FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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January 22, 2014

BRENDA A. CULLINAN, Complainant v. PEABODY TWENTYMILE MINING LLC, Respondent	DISCRIMINATION PROCEEDING Docket No. WEST 2013-541-D DENV CD 2013-05 Foidel Creek Mine

DECISION

Appearances: Brenda A. Cullinan, Complainant/Pro-se;
Christopher G. Peterson, Esq., Jackson Kelly PLLC, Denver, Colorado, for Respondent.

Before: Judge Manning

This case is before me upon a complaint of discrimination brought by Brenda A. Cullinan against Peabody Twentymile Mining, LLC., under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c)(3) (the "Act"). A hearing in the case was held in Steamboat Springs, Colorado. The parties presented testimony and documentary evidence and filed post-hearing briefs.

For the reasons below, I find that Twentymile did not discriminate against Cullinan under the Act when it terminated her employment and the discrimination complaint is dismissed.

I. SUMMARY OF EVIDENCE

Brenda A. Cullinan worked at the Foidel Creek Mine for approximately five and a half years. In early 2012, Cullinan served as a fire boss. While serving as fire boss, Cullinan believes that Twentymile discouraged her from recording hazardous conditions in the examination books. Cullinan cited specific examples of this conduct on March 6, 2012, May 1 2012, and May 7, 2012. (Exs. C-1,2,3,4). Twentymile managers, however, claim that they wanted Cullinan to differentiate between conditions that created hazards or were violations of safety standards and conditions that simply needed to be corrected. Cullinan also filed a discrimination complaint with MSHA in late June or July, 2012, which is not related to the present case. (Tr. 41-43).

In October 2012, Cullinan received a routine reassignment from fire boss to rock duster during a longwall move. Cullinan complained on October 28, 2012, that her asthma prevented her from being a rock duster due to dust exposure so she was subsequently reassigned to the road crew with no change in hours, pay, or overtime opportunities. (Tr. 50). When the longwall move was finished, Cullinan was not reassigned to her position as fire boss. Allen Meckley, a mine foreman, testified that because fire bosses were required to work in areas during rock dusting he chose not to return Cullinan to her fire boss position because he believed it would be hazardous for Cullinan due to her asthma. (Tr. 143). Cullinan believed that acting as a fire boss did not affect her asthma and that she was reassigned to road crew due to her complaints about asthma and her identification of hazards as a fire boss. (Tr. 14-15).

On November 20 to 21, 2012, Cullinan noticed exposed roof bolts in one location and she accidently dislodged roof support timbers in another location while driving a vehicle as a member of the road crew. Cullinan called Mike Zimmerman, her mine foreman, when she noticed the exposed bolts, but did not mention the timbers that she had dislodged. He told her to set timbers in the area of the exposed roof bolts. Cullinan later told Zimmerman that only one timber remained to be set, but another miner informed him that none of the timbers were set at the location of the exposed roof bolts. Cullinan testified at the hearing that she was referring to the site of the timbers she knocked down when she stated that only one remained to be set, while Zimmerman testified that he had no knowledge that Cullinan knocked down any timbers and knew only of the site of the exposed roof bolts. (Tr. 56-57, 85).

Zimmerman testified that Cullinan told two other miners to set the timbers where she reported exposed roof bolts and that she continued hauling rock after he specifically told her to discontinue hauling rock and set the timbers. (Tr. 86). Cullinan testified that the other miners offered to set the timbers for her. (Tr. 37). After ensuring that Cullinan would personally set the timbers, Zimmerman investigated the progress of timber setting in person. He found that the task was incomplete because only one timber had been set and it only touched the roof mesh and did not extend to the roof itself. Thus, it did not provide any roof support. He ordered her to set more timbers and to replace the defective timber.

On November 25, 2012, as a result of the events of November 20 to 21, 2012, a meeting was held with Scott Harrel, who was the director of human resources for Twentymile's Colorado region, and William Bennett, who was superintendent of underground operations at Twentymile at the time. In addition to meeting with Cullinan, they met with other members of the crew including Dallas Daniels. Daniels told management at the meeting that Cullinan asked him to load her rock hauler so she could continue hauling rock even though the timbers were not yet set where rock bolts were exposed. Cullinan's rock hauler could only be loaded while working under the exposed roof bolts and unsupported roof that Cullinan herself identified as a hazard. (Tr. 94-95, 115, 130). At the hearing, Harrel testified that Cullinan admitted that she knew that the one timber that she set did not reach the roof and therefore did not support the roof, and that she only reset it when confronted by Zimmerman. (Tr. 111, 120). Harrel and Bennett made the final decision to terminate Cullinan following this meeting. (Tr. 134; Ex. R-2).

Cullinan alleges that Twentymile terminated her employment as a result of the large number of safety hazards she identified when she worked as fire boss. Cullinan filed this discrimination complaint with the Department of Labor's Mine Safety and Health Administration ("MSHA") against Twentymile on November 27, 2012. On January 31, 2013, the Secretary determined that the facts disclosed during his investigation into the complaint did not constitute a violation of section 105(c) of the Act. On or about February 28, 2013, Cullinan filed this proceeding upon her own behalf with the Commission under section 105(c)(3) of the Act.

II. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Discussion and Analysis

I find that Cullinan established a prima facie case that Twentymile discriminated against her when it terminated her employment. A miner alleging discrimination under the Mine Act establishes a prima facie case by proving that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799-2800 (Oct. 1980), rev'd on other grounds sub nom. *Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981). The burden for establishing a prima facie case is low, only requiring that a judge could infer discrimination based upon the complainant's evidence. *Turner v. National Cement Co. of California*, 33 FMSHRC 1059, 1066 (May 2011). Cullinan presented evidence of protected activity and a connection between that activity and her termination that could allow an inference of discrimination, but Twentymile rebutted the prima facie case by showing that Cullinan's termination was not motivated by her protected activity.

I find that Cullinan established that protected activity occurred. A miner establishes the first element of a prima facie discrimination case by establishing that protected activity occurred. *Metz v. Carmeuse Lime, Inc.*, 34 FMSHRC 1820, 1825 (Aug. 2012) citing *Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981). The Act states that protected activity includes when a 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." 30 U.S.C. §105(c)(1). Cullinan claims that while she was an examiner she notified Respondent of numerous alleged dangers, which led to her termination.[1] (Tr. 18-23, 61; Exs. C-1,2,3,4,5,6). Respondent argues that the conditions cited by Cullinan did not constitute protected activity because they did not concern actual hazards.[2] These conditions, however, constituted

[1] Cullinan also filed a formal discrimination complaint with MSHA in July 2012. (Tr. 41). Based upon Cullinan's testimony, the substance of this complaint was not safety related. (Tr. 43). The fact that she made this complaint, however, is still protected under the act and is included in my discussion and findings concerning protected activity. 30 U.S.C. §105(c)(1).

[2] There is a point where a miner's safety related precautions are no longer protected because they are beyond the Act. Precautions should be protected when the miner holds a "good faith, reasonable belief that such precautions are needed, and when the precautions themselves are reasonable." *Zecco v. Consolidation Coal Co.*, 21 FMSHRC 985, 993 (Sep. 1999) quoting *Robinette*, 3 FMSHRC at 812. I find that Cullinan held a good faith, reasonable belief that her actions as a fire boss were necessary safety precautions.

"alleged" hazards, which are related to the Act and therefore protected by 105(c)(1). The Act, moreover, does not protect a miner based upon the nature of hazards, but based upon the action of making a complaint or report to an operator about those hazards. I find that the numerous occasions that Cullinan notified Respondent of alleged dangers while she was a fire boss qualify as protected activity under the Act.[3]

Cullinan established a connection between her protected activity and termination through showings of Twentymile's knowledge and animus.[4] A miner can establish the second element of a prima facie case, that the adverse action experienced by the miner was in any way a result of the miner's protected activity, through indirect evidence such as "(1) knowledge of the protected activity; (2) hostility towards the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant." *Turner*, 33 FMSHRC at 1066 citing *Chacon*, 3 FMSHRC at 2510. Zimmerman testified that he was aware of Cullinan's extensive identification of safety issues while she was fire boss. (Tr. 74-75). Bennett and Meckley also testified that they were aware of Cullinan's protected activities. (Tr. 135, 143). The protected activities occurred five to nine months prior to Cullinan's termination. I find that Respondent did have knowledge of Cullinan's protected activities.

Cullinan established that Twentymile exhibited animus toward her protected activity. The more that animus "is specifically directed towards the alleged discriminatee's protected activity, the more probative weight it carries." *Chacon*, 3 FMSHRC at 2511. Cullinan testified that on March 6, 2012, Zimmerman complained about her record keeping as a fire boss, telling her that she was "only allowed to write two lines," and not a "novel." (Tr. 18; Ex. C-1). Later that same day, Meckley suggested that they take Cullinan's pen away because she wrote too much. (Tr. 21; Ex. C-2). On May 1, 2012, Cullinan identified hazardous roof bolts and asked Zimmerman how

[3] I find that Cullinan's contention that she was terminated due to her asthma is not supported by the evidence. There has been no showing that she suffered from an acute disease like pneumoconiosis. *Perando v. Mettiki Coal Corp.*, 10 FMSHRC 491, 495 (Apr. 1988). In addition, Cullinan testified that her personnel file had always reflected her asthmatic condition and that in 2010 she successfully refused a rock duster position based upon her asthma. (Tr. 9-12). The evidence shows that Twentymile accommodated her asthma when assigning her work. I find that Cullinan's complaints concerning her asthma did not constitute protected activity and Twentymile did not terminate her for those complaints.

[4] I find that Cullinan's reassignment from fire boss to road crew was not an adverse action. Adverse action must be "'materially adverse to a reasonable employee.'" *Pendley v. Highland Mining Co.*, 34 FMSHRC 1919, 1927 (Aug. 2012) citing *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006). Cullinan did not argue that her work on the road crew was more dangerous or difficult than her work as a fire boss. Meckley testified that the road crew was "one of the easiest jobs in the mine and it's a good way to learn the mine." (Tr. 141). He also testified that the road crew worked in the intake, which had fresh air and less dust than the belt lines where the fire bosses work, which Meckley believed would be safer for Cullinan's asthma. (Tr. 142, 146-48). The reassignment did not change Cullinan's shift, rate of pay, or opportunity for overtime. (Tr. 50). Although Cullinan's reassignment may suggest that Twentymile disliked Cullinan's actions as a fire boss, it was not materially adverse to a reasonable employee and was therefore not adverse action.

to record the condition and he replied "not at all[,]" but then told Cullinan to list it as a hazard after she stated that she feared being responsible for an MSHA examination violation. (Tr. 22-23; Ex. C-3). Cullinan also testified that at one point she was taken into a back room and told not to "write up so much stuff in the books." (Tr. 25). Cullinan's showing that she performed protected activity that Twentymile knew of and exhibited animus toward could support an inference of discrimination and therefore Cullinan established a prima facie case.

Twentymile, however, rebutted that prima facie case by showing that Cullinan's termination was not motivated by her protected activity. The mine 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 the protected activity. *Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981). I credit Zimmerman's testimony that prior to meeting with Harrel and Bennett, Twentymile planned to simply discipline Cullinan for insubordination because she told Zimmerman that the timbers were set when they were not, she did not set the timbers herself as ordered, and she incorrectly set a timber. (Tr. 91-92). During the meeting, however, management learned that Cullinan told Dallas Daniels, another miner on the crew, to load her hauler with rock while parked underneath the exposed roof bolts and unsupported roof. (Tr. 115; Ex. R-19). Twentymile's representatives in the meeting believed that Cullinan directed or sanctioned the other, less experienced miner to work under unsupported roof, that she deliberately misled Zimmerman when he inquired about the progress of setting the timbers, and that she knowingly set a timber incorrectly and did not intend to correct the mistake until Zimmerman forced her to do so. (Tr. 85-87, 111-12). Twentymile's witnesses credibly testified that Twentymile terminated Cullinan's employment for insubordination and a safety violation, not as a result of Cullinan's protected activity. (Tr. 105, 111-12, 134).

I find that Twentymile did not believe that Cullinan recorded too many hazards, but rather that she identified nonthreatening conditions as hazards. On March 6, 2012, for instance, Cullinan cited water in a belt line as a hazard in her examination book. (Ex. C-2). Because the belt line was not an escapeway, Zimmerman made a notation in the examination book that the condition was not a hazard that required immediate attention. (Tr. 77). Cullinan was not disciplined for this situation. (Tr. 81). Whenever Cullinan cited conditions as creating a hazard, Twentymile would try to immediately correct the condition. (Tr. 71). The company believed that immediately correcting conditions that did not create a hazard was inefficient and removed miners from addressing actual safety concerns.

Twentymile presented evidence showing that it treated Cullinan the same as it treated other employees involved in cases of "comparable seriousness." (Tr. 118, 122; Ex. R-30). *Bridge Pero v. Cyprus Plateau Mining Corporation*, 22 FMSHRC 1361, 1368 (Dec. 2000) citing *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 283 n.11 (1976). Cullinan was previously disciplined for failing to set a parking brake on a mantrip. (Tr. 95; Ex. R-13). The mantrip rolled and was seriously damaged. The two other miners involved in the events on November 20 to 21 were also disciplined. One miner, Dallas Daniels, received a disciplinary letter instead of termination because he was less experienced than Cullinan, was not certified, had no previous disciplinary record, and told Twentymile that Cullinan directed him to work under the unsupported roof. (Tr. 115; Ex. R-19). Steven Soos, a contract employee involved in the incident with the timbers, was retrained instead of terminated because he had less experience

than Daniels or Cullinan and was working under their direction. (Tr. 117; Ex. R-20). Other miners had been terminated for serious safety violations. (Tr. 121-22, 131-35; Ex. R-30). I find that Cullinan was terminated because of her unsafe actions and the insubordinate behavior she exhibited on November 20, 2012. Cullinan's protected activity that occurred five months or more prior to the termination was not a factor in her termination.

I also find that although Twentymile exhibited some degree of animus toward Cullinan's protected activity; management never disciplined her for that activity. I credit Zimmerman's testimony that, although Cullinan documented various conditions as safety hazards in the company's books that he did not believe were safety hazards, he did not discipline her. (Tr. 74-75, 80-81). I also credit Zimmerman's testimony that when he told Cullinan not to record exposed roof bolts that she discovered in May 2012, he was joking. (Tr. 99-101; Ex. C-3). He then told Cullinan to mark it down as a hazard. *Id.* Bennett testified that he supported Cullinan's actions as a fire boss and attributed her mistakes to inexperience. (Tr. 135). Meckley testified that he assigned Cullinan to road crew instead of fire boss solely because of her health concerns, not due to her protected activity. (Tr. 143). Twentymile did not want to suppress Cullinan's identification of unsafe conditions, but rather wanted her to recognize which conditions represented actual hazards requiring immediate attention. Cullinan, furthermore, was no longer a fire boss at the time of her termination. Cullinan's protected activities occurred five to nine months before her termination, but the events of November 20 to 21 occurred just days before and, by Cullinan's own account, led directly to the meeting with management on November 25. (Tr. 38). Based upon the testimony of Twentymile management at hearing, Cullinan's termination was not motivated by her protected activity. I found the testimony of Zimmerman to be especially credible and convincing in this case.

Cullinan bears the burden to show that her termination was the result of her protected activity. *Metz*, 34 FMSHRC at 1829. She has not produced sufficient evidence to prove that her protected activity motivated her discharge.

III. ORDER

For the reasons set forth above, it is hereby **ORDERED** that Complainant's discrimination claim be **DISMISSED.**

/s/ Richard W. Manning
Richard W. Manning
Administrative Law Judge

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