

CCASE:
ROBERT W. SHELTON V. NEVADA GOLD MINING
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
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ROBERT W. SHELTON, : DISCRIMINATION PROCEEDING
Complainant :
 : Docket No. WEST 93-573-DM
 : WE MD 93-04
v. :
 : Sleeper Mine
 :
NEVADA GOLD MINING, INC., (Footnote 1) :
Respondent :

DECISION

Appearances: Robert W. Shelton, pro se, for Complainant.
Henry Chajet, Esq., and James G. Zissler, Esq.,
Jackson & Kelly, Washington, D. C., for Respondent

Before: Judge Amchan

Statement of Facts

Complainant, Robert Shelton, worked for Respondent, Nevada Gold Mining Company, as a truck driver at the Sleeper mine from August, 28, 1988, until December 22, 1992, when he was fired (Tr. 7). Shortly thereafter, he filed a complaint with the U. S. Department of Labor alleging that his termination was the result of retaliation for activity protected by section 105(c) of the Federal Mine Safety and Health Act. For the reasons stated herein, I find that Respondent did not violate the Act in terminating Mr. Shelton.

The events leading to Mr. Shelton's termination began on November 23, 1992, when general mine foreman, Roy Rose, returned to the Sleeper mine after six months on a temporary assignment at another of Respondent's facilities (Tr. 205, 344). Rose was the supervisor of Mr. Shelton's immediate boss, shift foreman Dennis Brown (Tr. 34 - 35). Neither Brown nor Shelton had a good relationship with Rose (Tr. 206, 226, 246, 251 - 254). When he learned that Rose would be returning to the Sleeper mine, Shelton told Brown that he (Shelton) and Brown "were history (Tr. 226)."

1Although this case was docketed with Respondent's name listed as Nevada Mining, Inc., the correct name of the company is Nevada Gold Mining, Inc. (Tr. 4). The caption of the case is, therefore, amended to reflect this correction.

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Mr. Shelton also told fellow employee Sean Riley that Rose "would get him (Shelton)" when he returned (Tr. 285).

Almost immediately upon Mr. Rose's return to the Sleeper mine, foreman Dennis Brown transferred from his job as head of complainant's crew to a position at the mine's crusher, where he did not report to Rose (Tr. 205). At the beginning of the day shift on November 23, 1992, Shelton's crew assembled for a line-out meeting, where they received their work assignments. Mr. Rose addressed the crew briefly and announced that Mr. Brown had voluntarily relinquished his position as the crew's foreman (Tr. 34).

Rose then looked at Shelton and said in a hostile manner, "Bob, I see by that smirk on your face that you don't believe me (Jt. Exh. 1, Tr. 38, 282 - 284).(Footnote 2)" Mr. Shelton pointed at Rose and told him that he was tired of his "retributions" (Tr. 39). The crew then went to work (Tr. 39).

Mr. Shelton was very upset after this confrontation (Tr. 39, 289). He believed that the incident was a prelude to his termination by Rose (Tr. 39). Shelton made several careless mistakes during his workshift on November 23. He turned in front of another driver and dumped the load in his truck at the wrong location on two or three different occasions (Tr. 40, 91).

On November 23, 1993, the Sleeper mine was in the midst of an MSHA inspection which commenced for reasons totally unrelated to Mr. Shelton (Tr. 45). However, on that date Shelton asked Sean Riley, who was the designated employee representative for MSHA inspections, if he could speak with the MSHA Inspector, James Watson (Tr. 290).

The next day Shelton met with MSHA Inspector Watson, Riley, and company safety director Bill Smith (Tr. 45). Shelton started off the discussion by telling Watson that "I'm going to pay for this big time (Tr. 47)." He then proceeded to tell Watson that he presented a hazard to himself and others due to his emotional state and that his condition was due to his treatment by Rose (Tr. 47, 75 - 76).

Inspector Watson was unsure as to what to do about Shelton's complaint (Tr. 48). At one point Shelton's personnel file was brought to Watson and, at another, Shelton talked to Watson's supervisor, Gary Day, on the telephone (Tr. 50, 332 - 333). At the conclusion of the meeting Watson asked Shelton if he felt

²It is unclear whether Mr. Shelton smiled, smirked, or made any facial expression that led Mr. Rose to make this comment.

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that he could return to work. Shelton replied that he thought he could and he worked for the rest of the day without incident (Tr. 50 - 52).

Watson informed Mr. Shelton that if he wanted to pursue this matter further with MSHA he would have to file a written complaint (Tr. 52). Complainant was off work from November 25 through November 27, 1992, for the Thanksgiving holiday. On November 26, 1992, he wrote a letter to David McIntosh, who had become general manager of the Sleeper mine in October, 1992 (Tr. 321, Jt. Exh. 1). Copies of that letter were provided to MSHA, the Winnemucca, Nevada police department and others (Jt. Exh. 1 p. 6).

The letter to McIntosh recounted Rose's comment to Shelton on the morning of November 23, 1993. Shelton then observed that:

This type of verbal debasement and degradation has been directed at me for over four years now. I consider this conduct discriminatory; and it serves no purpose other than harassment. I have never been subjected to this kind of treatment anywhere else in my working life. I feel the only purpose of this treatment is to force me to resign.

Shelton then proceeded to review his work experience at the Sleeper mine, focusing on his treatment by Rose. He also mentioned some problems he experienced with his foreman, Dennis Brown, and commented that "these problems could have been caused by pressure put on Dennis by Roy (Jt. Exh. 1, p. 4)." He complained about not having been considered for a position with plant security (Jt. Exh. 1, p. 5) Towards the end of his letter to McIntosh, Mr. Shelton stated:

I have worked in fear and shame now for the most part of my four years here. I have been denied any and all advancement of any kind. I have been harassed and humiliated in front of my peers. I have been made to suffer physical pain while doing my assigned tasks.(Footnote 3) The last two days on this job have been the worst ever. I have dumped material in the wrong areas. I turned in front of another driver. I can no longer work under these conditions. I am no longer asking to be treated better. I am now demanding it!...Taking

3Mr. Shelton was injured in three accidents while working for Respondent. He broke both feet jumping from a burning haul truck in October 1988. In November 1990, he sustained a concussion, three broken teeth, and a back injury, when a rock struck him while his truck was being loaded. In December 1991, a rock struck his truck and aggravated his back condition (Jt. Exh. 1, pp. 1 - 5). In none of these accidents was complainant at fault (Tr. 271).

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complaints and problems to supervisors has caused me grief. This is why I made a federal complaint to M.S.H.A. Inspector Jim Watson (Jt. Exh. 1, pp. 6 - 7).

On the last page of his letter, Mr. Shelton made a number of statements which have been characterized as "requests" by him and "demands" by Respondent. He stated that, if injured, he wanted Sean Riley to be with him at all times. He wrote that he did not want to be alone in any remote area of the mine site without a radio that will reach base, that he wanted his instructions posted in the mine security office, and that he wanted MSHA to investigate any accident of any kind as soon as possible (Jt. Exh 1, p. 7).

Mr. Shelton concluded his letter with this paragraph:

I want no one on one contact with Roy Rose ever again. [I]n four years of dealing with him, he has taught me well to fear him. I do not know if he would try to harm me physically or not. I will not take any chances from this time forward. I will not seek a restraining order on him at this time. If another incident happens to me involving him, I will. I will discuss these matters with you at your request.

Mr. Shelton did not fear a physical assault by Mr. Rose, who is smaller and older than Shelton (Tr. 133, 154-56). Rose never physically threatened Shelton (Tr. 156). The fear to which Shelton refers is that Mr. Rose would fire him (Tr. 154-55).

On November 28, 1992, Mr. Shelton reported to work for the night shift after a three-day holiday. He gave a copy of his letter to a company security officer and told her to call Mr. McIntosh at home (Tr. 58). He also gave a copy of the letter to his shift foreman, Carl Gibson. Complainant worked the night shifts on November 28, and 29, without incident. When he reported to work on November 30, 1992, his foreman sent him to McIntosh's office (Tr. 58 - 61).

McIntosh, who had not met Mr. Shelton before, told complainant that they needed "breathing room" and that he was suspending him with pay so that Respondent could investigate his complaints (Tr. 62, 375 - 376). McIntosh told Deborah Paparich, the human resources director at the Sleeper mine, to investigate the circumstances surrounding Mr. Shelton's letter (Tr. 335).

Three weeks later Shelton was asked to attend a meeting to discuss his letter. In addition to Mr. McIntosh and Complainant, Ms. Paparich and Sean Riley attended this meeting on December 21, 1992. Mr. McIntosh asked Shelton about the statements made in his November 26, 1992 letter. He responded that he stood by the letter (Tr. 351, 381 - 382). Mr. Shelton again stated that he

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could not work safely unless the company complied with his requests (Tr. 348, 382).

Mr. McIntosh told Shelton that he didn't understand why Roy Rose was the focus of his discontent, when correspondence he had looked at indicated that Dennis Brown was the source of his problems (Tr. 348, 382). McIntosh asked why Shelton did not take his concerns up with the human resources department. Shelton replied, "civil suit" (Tr. 349).(Footnote 4)

On December 22, 1992, Respondent hand delivered a letter from Mr. McIntosh to Mr. Shelton terminating his employment (Jt. Exh. 2). The letter cited as reasons for Shelton's termination an inability to interact and cooperate with mine supervision, management concern regarding his ability to function safely at the mine site, conditions placed by Shelton on his future employment, and defamatory statements made by Mr. Shelton regarding other employees. The letter also mentioned Shelton's harassment of other employees as a factor in his termination.

Mr. Shelton filed a timely complaint with the Mine Safety and Health Administration (MSHA) alleging that his termination violated section 105(c) of the Act in that he was fired in retaliation for activity protected by the statute. His complaint was investigated by MSHA, which concluded that it was not meritorious (Exh. R-1). Thereupon, Mr. Shelton filed a complaint with the Commission.

4Mr. Shelton did not contradict the testimony of Respondent's witnesses with regard to the December 21, 1992 meeting. His testimony suggests that he intimated that he was considering filing some sort of lawsuit against Respondent. At one point Shelton testified:

I told him [McIntosh], I said it's probably going to go all the way, all the way to court. And I did mention that how exactly, I put it that way, I don't remember. He looked at me at one point and said you have done this before, and I said yes, but I didn't mean this before. I mean like traffic court. I had been in court many times before (Tr. 70).

Complainant has a history of threatening other people, including supervisors, with legal action. He threatened Dennis Brown with criminal prosecution in 1990 (Tr. 233, Exh. C-1). McIntosh, who reviewed Mr. Shelton's 1991 letters to Dennis Brown and to General Manager Tom Irwin about Mr. Brown, may have had this in mind when he said, "you have done this before (Tr. 378, Exhs. C-1, C-2)."

Analysis

The issue before the Commission is whether Respondent's December 22, 1992 termination of Complainant violated section 105(c) of the Act. Section 105(c)(1) of the Federal Mine Safety and Health Act provides that:

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 because such miner . . . has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent . . . of an alleged danger or safety or health violation . . . or because such miner . . . has instituted or caused to be instituted any proceeding under or related to this Act . . . or because of the exercise by such miner . . . of any statutory right afforded by this Act.

The Federal Mine Safety and Health Review Commission has enunciated the general principles for analyzing discrimination cases under the Mine Act in *Sec. ex rel. Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (October 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981), and *Sec. ex rel. Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981). In these cases, the Commission held that a complainant establishes a prima facie case of discrimination by showing 1) that he engaged in protected activity and 2) that an adverse action was motivated in part by the protected activity.

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 the protected activity. If the operator cannot thus rebut the prima facie case, it may still defend itself by proving that it was motivated in part by the miner's unprotected activities, and that it would have taken the adverse action for the unprotected activities alone.

Did Complainant Engage In Protected Activity?

There are several activities engaged in by Robert Shelton between November 23, 1992, and December 22, 1992, that can arguably be characterized as activity protected by section 105(c) of the Act. On November 23, 1992, he asked to speak with MSHA Inspector Watson. On November 24, 1992, he spoke with Watson about his relationship with general mine foreman Roy Rose, and

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asserted that he was a hazard to himself and others as the result of his confrontation with Rose the previous morning.

On November 26, 1992, Mr. Shelton wrote to Mr. McIntosh. Of the statements made in that letter, the only ones that conceivably constitute protected activity are his request/demand for a radio that will reach base when working in remote areas of the mine, and his request/demand that MSHA investigate "any accident of any kind."

I conclude that complainant engaged in protected activity with regard to each of the above, with the exception of the substance of his conversations with Watson. With regard to the other items, I would find a violation of section 105(c), if I were to conclude that Mr. Shelton would not have been terminated without them.

Analyzing complainant's conversation with the MSHA Inspector, however, presents a very close question as to whether it was protected by the Federal Mine Safety and Health Act. Mr. Shelton did not talk to MSHA about any safety hazards other than those presented by his emotional state due to his fear of being fired. There was nothing that complainant could have reasonably expected MSHA to do about his problems. Indeed, an exchange between the undersigned and complainant establishes that Mr. Shelton sought nothing from the inspector that was even remotely related to Mr. Watson's authority:

THE COURT: Let me ask you something, what did you expect Mr. Watson to do?

MR. SHELTON: I--really--I really don't know. I had no idea what his powers were, what he was doing to do. But the most important thing is that I think he would do something. He would address mine management. He would talk to Roy...(Tr. 49)

What Mr. Shelton was asking of Inspector Watson was so clearly outside MSHA's responsibilities, that his conversations with MSHA personnel were unprotected by the Act. It is clearly not within MSHA's authority to protect miners from discharge for reasons unrelated to safety and health, or to seek better treatment of miners regarding matters unrelated to the Act.

It is true that Mr. Shelton did cast his concerns as a safety issue. Nevertheless, an allegation that a miner is a nervous wreck because his supervisor doesn't like him is far removed from what Congress intended to protect in enacting section 105(c). Although I find that Respondent terminated Mr. Shelton solely for other nonprotected reasons, I conclude

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that nothing in the Act would have prevented it from firing him for bringing his non-safety and health problems with Mr. Rose to MSHA.

In this regard, I note that complainant made no effort to seek redress from his employer--such as asking for the day off and/or seeking intervention by the human resources department. Given the fact that the company human relations department had satisfactorily resolved his problems with Dennis Brown in 1991, I question Mr. Shelton's good faith in bringing his problems with Mr. Rose to MSHA in December 1992 (Tr. 207 - 208).

Complainant failed to establish that his termination was in any part motivated by protected activity

Although complainant's suspension and termination occurred shortly after the protected activities described above, there is neither direct nor circumstantial evidence suggesting that these adverse actions were related to these activities. The reason no inference can be drawn from the timing of the suspension and discharge is that intervening unprotected events occurred which I find caused his discharge.

The most important intervening event was the November 26, 1992 letter to General Manager McIntosh. Although some statements in that letter may be protected, most of them are not. The demand/request for "no one on one contact with Roy Rose ever again," was sufficient grounds for discharge in of itself. No employee has a right to tell his employer that he doesn't want to be supervised by an individual selected by his employer for a management position.

Mr. McIntosh testified that he fired Mr. Shelton primarily for being unable to work with site management (Tr. 384). I find that explanation completely credible--particularly in light of the fact that McIntosh offered complainant an opportunity to retract his requests/demands, which Mr. Shelton declined (Tr. 351, 381 - 382).

Respondent also mentioned other reasons for the termination. McIntosh expressed concern regarding complainants' ability to work safely (Tr. 384 - 385). In view of Mr. Shelton's assertion that his encounter with Mr. Rose had rendered him a hazard to himself and others, it was perfectly reasonable for Respondent to conclude that he might again become a hazard since the company legitimately had no intention of exempting him from contact with Mr. Rose. I find Respondent's witnesses credible on this account as well.

Ms. Paparich, Respondent's Director of Human Resources, testified that her investigation of Mr. Shelton's letter also apprised her of numerous unsafe acts he had engaged in, as well

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as difficulties he had with other employees (Tr. 329-30, 338, 340). However, the record does not establish that Mr. Shelton was any worse than a number of other employees in this regard (Tr. 203, 210, 214 - 215, 220, 224, 229, 239).

This, however, does not advance complainant's assertion that he was fired in retaliation for activities protected by the Mine Safety and Health Act. The record in this case establishes that complainant was fired primarily for his inability to get along with Mr. Rose, his history of conflict with his supervisors, his insistence that he not be supervised by Rose, and management's concern that Mr. Shelton's continued employment with Nevada Gold could be dangerous to himself and others (Tr. 360, Jt. Exh. 2).

In conclusion, I find that complainant has failed to make out a prima facie case of discrimination under section 105(c) of the Act. Even assuming that the evidence in this case makes out a prima facie case, I find that Respondent has met its burden of proving that it would have fired complainant for unprotected activities without regard to those that are protected.

ORDER

Robert Shelton's discrimination complaint under section 105(c) of the Act is DISMISSED.

Arthur J. Amchan
Administrative Law Judge
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