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JAMES WATERS V. IMC FERTILIZER
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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December 5, 1994

JAMES D. WATERS, : DISCRIMINATION PROCEEDING
Complainant :
 : Docket No. CENT 93-261-DM
v. : MSHA Case No. SE MD 93-04
 :
IMC FERTILIZER, INC., : Carlsbad Facility
Respondent :

DECISION

Appearances: David W. Strickler, Esq., and W.T. Martin, Jr.,
Esq., Carlsbad, New Mexico, for Complainant;
& Charles C. High, Jr., Esq., Kemp, Smith, Duncan
Hammond, El Paso, Texas, for Respondent.

Before: Judge Fauver

This is a discrimination action under 105(c) of the
Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801
et seq.

Having considered the hearing evidence and the record as a
whole, I find that a preponderance of the substantial, probative
and reliable evidence establishes the Findings of Fact and
further findings in the Discussion below:

FINDINGS OF FACT

1. Complainant, James Waters, began working for Respondent,
IMC Fertilizer, Inc., on April 15, 1985, at IMC's Carlsbad, New
Mexico mine. Mr. Waters has a Bachelor of Science Degree in
Metallurgical Engineering, a Master's Degree in Business
Administration, with a specialty in Industrial Management, and
substantial experience in mineral chemical processing,
engineering and plant operations. IMC's annual pay evaluations
of Mr. Waters were very favorable. The company does not contend
that he was discharged for cause, but contends he was terminated
in a reduction in force due entirely to business reasons.

2. IMC owns a large underground mine near Carlsbad, New
Mexico where it mines potash and other minerals for sale or use
in interstate commerce. Respondent also has mining and
processing operations in Louisiana, Florida, and Canada and
maintains corporate headquarters in Northbrook, Illinois. The
Carlsbad mine employs about 600 employees.

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3. Complainant was hired at the Carlsbad mine in 1985 as Superintendent of Construction and Engineering. He transferred to Surface Production Superintendent in 1989 and was promoted to Manager of Surface Operations on July 1, 1992. This was the number two position in surface operations. Dale Willhoit, Production Manager, was Complainant's supervisor for his entire employment.

4. On April 29, 1993, Complainant's position was eliminated and his employment terminated along with four other employees in a reduction in force at the Carlsbad mine.

5. Following his termination, Complainant filed a complaint with the Mine Safety and Health Administration claiming that he was terminated in violation of 105(c) of the Act. MSHA investigated the complaint and concluded that no violation had occurred.

The Company's Financial Problems

6. In 1992 and continuing into 1993, the company experienced major financial problems. These were brought on by a combination of factors, including, a sharp decline in the price of phosphate, expenses associated with an inrush of water into the company's Canadian mine, poor performance of a sulphur operation in which the company invested heavily, and the settlement of litigation arising out of an explosion at the company's facility in Sterlington, Louisiana. For the third quarter ending on March 31, 1993 (the fiscal quarter ending just prior to the April 1993 reduction in force), the company reported a net loss of \$113.7 million. This included a litigation settlement of \$108.5 million. Throughout this period, the Carlsbad mine remained profitable.

7. Concerned that its bank creditors would call its loans, which were in excess of \$50 million, the Company retained outside bankruptcy counsel and prepared the necessary filings in the event they were needed.

Reductions in Force

8. Because of its financial difficulties, the company implemented reductions in force in 1992 and 1993, terminating over 600 employees.

Effect On Carlsbad Mine In 1992

9. Although the Carlsbad mine remained profitable, it was required to share the Company's financial burden by reducing costs. In November 1992, Walt Thayer, Vice President and General Manager of the Carlsbad mine, was asked by his supervisor,

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corporate Executive Vice President Jim Spier, to contribute as much as he could to cash flow, to produce at the best margin possible, and to cut costs as much as possible. This meant that the Carlsbad mine was being asked to increase production at the same time it was being asked to cut costs.

10. In 1992, Thayer was able to accomplish this without laying off many people. Because additional employees were needed to increase production and therefore increase cash flow, Thayer held off hiring the additional people and, instead, transferred people from other positions into underground miner positions which were necessary to increase production. In addition, some positions were eliminated while others were not filled. A few employees were either offered a retirement package, a severance package, or laid off. All decisions on cost reduction at Carlsbad were made by Thayer. A total of five employees were separated from the payroll during this reduction in force.

In 1993

11. The company's financial problems continued and in early 1993 the Carlsbad mine was again asked to cut costs. On March 22, 1993, Executive Vice President Spier, Thayer's supervisor, called from the corporate office and in Thayer's absence talked to Dale Willhoit, the Production Manager. Spier told Willhoit that the Carlsbad mine was behind in production, was \$32,500 unfavorable in labor and salaries, and there was "no choice" but to have a further reduction in costs.

12. Willhoit immediately called Thayer, who was on vacation, and told him of Spier's instructions. Thayer told Willhoit to start making a list of what he thought could be done to reduce costs.

13. As requested, Willhoit prepared a list of recommended moves and terminations. The list included 19 individuals and listed their salaries and Willhoit's recommended personnel actions. Among his recommendations were to move Cy Bullen to Manager Mine Operations, Morehouse to Mine Engineer, and Complainant to Production Superintendent.

14. Thayer did not accept all of Willhoit's recommendations. He decided to eliminate the level of management directly below Production Manager (Willhoit). This level consisted of three positions: Mine Manager, held by Dan Morehouse; Surface Operations Manager, held by Complainant; and Mine Operations Coordinator, held by Cy Bullen. Upon elimination of this level, the employees previously reporting to these positions were to report directly to the Production Manager (Willhoit).

15. Thayer retained Morehouse by offering him a demotion to Mine Engineer in the Mine Engineering Department.

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16. Cy Bullen was 66 and entitled to retirement. Thayer placed him on full retirement and gave him a generous severance package that Bullen found to be "very good."

17. Complainant was terminated without an offer of transfer or demotion.

18. In addition to eliminating Complainant's level of management, Thayer eliminated three lower positions and terminated the employees. In total, five employees had their jobs eliminated and were terminated: Linda Carr, Receptionist; Scot Bendixsen, Personnel Supervisor; Myra Jacks, Data Entry Operator; Cy Bullen, Mine Operations Coordinator (placed on full retirement); and Complainant, Manager of Surface Operations.

19. Once Thayer decided on the cost reductions, his plan was sent to the corporate office for review and approval. The corporation promptly approved.

20. Originally, it was planned to have the immediate supervisor meet with each employee being terminated. However, Thayer decided that he would meet with them individually.

21. On April 29, 1993, Thayer summoned Complainant to his office at the end of the shift. He told him his job was eliminated immediately, that he was to leave the property immediately, and that the company would empty his desk and send his personal belongings to him. Complainant tried to ask him whether he could take a demotion or transfer, but Thayer cut him off and told him he had someone else coming in and could not talk to him and that if he had any questions he should call Wilcox (in Human Resources). Complainant insisted on taking some of his personal belongings with him, and Thayer assigned a subordinate employee to escort him to his office, watch him as he removed personal belongings and escort him to the front gate. I find that Thayer's abrupt and insulting treatment of Complainant resulted from substantial management hostility toward Complainant.

22. Shortly after Complainant's termination, Willhoit prepared a "Confidential" evaluation on Complainant, which was placed in Complainant's file. Willhoit rated him average in performance and below average in "attitude." Willhoit's evaluation effectively eradicated years of very favorable performance evaluations received by Complainant. I find that Willhoit's downgrading evaluation resulted from substantial management hostility toward Complainant.

The Robbie Slusher Matter

23. In his complaint to MSHA, Complainant alleged that he was terminated in retaliation for his conduct in connection with

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an incident involving Foreman Robbie Slusher. Specifically, Complainant alleged that:

Mr. Waters became aware of an incident resulting in injury to a miner that involved the possibility that the injured miner's front-line supervisor had willfully or knowingly placed the miner in an unsafe condition. Further, it came to Waters' attention that IMC's report to MSHA had intentionally misstated the nature of the supervisor's involvement in the injury. Mr. Waters brought the matter to the attention of his supervisors at IMC, and recommended that front-line supervisors be given additional training, with particular emphasis on knowingly or willfully subjecting miners to unsafe working conditions. Despite Mr. Waters' exemplary record, he was discharged six weeks later.

24. This incident involved an accident on March 11, 1993, when Foreman Robbie Slusher (one of the supervisors under Complainant) was sent to measure a pipe for a blueprint. When he arrived, he saw that the pipe was higher than he could reach. He observed a 6 x 6 x 40 inch timber nearby, stood it on its end and leaned it against a feed pump, thinking that he could stand on it and reach the pipe. A miner, Mike Sensibaugh, offered to help. Sensibaugh climbed on the timber while Slusher steadied it with his foot. The miner attached a safety belt to climb up to the pipe to be measured. When he was finished and stepped on the timber to descend, the timber slipped and he caught himself on another pipe. The sudden move and pressure dislocated his shoulder. He was out for several weeks and returned for restricted duties.

25. The following morning, Thayer called a meeting to find out what happened, whether any discipline was needed and what could be done to prevent similar accidents. This was attended by Thayer, Willhoit, Wilcox, Complainant, and Jim Spearman, the Maintenance Superintendent. Complainant's principal concern going into the meeting was that the company "would take this young man (Slusher) who had been a supervisor for at that time I am going to think a year and a half or so and terminate his employment. . . ." Tr. 508.

26. During the meeting Complainant expressed his concern for Slusher and said he did not want to see him terminated or charged by MSHA. He also recommended that front-line supervisors be given special training on potential liability for willful or knowing violations that place miners in danger. After reviewing the incident, the group decided that Slusher should not be terminated but that he should be suspended from regular duties for three days with pay, required to present safety seminars on the use of ladders, receive a written reprimand, and be protected in the report to MSHA. With respect to reporting the accident to MSHA, Complainant asked, "How are we going to take care of the

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accident report to MSHA?" Tr. 518. Wilcox, who had responsibility for safety as well as human resources, said that was his responsibility and he would "take care of it." Complainant thought that Wilcox's statement meant that Slusher would be written out of the MSHA report. He had no objection to this and expressed no disagreement.

27. At the conclusion of the meeting, Thayer polled everyone to see if there was a consensus on how the matter should be handled. Everyone agreed, including Complainant.

28. IMC's accident report to MSHA was prepared a few days later, on March 16, 1993, but was not sent to MSHA until May 6, 1993, the day Sensibaugh returned to work for restricted duties. The report was filed with MSHA after Complainant's termination. A comparison of IMC's internal accident report (Exh. C-2) and the report to MSHA (Exh. C-3) shows that Slusher's involvement and the failure to use a ladder were written out of the report to MSHA. The report to MSHA was deceptive and covered up the safety accident as a mere "slipping" accident without fault.

29. On the date of the meeting, March 12, 1993, Complainant had prepared an advance memorandum to Dale Willhoit. The memorandum (Exh. C-4) argued to save Slusher from discharge by pointing out a perceived failure of the company to train front-line supervisors as to "the implications of knowingly or willfully placing an employee in an unsafe situation" and the "potential liabilities for both the salaried employee and IMC-Fertilizer" It concluded with the statement:

Had we had an ongoing program to reinforce our position on this and thoroughly explain the law, I would be forced to recommend termination.

30. Complainant gave copies of his memorandum to a secretary before the meeting on March 12, expecting her to deliver the memorandum to Willhoit and Wilcox before the meeting. However, she did not deliver it until shortly after the meeting.

31. Willhoit and Wilcox were both upset by the memorandum, which exposed IMC to potential liability for Foreman Slusher's failure to use a ladder and for IMC's (planned) deceptive accident report to MSHA. They told Complainant to destroy the memorandum. Complainant destroyed the memorandum except for one copy. On prior occasions, he had been instructed to destroy memoranda dealing with various matters, some involving safety and some unrelated to safety.

32. At times, Willhoit (Complainant's supervisor) had warned Complainant about writing memoranda that put the company in a bad light. He advised him not to write memoranda on safety problems and counseled him that any memoranda containing unfavorable

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information on safety would not be well received by higher management. Complainant felt intimidated by Willhoit's remarks. In one instance, he removed any reference to safety in a memorandum requesting that UHF radios be purchased for communications with miners. He did not realize his Slusher memorandum was controversial until Wilcox and Willhoit became upset and told him to destroy it.

The Air Transfer/Cullins Matter

33. Although not mentioned in his MSHA complaint, Complainant contended at the hearing that his termination was also motivated by his memorandum of October 10, 1990, and his continuing efforts up to February 1993, to persuade the company to correct what he considered to be a serious hazard in using PVC pipe to transfer acid.

34. In its reagent plant, the company uses hydrochloric acid in the processing of ore. The acid is stored in a tank and must be transferred at specified times. This has been a part of the processing operation for over 30 years. A storage building contains three mixing tanks and storage tank of amine. Outside, there is a storage tank containing hydrochloric acid. Amine must be neutralized with hydrochloric acid to render it usable for IMC's purposes.

35. At various times, the acid has been transferred into the storage building by one of two methods: pressurized air or an acid pump. Prior to Complainant's arrival, acid had been transferred by a Wilfrey pump before the company switched to an air transfer system. The Wilfrey pump leaked acid around the shaft, causing some maintenance and repair problems.

37. When Complainant was hired, the company was using the air transfer system with PVC pipe as the conduit for the acid.

38. On October 9, 1990, Complainant inspected the air transfer system in response to an employee complaint about fumes in the reagent plant. Complainant had not examined the system
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Extensive evidence was introduced at the hearing by Complainant and Respondent on the Slusher matter, the air transfer/Cullins matter and the reduction in force, without objection by Respondent or Complainant as to the issues being tried. The case was tried on the key issues whether the Slusher matter and the air transfer/Cullins matter involved protected activities by Complainant, whether his termination in the reduction in force was motivated "in any part" by protected activities, and, if so, whether Respondent proved an affirmative defense.

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before. Complainant had substantial experience with PVC pipe and believed it was not safe as a conduit for acid. When he inspected the air transfer system, he saw an immediate hazard in the company's use of PVC pipe. Complainant then prepared a memorandum to Willhoit, dated October 10, 1990, in which he informed Willhoit of the problem and recommended that a regular acid pump be purchased immediately and that the company stop using the air transfer system. His memorandum stated in part:

I further recommend we use acid grade stainless, hastelloy, or FRP piping and do away with the cheap PVC we are currently using. I doubt if you would get the manufacturers to certify the contractor grade PVC we use for concentrated HCl.

We are now highly exposed to a potential accident in this area and cost of a pump and piping at \$4,000 - \$5,000 is a very cheap policy.

Copies were sent to Daily Jones, Jim Spearman, and J. McKenny.

39. Willhoit was upset by this memorandum and told Complainant to shred it. When Complainant said it had already been distributed to others, Willhoit wrote a number of items on the memorandum for further study.

40. Complainant gave a copy of Willhoit's questions to Daily Jones and asked him to "check it out." Jones never finished the project because Complainant determined his work priorities and assigned him to other tasks.

41. Complainant did not respond to the questions asked by Willhoit because he thought Willhoit had made up his mind and a further reply would be futile. He also was intimidated by Willhoit's strong reaction to his memorandum and to his warning, after the memorandum, not to put safety problems in writing.

42. On July 1, 1992 Complainant was promoted to Manager of Surface Operations, based upon Willhoit's recommendation.

43. Purchases on requisitions required Willhoit's approval if they were for his department. However, if an item could be found in the city of Carlsbad in the range of \$1,000 - \$2,000 it could be purchased without his approval.

44. On August 26, 1992, a Teel acid pump had been received on a "city ticket" in the company's warehouse. Five days later, August 31, 1992, the Complainant instructed Jim Spearman to have the "new acid pump" installed. Copies of these instructions were sent to Willhoit. The pump was installed September 23, 1992.

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This pump proved to be unsatisfactory and the company returned to the air transfer system. Complainant also tried another pump and it likewise did not work.

45. Complainant received very favorable annual evaluations for 1991 and 1992.

46. On February 7, 1993, Reagent Helper Cheryl Cullins was working on the air transfer system when the PVC pipe burst and spewed acid on her. She immediately washed off in an emergency shower and was taken to a hospital emergency room. She suffered no lost time for injury. The pipe burst with such force that she was knocked down on her face and several pieces of pipe struck her.

47. Complainant promptly asked Daily Jones to determine the best kind of pump and pipe to use and to prepare the necessary purchase orders for recommendation to Willhoit. Jones recommended a Fybroc pump which he believed to be better than a Wilfley pump. The pump and pipe were approved by Willhoit, ordered and installed in June 1993, after Complainant's termination.

Acts of Management Hostility

48. Following the Slusher matter on March 12, 1993, and the Cullins accident in February 1993, there were a number of management acts of hostility toward Complainant: (A) Complainant was excluded from meetings to which he ordinarily would have been invited and expected to participate; (B) the discussions in such meetings were kept secret from him; (C) Complainant's authority in his department was bypassed; (D) Dale Willhoit deliberately deceived him two days before his termination, by telling him that he was doing a good job and there was nothing to worry about and that he was not being deliberately excluded from meetings; (E) the company accorded Complainant disparate treatment in the reduction in force; (F) the company showed hostility toward Complainant by its abrupt, insulting treatment of him when he was terminated, by giving him short shrift, cutting off his questions, and having him guarded while he removed personal belongings from his office and physically escorted to the front gate; and (G) shortly after his termination, Willhoit wrote a "Confidential" evaluation for Complainant's file that downgraded his evaluation for performance and attitude despite years of outstanding evaluations.

DISCUSSION WITH FURTHER FINDINGS, CONCLUSIONS

General Principles

Section 105(c)(1) of the Act protects miners from retaliation for exercising rights under the Act, including the right to notify the operator of an alleged danger or violation of the Act.

The basic purpose of this protection is to encourage miners "to play an active part in the enforcement of the Act" recognizing that, "if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation." S. Rep. No. 95-181, 95th Cong. 2d Sess. 1977, reprinted in the Legislative History of the Federal Mine Safety and Health Act of 1977 at 623 (Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess. (1978)).

This provision is a key part of remedial legislation, which is to be liberally construed to effectuate its purposes.

To establish a prima facie case of discrimination under 105(c) a miner must prove (1) that he or she engaged in protected activity and (2) that the adverse action complained of was motivated "in any part" by that activity. The operator may rebut the prima facie case by showing either that no protected

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Section 105(c)(1) provides:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners of applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

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activity occurred or that the adverse action was in no part motivated by protected activity. If an operator cannot rebut the prima facie case in this manner, it may nevertheless affirmatively defend by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. Haro v. Magma Copper Company, 4 FMSHRC 1935 (1982); National Cement, 16 FMSHRC 1595 (1994) (and cases cited).

A prima facie case of discriminatory intent may be established solely through circumstantial evidence. The most common indicia of discriminatory intent are: (1) knowledge that the miner was engaged in protected activity; (2) hostility toward the protected activity; (3) coincidence of timing between the protected activity and the adverse action; and (4) disparate treatment of the miner.

A miner need not prove disparate treatment to establish a prima facie case. Knowledge of the miner's protected activity is "probably the single most important aspect of a circumstantial case," and may itself be proved by circumstantial evidence. Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510 (1981), rev'd in part on other grounds sub non. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983).

Protected Activities

The first element Complainant must prove is that he was engaged in "protected activity."

The Slusher Matter

Complainant alleges discrimination because of the Slusher matter, contending (1) that he "brought to the attention of his supervisors" an "incident that involved the possibility that [an] injured miner's front-line supervisor had willfully or knowingly placed the miner in an unsafe condition" and the fact that "IMC's report to MSHA had intentionally misstated the nature of the supervisor's involvement in the injury"; and (2) that Complainant recommended that "front-line supervisors be given additional training, with particular emphasis on knowingly or willfully subjecting miners to unsafe working conditions." Exh. R-37.

Complainant's participation in the Slusher matter involved writing a memorandum and attending a meeting on March 12, 1993.

I find that Complainant's statements at the meeting, and in his memorandum, concerning his view that better safety training was needed to instruct supervisors on their potential liability for knowing or willful violations that place miners in danger were protected activities under 105(c) of the Act. Deficiency in the safety training of supervisors can present a danger to miners.

The Air Transfer/Cullins Matter

At the hearing Complainant also introduced evidence of an air transfer/Cullins matter that began with his memorandum on October 10, 1990, and extended to his efforts in February 1993, to persuade the company to correct what he believed to be a serious hazard in the use of PVC pipe to transfer acid. In clarifying the basis of his discrimination complaint, Complainant testified that the other incidents he mentioned at the hearing were only for purposes of "background" and that "the two items that are involved with my termination, sir, are the Cullins accident and the memo that I wrote (about) Mr. Slusher." Tr. 475-476.

I find that Complainant's October 1990 memorandum and continuing efforts to persuade management to change the air transfer system were protected activities. The risk of injury was serious and in fact the accident forecast by Complainant occurred.

Did Complainant Show Management Hostility Toward His Protected Activities?

The Slusher Matter

I find that the evidence as to the first part of the Slusher matter (item (1) above) does not show management hostility. Rather than his bringing to the attention of management the Slusher matter or the fact that IMC's report to MSHA intentionally misstated the supervisor's involvement, Complainant was actually called to a meeting by management before the IMC report to MSHA, and at the meeting he and everyone else agreed to a plan to protect Slusher from being charged by MSHA by writing Slusher out of the IMC accident report to MSHA. After the meeting, the IMC report to MSHA not only wrote Slusher's involvement out of the accident report, but even omitted the need to use a ladder instead a piece of timber for climbing, and recast the incident as a mere "slipping" accident without fault or risk of IMC liability. Complainant had no objection to this plan. In fact, he participated in it. Complainant made no effort to see the actual report to MSHA, which was prepared on March 16, 1993, and was not sent to MSHA until May 1993, after Complainant was terminated.

In summary, Complainant went to the Slusher meeting to try to protect Slusher from being discharged by IMC or being charged by MSHA. He succeeded and had no objections to the meeting and its outcome. There is no evidence that item (1) generated any hostility by management.

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However, the second part of the Slusher matter, item (2) above, shows management hostility toward a protected activity. At the March 12 meeting, Complainant recommended (1) special training of front-line supervisors on their potential liability for willful or knowing violations that place miners in danger; (2) leniency for Foreman Slusher, and (3) protection of Slusher in the accident report to MSHA. The meeting reached a unanimous agreement as to how to resolve the Slusher matter i.e., to suspend Slusher from regular duties for three days with pay, with an assignment to conduct safety training on the use of ladders, to give him a letter of reprimand, and to protect him in IMC's accident report to MSHA.

Complainant prepared a memorandum on the Slusher matter and gave it to a secretary to deliver to Willhoit and Wilcox before the meeting. However, it was not delivered to them until shortly after the meeting. Willhoit and Wilcox were upset by Complainant's memorandum because, among other things, it exposed Respondent to potential liability for Slusher's failure to use a ladder or other safe means in having a miner do elevated work and it exposed Respondent to potential liability for its (planned) deceptive accident report to MSHA.

I find that Complainant's Slusher memorandum was a protected activity that generated substantial management hostility toward Complainant.

The Air Transfer/Cullins Matter

I also find that the Air Transfer/Cullins Matter involved protected activities that generated substantial management hostility toward Complainant.

In his memorandum of October 10, 1990, Complainant warned Respondent that the PVC pipe in the air transfer system presented a high risk of rupturing and spraying acid on miners. His warning proved prophetic when the PVC pipe ruptured on February 7, 1993, and sprayed acid on Cheryl Cullins. While she was able to get to an emergency shower, she could have been seriously injured.

Willhoit was upset by Complainant's 1990 memorandum and told him to shred it. He believed the memorandum could subject IMC to liability. The PVC pipe was used without incident until the Cullins accident in February 1993. Complainant was promoted on July 1, 1992, based on Willhoit's recommendation. When the PVC pipe burst in February 1993, spraying acid on Cheryl Cullins, Complainant promptly came up with recommendations (through his subordinate Daily Jones) for a pump and replacement of the PVC pipe.

Management Acts of Hostility

Complainant's memoranda as to the PVC pipe and the Slusher matter were met by hostility from management, who told him to destroy the memoranda. In addition, shortly after the Cullins accident (February 1993) and the Slusher matter (March 1993) there were a number of hostile acts of management toward Complainant: (A) excluding Complainant from meetings to which he would have ordinarily been invited and be expected to participate; (B) keeping such meetings a secret from Complainant; (C) bypassing Complainant's authority in his department; (D) Willhoit's deliberate deception of Complainant, two days before his termination, by telling him he was doing a good job, there was nothing to worry about, and he was not being excluded from meetings; (E) IMC's disparate treatment of Complainant in the reduction in force; (F) the abrupt, insulting treatment of Complainant when he was terminated, by cutting off his questions and having him guarded while he removed personal belongings from his office and physically escorted to the front gate; and (G) Willhoit's "Confidential" post-employment evaluation of Complainant in which Willhoit eradicated the benefit of years of very favorable performance evaluations by evaluating him as average in performance and below average in "attitude."

Was Complainant's Termination Motivated "In Any Part" by Protected Activities?

In the reduction in force in 1993, the Carlsbad Mine Manager, Walter Thayer, had discretion as to how and where to cut costs. Corporate headquarters did not prescribe for Carlsbad any names or positions that had to be cut or any ratio between positions and non-personnel items to be reduced.

Thayer had input from Willhoit and Wilcox as to recommended personnel reductions and changes. Willhoit recommended eliminating Complainant's position but retaining him in a demoted position. Wilcox recommended eliminating Complainant's position and terminating him.

Thayer had a number of options with regard to Complainant, including: (1) retain Complainant without change, (2) eliminate his position but offer him a transfer or demotion, and (3) eliminate his position and terminate his employment.

Thayer decided to eliminate the "level of management" at which Complainant was employed, which involved the positions held by Cy Bullen, Dan Morehouse, and Complainant. Bullen was 66 and eligible for retirement. He was put on full retirement with a generous severance package that Bullen found to be "very good." Morehouse was offered and accepted a lower position in the Mine Engineering Department. Complainant was terminated without an offer of transfer or demotion. In making these decisions, Thayer

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did not consider eliminating or reducing various non-payroll costs (exceeding \$500,000 a year) such as company cars to supervisors, free bus transportation, free coffee service, and a recreation lake resort provided by the Carlsbad mine.

Complainant was given disparate treatment in that he alone at his management level was terminated without an offer of transfer, demotion or retirement. Also, as found above, Complainant's Slusher memorandum of March 12, 1993, and his efforts (from October 1990 to February 1993) to persuade IMC to correct the hazard of using PVC pipe to transfer acid were protected activities that were met with marked hostility by management.

Taken as a whole, I find that the reliable evidence shows that Complainant's termination on April 29, 1993, was motivated at least in part by his protected activities.

Did Respondent Establish An Affirmative Defense?

If an operator fails to rebut a prima facie case of discrimination, it may raise an affirmative defense in a "mixed motive" case. It then has the burden to prove that, while it considered both protected and unprotected activities, the unprotected activities were of such weight that the operator would have taken the adverse action in any event for those activities alone.

Respondent contends that it would have terminated Complainant in the reduction in force even if he had not engaged in protected activities. However, its evidence does not point to any objective or other compelling factor, e.g., a seniority system, misconduct, or orders from corporate headquarters, that required Complainant's termination.

Respondent's mine manager, Thayer, had discretion to select employees for retention, termination, transfer or demotion as part of the reduction in force, and to choose between personnel and non-payroll items in reducing costs. As stated, Thayer had a number of options with regard to Complainant, including: (1) retaining him without change; (2) eliminating his position with an offer of transfer or demotion; and (3) eliminating his position and terminating his employment. The fact that Thayer exercised discretion in terminating Complainant does not show -- let alone carry a burden of proving -- that Thayer would have chosen to terminate Complainant in any event had there been no protected activities.

Given the force of management's hostility toward Complainant's protected activities, it is unlikely that, but for his protected activities, a person of Complainant's education, experience, and performance as reflected by his record and career

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at IMC would have been terminated without at least an offer of transfer or demotion as was accorded to Dan Morehouse.

I find that Respondent has failed to prove an affirmative defense.

CONCLUSIONS OF LAW

1. The judge has jurisdiction.
2. Respondent terminated Complainant's employment on April 29, 1993, in violation of 105(c) of the Act.

ORDER

WHEREFORE IT IS ORDERED that:

1. Within 15 days of this decision, the parties shall confer (by telephone or otherwise) in an effort to stipulate (A) the position which Complainant should be offered for reinstatement at the Carlsbad mine or an economic reinstatement agreement (i.e., a lump sum agreed to in lieu of reinstatement); (B) back pay and interest computed from April 29, 1993, after legal deductions e.g., earnings from other employment, (C) reimbursement for any other economic or tax losses caused by his termination, and (D) a reasonable attorney's fee and reimbursement for Complainant's litigation costs reasonably incurred in this action. Provided: Respondent's stipulation of any matter regarding relief shall not waive or lessen its right to seek review of the judge's decision on liability or relief.
2. If the parties are able to stipulate the relief, they shall file with the judge, within 30 days of this decision, a proposed Order for Relief.
3. If the parties are unable to stipulate the relief, Complainant shall file with the judge, within 30 days of this decision, a proposed Order for Relief. Respondent shall have 10 days to reply. If issues or relief are raised, a separate hearing on relief shall be scheduled.
4. This decision shall not constitute the judge's final disposition of this case until a final Order for Relief is entered.

William Fauver
Administrative Law Judge

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