of the complainant that he became a "setup foreman" shortly before he became a Part 90 miner, and that after achieving that status he told foreman McKinney that he did not expect any different treatment because he felt that the setup foreman position that he occupied was "out of the dust about as good as any place he could be in the mine because there's no really dust free atmosphere in the mine". The respondent points out that the complainant did not request that Mr. McKinney transfer him to the setup foreman position after he obtained Part 90 status, and in fact told

Mr. McKinney that he did not "expect any change whatsoever", and "did not want a change made", and that the only reason that he filed for Part 90 classification was "to get it on record that if I lived to retire, I might get black lung (benefits), or if I died maybe my wife would get black lung (benefits)".

The respondent further argues that the complainant confirmed that he was already doing outby work prior to becoming a Part 90 miner, that he had been doing such outby work since before 1991, and that this work involved construction and special projects, and not coal production. The respondent points out that the complainant admitted that the respondent seemed generally to keep him in a less dusty environment after he became a Part 90 miner, and that according to his own testimony, he did not assert any Part 90 transfer rights. Citing Mullins v. Beth-Elkorn Coal Corp., 7 FMSHRC 1819, 1837 (November 1985), the respondent argues that a miner is not entitled to exercise his Part 90 rights unless he is working in an atmosphere which has a concentration of more than 1.0 milligrams of respirable dust, and that in this case there is no notable evidence that the dust concentration in the area in which the complainant was working prior to the reduction in force exceeded the limits imposed by Part 90. Under all of these circumstances, the respondent concludes that the complainant could not have exercised any Part 90 rights even if he had desired to do so, and that the testimony supports a conclusion that he either did not assert any Part 90 transfer rights or that he explicitly waived such rights.

The respondent concludes that the complainant has failed to show that his layoff was motivated by an alleged exercise of his Part 90 rights, and it takes the position that his case is factually similar to McCracken v. Valley Camp Coal Co., 2 FMSHRC 928 (April 1980). In McCracken, the complainant was laid off during a reduction in force in which 137 union employees and 14 supervisors were laid off, and as in the instant case, the complainant asserted a claim that he was qualified for underground mining positions and that he should have been considered for such positions. The respondent took the position that the complainant did not have the ability to perform available work, and Judge Melick ruled that the complainant's discharge resulted from a legitimate reduction in force. McCracken, 2 FMSHRC at 929.

In response to the complainant's assertion that he had more seniority and/or was more qualified than other supervisors who were not terminated during he reduction in force, and that these supervisors (Parsons and Wiggins) began performing all or part of his job duties after the reduction in force, the respondent cites the Commission's decision in Mullins v. Beth-Elkhorn Coal Corp., 9 FMSHRC 891, 899 (May 1987), holding that the Mine Act "is not an employment statute", and it concludes that the complainant's claims as to who should or should not have been terminated during

the reduction in force are not appropriate subject matter for these proceedings.

In further support of its argument, the respondent points out that when asked how it was that Part 90 affected his layoff, the complainant stated that he only has a 60% hearing loss in one ear, that he was a good employee for 12 years, and that the respondent does not want MSHA inspectors coming to the mine to take dust samples because they may discover other violations while they are present at the mine. The respondent concludes that there is absolutely no evidence in this case to indicate anything other than the complainant was laid off during a legitimate reduction in force, and that he has failed to establish a prima facie case under section 105(c) of the Act.

Even assuming that the complainant has established a prima facie case, the respondent argues that his layoff was in no way motivated by any alleged protected activity. In support of this conclusion, the respondent cites the uncontradicted testimony of Mr. Donnelly that the work force at the No. 7 Mine was reduced in April 1992, because the world coal market was in decline and the respondent was experiencing difficulty selling its coal at a profit. Under these circumstances, the respondent asserts that it was necessary to reduce coal production at all of its mines, and that the evaluation of which salaried employees were to be laid off was accomplished by examining the number of jobs available at the reduced level of operations and then filling these jobs with the most qualified persons. Respondent states that there is uncontradicted testimony that the complainant had no desire to work in a coal production position and that his preference for avoiding work at the face was pivotal in the respondent's decision not to retain him.

The respondent cites Mr. McKinney's undisputed testimony that prior to his classification as a Part 90 miner, the complainant told Mr. McKinney that he did not want to be assigned to the coal production face due to additional job pressures and responsibilities associated with face work, and that in implementing the reduction in force, an effort was made to keep employees who were able to fill in on a longwall face or who could supervise a miner section. The respondent also states that the uncontradicted testimony of Mr. Phillips reflects that on several occasions prior to September 1991, the complainant told Mr. Phillips that he did not want anything to do with coal production at the face and that he wanted to continue to do outby work so that he would not have to comply with the laws applicable to face work.

The respondent concludes that it effectuated a legitimate reduction in force in April 1992, properly followed its procedures during the reduction in force, and that the complainant was laid off during the reduction in force without

regard to his Part 90 status. Respondent further concludes that it has rebutted the prima facie case that the complainant has attempted to establish, and that the complainant has elicited no affirmative and persuasive evidence that the legitimate cause for his termination was merely a pretext for unlawful motive on the part of the respondent.

Findings and Conclusions

In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of production and proof to establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Company, 2 FMSHRC 2768 (1980), rev'd on other grounds sub nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (2d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981): Secretary on behalf of Jenkins v. Hecla-Day Mines Corporation, 6 FMSHRC 1842 (1984); Secretary on behalf of Chacon v. Phelps Doge Corp., 3 FMSHRC 2508, 2510-2511 (November 1981) rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983).

The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no way motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it may nevertheless affirmatively defend by proving that it was also motivated by the miner's unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Company, 4 FMSHRC 1935 (1982). The ultimate burden of persuasion does not shift from the complainant. Robinette, supra. See also Boich v. FMSHRC, 719 F.2 194 (6th Cir. 1983); and Donovan v. Stafford Construction Company, No. 83-1566 D.C. Cir. (April 20, 1984) (specifically-approving the Commission's Pasula-Robinette test). See also NLRB V. Transportation Management Corporation, U.S. , 76 L.ed.2d 667 (1983), where the Supreme Court approved the NLRB's virtually identical analysis for discrimination cases arising under the National Labor Relations Act.

Direct evidence of actual discriminatory motive is rare. Short of such evidence, illegal motive may be established if the facts support a reasonable inference of discriminatory intent. Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510-11 (November 1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983); Sammons v. Mine Services Co., 6 FMSHRC 1391, 1398-99 (June 1984). As the Eight Circuit analogously stated with regard to discrimination cases arising under the National Labor Relations

Act in NLRB v. Melrose Processing Co., 351 F.2d 693, 698 (8th Cir. 1965):

> It would indeed be the unusual case in which the link between the discharge and the [protected] activity could be supplied exclusively by direct evidence. Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence. Furthermore, in analyzing the evidence, circumstantial or direct, the [NLRB] is free to draw any reasonable inferences.

Circumstantial indicia of discriminatory intent by a mine operator against a complaining miner include the following:

> Knowledge by the operator of the miner's protected activities; hostility towards the miner because of his protected activity; coincidence in time between the protected activity and the adverse action complained of; and disparate treatment of the complaining miner by the operator.

Protected Activity

Section 105(c)(1) of the Mine Act provides in pertinent part 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 is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 * * *. (Emphasis added.)

The mandatory health standards authorized by section 101(a)(7) of the Mine Act, are found at 30 C.F.R. Part 90. Pursuant to those regulations, a miner employed at an underground coal mine or at a surface area of an underground coal mine may be eligible to work in a low dust area of the mine where there has been a determination that he has evidence of pneumoconiosis. If there is evidence of pneumoconiosis, a miner may exercise his option to work in a mine area where the dust levels are below 1.0 milligrams per cubic meter of air.

In Goff v. Youghiogeny & Ohio Coal Co., 7 FMSHRC 1776, 1780-81 (November 1985), the Commission held that section 105(c) of the Act bars discrimination against or interference with

miners who are "the subject of medical evaluations and potential transfer" under the Part 90 standards. However, the Commission has recognized that a miner's Part 90 rights, and the protection afforded him in that status, are not unlimited and that he is not entitled to work in a mine environment totally free of respirable dust. Goff v. Youghiogeny & Ohio Coal Co., 8 FMSHRC 1860, 1865 (December 1986).

In Martha Perando v. Mettiki Coal Corporation, 10 FMSHRC 491 (April 1988), the Commission held that even if the complaining miner suffering from industrial bronchitis were included within the scheme of MSHA's Part 90 regulations, she would not have had a right under those provisions to transfer with pay retention to a less dusty position since her underground work areas were consistently below the required Part 90 respirable dust level of 1.0 mg/m3. The Commission also observed that "Exposure to some amount of respirable dust is inherent in virtually all underground coal mining", FMSHRC at 496.

In Jimmy R. Mullins v. Beth-Elkhorn Coal Corporation, et al., 9 FMSHRC 891 988 (may 1987), the Commission observed that the Mine Act "is not an employment statute", and it held that while a Part 90 miner has the right to be transferred to a position satisfying the requisite Part 90 criteria, he is not entitled to dictate to the operator or otherwise specify the particular position to which the transfer must be made. The Commission further held that "placement in a position meeting the relevant dust concentration criteria is all that is required", and that "the fundamental purpose of these transfer provisions is the protection of miners' health--not the distribution of specific jobs", 9 FMSHRC 895, 897.

The record in this case establishes that the complainant engaged in a protected activity when he filed for, and received, Part 90 miner status, and that he suffered an adverse personnel action when he was laid off. However, the critical quesiton is not whether the respondent treated the complainant in a reasonably fair manner when it laid him off, but whether or not the layoff was made in any part because of the complainant's Part 90 status. As appropriately noted by Commission Judge Broderick in Jimmy Sizemore and David Rife v. Dollar Branch Coal Company, 5 FMSHRC 1251, 1255 (July 1983), " . . . the Commission has no responsibility to assure fairness in employment relations or to determine whether an employee was discharged for cause, but only to protect miners exercising their rights under the Act". And, as stated by the Commission in Bradley v. Belva Coal Co., 4 FMSHRC 982 (June 1982), "our function is not to pass on the wisdom or fairness of such asserted business justifications, but rather only to determine whether they are credible and, if so,

whether they would have motivated the particular operator as claimed".

The Alleged Discrimination

In his initial complaint filed with MSHA, the complainant asserted that he elected to transfer to a less dusty atmosphere upon notification of his option to transfer as a Part 90 Miner. However, the evidence reflects otherwise, and the complainant confirmed that he did not request or exercise any transfer rights as a result of his Part 90 status. He admitted that he did not expect or want any changes made in his work status, and that he only filed for Part 90 status in order to preserve any future claims for black lung benefits. Further, the complainant admitted that he was already doing work outby the face prior to his Part 90 designation, and that the respondent generally kept him in a less dusty environment after that designation.

Although the complainant alluded to his Part 90 status at the time he filed his MSHA complaint, and expressed his belief that his status contributed to his layoff, the thrust of his complaint was his assertion that he was laid off because the respondent wished to retain younger foremen. Indeed, in the course of the heiarng, the complainant confiremd that in his sworn complaint filed with the EEOC in connection wiht his age discrimination complaint, he took the positon that his age was the determinative factor for his layoff.

In the absence of any direct evidence that management's decision to lay off the complainant was motivated in part by his Part 90 status, a discriminatory motive may be determined by circumstantial evidence showing that management was hostile towards him because of his status, the coincidence in time between his filing for and receiving that status, and any disparate treatment accorded him because of his status. Although a resonable inference of motivation may be drawn from such circumstantial evidence, Secretary ex rel. chacon v. Phelps Dodge Corp., supra; Sammons v. Mine Services Co., supra, there must be credible evidence of discriminatory inent or credible evidence from which a reasonable inference of discrimination or driscriminatory intent can be drawn. Branson v. Price River Coal Co., 853 F.2d 786, (10th Cir. 1988).

I find no evidence of any disparate treatment of the complainant by the respondent, and the record establishes that he was not the only salaried foreman affected by the layoff. The complainant confirmed that the respondent never intimidated, harrasssed, or threatened him because of his Part 90 status, and never said anything negative about his status. The complainant further confirmed that the respondent had never taken any negative action against any employee because of their Part 90 status.

I find no evidence to support the complainant's claim that the respondent placed him on a job which subjected him to dust in response to his request for a dust free environment, and that the respondent deliberately kept him away from his work area in order to meet MSHA's respirable dust standards prior to any inspections. The only incident alluded to by the complainant concerned a three-hour discussion in "fresh air" in the company of an MSHA inspector, a union safety representative, and a company representative, at a time when the complainant was wearing a respirable dust sampling device. The credible testimony regarding that incident reflects that the inspector was in control and responsible for any delay in the complainant's returning to work. Further, the complainant himself confirmed that during his respirable dust sampling period, he was assigned to his normal work duties, that there was no "hanky panky" connected with the sampling, and there was no avoidance of any dusty working conditions in an attempt to hide them from an inspector. The complainant also confirmed that the respondent was never cited for assigning him work under dusty conditions, that he knew of no Part 90 miners ever being cited for working under dusty conditions, and that the respondent had never been cited for exceeding MSHA's dust exposure regulations.

Mr. Donnelly confirmed that the reduction in force which affected the 134 union jobs was accomplished under the collective bargaining agreement, and in the absence of any evidence to the contrary, I assume that miners affected by the reduction were afforded their appropriate union protection. However, as a salaried supervisory management employee, and in the absence of any evidence to the contrary, I assume that the complainant had no formal layoff retention rights, and that his continued employment was at the discretion of mine management. The complainant confirmed that he had no seniority rights, and the record reflects that he received severance and accrued vacation pay when he was laid off.

Citing Simpson v. Kent Energy, Inc., 11 FMSHRC 770 (May 1989), the complainant suggests that in order to establish the legitimacy of the layoff, and to support its contention that the reduction in force was necessary because of adverse economic conditions affecting the world coal market, it was incumbent on the respondent to provide written documentation and business records to support this claim. In the absence of such documentation, the complainant would totally discount the testimony presented by the respondent in support of the propriety of the layoff.

In the Simpson case, the Commission observed that the trial judge weighed the respondent's evidence and found it lacking in specificity and certainty, and the Commission cited several transcript references reflecting the respondent's rather equivocal testimony, highlighted by a number of "guesses",

concerning certain critical facts connected with the layoff in question. It was in this context that the Commission observed in part at 11 FMSHRC 779, that the company "did not introduce seniority lists or business records explaining the layoff decisions or the effects of the alleged recession on the mine's operation". In short, the Commission affirmed the trial judge's credibility findings, and I find nothing in the decision to support any conclusion or general rule that the only evidence worthy of belief is written documentary business records.

The record in this case reflects that the respondent took the pretrial deposition of the complainant. However, the complainant did not depose any of the respondent's witnesses, including the mine manager, (Willis Coaxe), who made the final decision to lay him off. Although Mr. Coaxe was not called to testify in this case, there is no evidence that he was not available and the complainant did not subpoena him. Further, the complainant apparently made no attempt to seek out any documentary evidence from the respondent through pretrial discovery.

The evidence reflects that prior to 1991, the complainant worked at different jobs tasks involving construction and special projects, rather than coal production, and that his supervision of a continuous miner section on a full time basis took place during his initial 13 months of employment, and on a part-time basis thereafter (Tr. 82). The complainant acknowledged that most of the coal production took place at the longwall sections, and he conceded that he had never worked on, or supervised, such a section and that he was not qualified or trained to perform the duties of a longwall foreman (Tr. 83). The evidence also reflects that most of the complainant's work experience was in the outby areas of the mine.

Shift foreman Phillips, who supervised the complainant's work, confirmed that he evaluated his supervisors on a daily basis and that he considered the complainant to be "an average construction foreman". General mine foreman McKinney, who also was familiar with the complainant's work, confirmed that during the layoff consideration he reviewed a list of salaried supervisory personnel that included individuals with longwall and coal face production experience, and that four or five of these individuals would be retained ahead of the complainant. Both Mr. Phillips and Mr. McKinney confirmed that salaried personnel with longwall or face coal production experience, or those experienced in supervising a miner section, were given preference during the reduction in force and layoff.

Mine Manager Donnelly acknowledged that he had never personally observed the complainant's work, and he indicated that no written evaluations of supervisors were made for several years prior to the layoff in question. However, he confirmed that in

his discussions with other supervisory foreman who were aware of the complainant's work, the complainant was characterized as an "average" supervisor. Mr. Donnelly further confirmed that the reduction in force brought about by the adverse coal market would result in fewer longwall and continuous miner work shifts, and that it was critical to retain personnel skilled in those jobs.

Mr. Donnelly acknowledged that he was aware of the complainant's statements that he did not like to do face production work because he did not wish to accept the responsibilities and pressures of that kind of work and preferred to continue working outby, and that this was a factor that he considered in the decision not to retain him. Mr. McKinney confirmed that the complainant told him that he did not want to work on a production face because he did not want the additional responsibilities and pressures of such a job, and that Mr. Phillips also informed him about similar statements made to him by the complainant. Mr. Phillips confirmed that the complainant had indeed made such statements to him.

The complainant's testimony concerning the statements attributed to him is both equivocal and unconvincing. He testified that "he might have made" the statements, did not deny making them, but indicated that he simply could not recall (Tr. 200). Having viewed Mr. Donnelly, Mr. McKinney, and Mr. Phillips in the course of the hearing, I find them to be credible witnesses, and I believe that the complainant made the statements in question. Under the circumstances, I do not find Mr. Donnelly's consideration of these statements during his layoff deliberations to be unusual or unreasonable.

The record reflects that two prior layoffs occurred at the mine in 1982 and 1986 prior to the layoff which resulted in the complainant's termination, and there is no suggestion that those layoffs were other than legitimate. With regard to the layoff which resulted in the complainant's termination, Mr. Donnelly and Mr. McKinney presented credible and unrebutted testimony concerning the facts and circumstances which prompted the reduction of the work force which affected a substantial number of salaried personnel in addition to the complainant, and they explained how the reductions were accomplished and the pertinent factors and considerations which were made in deciding who would be retained and who would be laid off. The fact that little or nothing was reduced to writing is irrelevant, particularly when salaried management personnel are involved. As the responsible management officials, Mr. Donnelly and Mr. McKinney were free to make certain managerial judgments and decisions regarding salaried personnel, including who would be retained and who would be laid off, and I conclude and find that these were matters within their managerial authority and discretion. Further, after careful consideration of all of the evidence and testimony regarding the reduction in force and layoff in question, I

conclude and find that their explanations of the events in question are reasonable and plausible.

I find nothing unusual about Mr. McKinney's expressions of surprise and shock at learning of the complainant's Part 90 status. Mr. McKinney's explanation that he had always been under the impression that this was a status accorded only union employees is believable. With regard to Mr. Donnelly's statement that the complainant's Part 90 status "would not enhance his record with the company", while it could possibly support an inference that Mr. Donnelly was influenced by the complainant's status during the layoff discussions, when considered in the context of the drastic layoffs affecting a relatively large number of people, including approximately 25 salaried supervisory personnel, and the elimination of the majority of the remaining special projects foreman jobs, I cannot conclude that the statement, standing alone, establishes that Mr. Donnelly was influenced by the complainant's Part 90 status, or that he was predisposed not to retain him because of that status. I find nothing in the statements made by Mr. Donnelly and Mr. McKinney to suggest any retaliatory or ulterior motive on their part simply because the complainant sought and received Part 90 status. Nor do I find any persuasive evidence to show that the legitimate cause for the complainant's layoff was a pretext for an unlawful motive on the part of the respondent.

Conclusion

I find no persuasive evidence, direct or circumstantial, from which to draw a reasonably supportable inference of discriminatory intent or motivation on the part of mine management with respect to the layoff because of the complainant's Part 90 miner status. I find no credible evidentiary foundation for inferring or concluding that management's decision not to select or include the complainant among those salaried supervisory personnel who were retained during the reduction in force was in any way related to his Part 90 Miner status.

ORDER

On the basis of the foregoing findings and conclusions, I conclude and find that the complainant has failed to establish a prima facie case of discrimination. Even if the complainant had established such a case, I would still conclude and find that it was rebutted by the respondent's credible evidence establishing reasonably plausible economic and management non-discriminatory reasons for the reduction in force and layoffs in question.

Under the circumstances, the complainant's discrimination complaint and claims for relief ARE DENIED AND DISMISSED.

George A. Koutras
Administrative Law Judge

Distribution:

Ralph E. Coleman, Esq., Coleman & Friday, 2175 11th Court South, Birmingham, AL 35205 (Certified Mail)

R. Stanley Morrow, Esq., Jim Walter Resources, Inc., P.O. Box 133, Brookwood, AL 35444 (Certified Mail)

Mark Strength, Esq., David M. Smith, Esq., MAYNARD, COOPER, FRIERSON & GALE, P.C., 1901 Sixth Avenue North, 2400 AmSouth-Harbert Plaza, Birmingham, AL 35203-2602 (Certified Mail)

/ml