

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 26, 2015

JOLEEN OLSON,
Complainant

v.

CORDERO MINE, LLC,
Respondent

DISCRIMINATION PROCEEDING

Docket No. WEST 2014-420-D
Case No. DENV-CD-2014-02

Mine ID: 48-00992
Mine: Cordero Mine

ORDER GRANTING RESPONDENT’S MOTION FOR DIRECTED VERDICT

Appearances: Joleen Olson, Gillette, Wyoming for Complainant

Robin Repass, Esq., Kristin White, Esq., Jackson Kelly PLLC, Denver,
Colorado for Respondent

Before: Judge Moran

This case is before the Court upon a complaint of discrimination under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). The Complainant, Joleen Olson, acting *pro se*, alleges that she was discharged on October 30, 2013 by Respondent, Cordero Mine (Cordero), for approaching a mechanic about a safety issue on October 19, 2013. Respondent denies the allegation of unlawful discrimination and maintains that Complainant was discharged for unprotected activity. A hearing was held in Gillette, Wyoming on September 9, 2014.

At hearing, after Ms. Olson’s opening statement, Respondent moved for a directed verdict. The court explained the process of a directed verdict to the Complainant and then allowed Ms. Olson to present her case-in-chief before entertaining such a motion. At the conclusion of Complainant’s presentation of her case, Respondent appropriately again moved for a directed verdict on the grounds that Joleen Olson failed to establish a prima facie case of discrimination, because no evidence was presented that she engaged in protected activity. Tr. 213. For the reasons set forth below, the court ruled in favor of the Respondent. This Order memorializes the ruling issued at the hearing.

Section 105(c)(1) of the Mine Act states, “[n]o person shall discharge or in any manner discriminate against or cause to be discharged . . . any miner . . . because such miner . . . has filed or made a complaint under or related to this Act. . . .” 30 U.S.C. § 815(c)(1). A complainant establishes a prima facie case by “presenting evidence sufficient to support a conclusion that the individual engaged in protected activity, that there was an adverse action, and that the adverse action complained of was motivated in any part by that activity.” *Franks v. Emerald Coal Res.*, 36 FMSHRC 2088, 2093 (Aug. 2014).

The Commission’s Procedural Rules do not specifically address motions for a directed verdict. However, Procedural Rule 1(b) states that “[o]n any procedural question not regulated by the Act, these Procedural Rules, or the Administrative Procedure Act . . ., the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure” 29 C.F.R. § 2700.1. The Commission has observed that a directed verdict is appropriate when the requirements of FRCP Rule 52(c) have been met. In this regard, it noted that Rule 52(c) provides that if a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter judgment as a matter of law against the party or decline to render any judgment until the close of all the evidence. Fed. R. Civ. P. 52(c); *Essroc Corp.*, 15 FMSHRC 606, 615 (Apr. 1993).¹

Complainant Joleen Olson had worked at the Cordero mine as a warehouse employee for over 6 years. Tr. 121. Her complaint is the result of events that happened on and after October 19, 2013. On October 19th, as directed by her supervisor, Ms. Olson began the task of moving equipment baskets, from an outside area to the inside of the warehouse, using a standing forklift.² Tr. 60. Before starting this task, she advised Rory McAmis, the step-up supervisor³ that day, of her plan to move the baskets. Tr. 61. She obtained caution, or “warning,” tape and cordoned off the area where she would be working, to prevent people from passing through. *Id.* This tape was installed because the forklift she was using does not allow its operator to see

¹ In *Aluminum Company of America v. Secretary*, 15 FMSHRC 1821 (September 1993), the Commission noted that at the conclusion of the Secretary’s case, the judge entered a decision from the bench granting Alcoa’s motion to dismiss and that, as this Court does today, the judge in that matter subsequently issued a written decision confirming his bench decision. Thus, the Commission has subscribed to the view that the use of a directed verdict may be an appropriate action. A number of administrative law judge decisions have employed its use. It is clear that the Court can decide a matter after hearing the evidence without waiting for post-hearing briefs. *Secretary of Labor v. Paul Bentley*, 2013 WL 6792634, n. 20 (November 2013) (ALJ), *Sec. v. Drummond Company, Inc.*, 14 FMSHRC 2039, (Dec. 1992) (ALJ), *Secretary v. Consolidation Coal*, 11 FMSHRC 311 (March 1989)(ALJ), *Secretary v. Cyprus Emerald Resources*, 10 FMSHRC 1417 (October 1988) (ALJ), *Jim Walter Resources, Inc. v. Secretary*, 34 FMSHRC 1386, (June 2012) (ALJ), *Eastern Associated Coal v. Secretary*, 22 FMSHRC 1020, (August 2000) (ALJ).

² The forklift was also referred to as a “yale.” Tr. 60.

³ A step-up supervisor is someone that takes the place of the normal supervisor when that person is absent. Tr. 168.

directly in front of it. Tr. 67. Therefore, Ms. Olson, as the forklift operator, might not see one who was directly in front of the machine, presenting a safety hazard.

After making a few trips with the forklift, McAmis requested that Olson rearrange the tape to allow the mechanics access to a particular area in order to perform their work duties. Tr. 62. Olson obliged. *Id.* Afterwards, as she was coming around a corner, Olson noticed Wayne Martinson, an employee, putting the caution tape back in place. Tr. 63. Olson questioned Martinson about his actions, to which he responded that Wayne Larson needed to take belly pans⁴ to the wash area and went through the taped area. Tr. 63. Olson then confronted Larson, telling him to use the alternate route that she left open. Tr. 64. After she reestablished the tape, Larson went through it again. *Id.* Olson again approached Larson and then she proceeded to take down the tape and stop moving the baskets until he was finished bringing the pans to the wash station. Tr. 65. She was concerned about colliding with Larson's forklift because of her forklift's limited view. Tr. 67.

Olson testified that this event upset her because Larson did not attempt to communicate with her before removing the tape, failing to follow proper safety protocol. Tr. 65-66, 69-70. She stated that she did not file a safety complaint with McAmis because she did not think she would be successful. Tr. 73. On October 21, 2013, Olson spoke with her regular boss, Anita Werner about the incident. Tr. 189-90. Complainant Olson testified that Ms. Werner did not tell her that she was wrong for putting up the caution tape. *Id.* Of significance, Ms. Olson confirmed that no adverse action was taken against her for putting up the tape. Tr. 74-75, 171.

The Court stated its view that Ms. Olson's actions installing the caution tape was motivated by legitimate safety concerns, but advised that whether those actions were protected activity was a different question. Tr. 69. Complainant then agreed that on the two occasions that day when Larson took the caution tape down, he later put the tape up again. Tr. 70-71. Ms. Olson also agreed with the Court's characterization that the dispute Ms. Olson had with Mr. Larson was an employee-to-employee dispute. Tr. 71. Importantly, Ms. Olson stated that, following her problems with Larson, she never went to any supervisor to make a safety complaint about the incidents. Tr. 72. To emphasize this important point, Ms. Olson reaffirmed that she never went to management to allege a safety complaint. She maintained that she did not make a safety complaint because she did not feel she would succeed, as she believed that management would side with Larson's position. Tr. 73. However, that failure to act, in the Court's view, was a critical omission. The Complainant's notion that she would not prevail if she made a safety complaint is not a basis to excuse her failure to do so. Further, no one from Cordero management spoke to Ms. Olson about the incident that day. Thus, no one from management criticized Ms. Olson or took any adverse action against her that day, in the wake of her employee-to-employee dispute. Tr. 74. After the incident on October 19th, Ms. Olson continued to work at Cordero until October 28th. Tr. 76. Ms. Olson affirmed that she installed caution tape and cones on occasion following the October 19th event but that no problems resulted from her installing those safety devices and that no one from Cordero management had any criticism of her in connection with those actions. Tr. 78-79.

⁴ A belly pan is located at the bottom of a bulldozer to protect the engine and transmission. Tr. 53.

On cross-examination, Ms. Olson agreed that, well before the events forming the grounds for her discrimination complaint, she had received a disciplinary letter, on June 28, 2013. Tr. 79. The disciplinary letter involved no safety related issues whatsoever, but rather it detailed alleged violations of the company's code of conduct. Along with Ms. Olson, three other employees received disciplinary letters at that time, with each of the letters involving employees failing to get along with one another at work. Tr. 80-84, Respondent's Exhibit, R 4. Ms. Olson then conceded that the employee-to-employee frictions that prompted the June 28th letter continued. Tr. 91-100. A business record, dated July 25, 2013 was generated from these disputes. The letter summarized new events involving employee disputes with one another, with Ms. Olson being one of those employees. No safety complaints were involved in the letter and Ms. Olson signed it. R- 33, Tr. 100-101. The employee-to-employee disputes did not end there. A July 31, 2013 handwritten letter from Ms. Olson to her supervisor, which also did not contain any safety complaints, related only to the continuing "drama" of conflicts between Olson and other employees. Tr. 105. On August 7, 2013 Complainant Olson then received her "last and final" order for inappropriate behavior. Tr. 107. R-5. As with each of the other documents in this record, no safety or safety-related issues were involved.

Returning to the October 19th event upon which Ms. Olson bases her complaint, on October 22, 2013, three days later, Ms. Olson then sent Larson text messages, upon learning that he reported the October 19th incident to human resources. Tr. 116. Ms. Olson was notified that she was being terminated on October 28, 2013. Tr. 76-77.

On October 30, 2013, Olson met with human resources employee Jodi Klecker and Werner and signed her termination papers. Tr. 191-93. Olson stated that Ms. Klecker told her she was correct in hanging the caution tape and that she was not being fired for doing so. Tr. 191-92. Ms. Klecker explained to Olson that her employment was being terminated for violating her last and final warning for failing to follow Cordero's code of conduct.⁵ Tr. 193. Ms. Olson testified that she believed her termination was the result of her conflict with Larson on October 19th but she agreed with Respondent's counsel that she did not make a safety complaint to mine management and therefore was not terminated for making a safety complaint. Tr. 172.

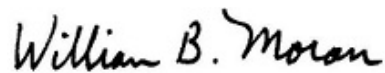
After consideration of the facts above and the record as a whole, it is completely clear that Ms. Olson's complaint has nothing to do with protected activity under the Mine Act, but rather stemmed from wholly personal disputes she had with fellow employees. The Court expressly makes no findings about which side was correct in these employee-to-employee disputes, because it is not material to any issue under the Mine Act as *no protected activity nor any safety related complaints were involved, or even alleged to be involved, in this complaint.*

⁵ As noted in the body of this Order, but included here for emphasis, Respondent's counsel presented evidence at the hearing that prior to the October 19, 2013 incident, Olson had received a disciplinary letter on June 28, 2013 and a last and final warning on August 7, 2013. Tr. 80, 107; Ex. R-4. Olson also met with human resources employee Amy Clemetson on August 6, 8, 10 and October 10, 2013. Tr. 117-18, 135, 136-37, 138-39. Both warnings and all interactions with Clemetson were pertained to Complainant's employee-to-employee conflicts. As also noted, Ms. Olson testified that *none* of these interactions with mine management or human resources involved safety complaints of any kind. Tr. 101, 105, 114, 117-18, 135, 136-37, 152.

Accordingly, based on the undisputed record, the Court finds no evidence that Olson engaged in protected activity, as she testified herself in several instances during the hearing that she made no safety complaints to mine management or human resources and, again based on the undisputed record, the Court finds that her disciplinary incidents prior to October 19 did not stem at all from any protected activity. Given the undisputed facts, Ms. Olson has failed to establish the first prong of a prima facie case for discrimination and this was explained to her by the Court during the hearing. Therefore, the Court finds that Cordero did not unlawfully discriminate against Joleen Olson under section 105(c)(3) of the Act and it hereby affirms its oral ruling made at the hearing in favor of Respondent's motion for a directed verdict.

If Complainant does not agree with the Court's decision in this case, she may petition for discretionary review by the Commission pursuant to Commission Procedural Rule 70. The petition must be made to the Commission within 30 days of the date of this order and be filed upon one or more of the five grounds listed in Rule 70(c).

WHEREFORE, this case is **DISMISSED**.

A handwritten signature in black ink that reads "William B. Moran". The signature is written in a cursive, slightly slanted style.

William B. Moran
Administrative Law Judge

Distribution:

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