FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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December 23, 2002

CORD EASLEY,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEST 2001-133-DM
	:	WE MD 00-13
	:	
v.	:	
	:	Portable Crusher #1
MORRILL ASPHALT PAVING,	:	Mine I.D. 45-03357
Respondent	:	

DECISION

Appearances: Devin Poulson, Esq., Lacy & Kane, East Wenatchee, Washington, for Complainant;
Lewis L. Ellsworth, Esq., Gordon, Thomas, Honeywell, Malanca, Peterson & Daheim, Tacoma, Washington, for Respondent.

Before: Judge Manning

This case is before me on a complaint of discrimination brought by Cord Easley against Morrill Asphalt Paving ("Morrill") under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c)(3) (the "Mine Act"). Mr. Easley alleges that he was terminated from his employment with Morrill because he complained about safety conditions at the crusher. An evidentiary hearing was held in Wenatchee, Washington. The parties filed post-hearing briefs. For the reasons set forth below, I find that Mr. Easley established a *prima facie* case of discrimination but that Morrill established that it would have terminated Easley for his unprotected activities alone.

I. SUMMARY OF THE EVIDENCE

At all pertinent times, Morrill was in the sand and gravel business. Prior to November 2000, Morrill operated a portable rock crushing plant in the State of Washington. This case arose as a result of events that occurred between January and May 2000 at the portable crusher.

Cord Easley starting working for Morrill in July 1999 as a groundsman. He performed various tasks such as greasing bearings and cleaning up spilled material from under conveyor belts. After he had worked for Morrill for several months, he was transferred to the

maintenance crew. As a maintenance employee at the crusher he welded guards on equipment, replaced bearings on shafts, and repaired equipment.

In October 1999, the portable crusher was moved from Gold Bar, Washington, to Maple Valley, Washington. Sometime after the crusher was set up in Maple Valley, Easley was assigned to work on the evening maintenance shift assisting Mike Fletcher. They were the only employees working on this shift during which equipment maintenance was performed. Sometime in January 2000, Fletcher was transferred to the day shift as a plant operator and Easley remained on the evening shift as the maintenance man.

Because Morrill needed to have more than one person working on the evening shift, it hired Don Drinkwater to work with Easley. Easley functioned as the chief mechanic on the evening shift. Easley and Drinkwater reported to work about two hours before the end of the day shift, so there was an overlap of shifts. Their supervisor was Roger Harting, the plant superintendent.

In January, Fletcher, Easley, and other employees became concerned that Drinkwater and Randy Syria were either drinking on the job or drinking before they arrived at work. They believed that both employees smelled of alcohol. Easley testified that he saw Drinkwater go to his truck on a number of occasions to get a drink during the evening shift. (Tr. 42). Easley testified that he could smell alcohol on Drinkwater's breath. Easley also stated that Drinkwater admitted that he was drinking. (Tr. 43). Easley testified that sometime before Christmas 1999, when he was working the day shift, he noticed that Syria sometimes smelled of alcohol. (Tr. 41). He would be surly when he had been drinking. Easley was concerned that these employees could cause an accident or injury.

Easley discussed the drinking issue with Fletcher and John Partridge, another Morrill employee. Approximately a week after Drinkwater started work, Easley raised the drinking issue with Mr. Harting. About a week later, Fletcher and Easley became concerned that Harting was not doing anything to stop employees from being intoxicated at work. Fletcher had previously developed a relationship with Richard Thody, the safety director for Goodfellow Brothers, Inc., the parent company of Morrill. Fletcher called Thody on the telephone to discuss the drinking problem. Fletcher handed the phone to Easley so that Easley could describe what he knew from events that occurred on his shift. This short conversation was the only contact that Easley had with Mr. Thody.

Thody raised the drinking issue with upper management. Morrill held a meeting at the crusher on February 8, 2000, to discuss alcohol abuse. Easley, Fletcher, Syria, Drinkwater, and all other crusher employees were in attendance. Chris Gibbs, Morrill's shop superintendent, was also present. Gibbs supervised Morrill's maintenance shop in Wenatchee, Washington, but he also indirectly supervised maintenance employees at the crusher. At this meeting, employees were told that anyone who was suspected of consuming alcohol on the job would be tested and that, if he tested positive, he would be immediately terminated from his employment.

Immediately following this meeting, Harting told Fletcher that he was being laid off from his job. He was not given much of an explanation except that Morrill did not need two plant operators at the crusher. When he discussed his lay-off with Thody, Thody told him that he may have been discriminated against for raising safety issues. Fletcher filed a discrimination complaint with the State of Washington under the Washington Industrial Safety and Health Act ("WISHA"). The Washington Department of Labor and Industries ("L&I") investigated Fletcher's complaint. Fletcher also filed a discrimination complaint with the Department of Labor's Mine Safety and Health Administration ("MSHA"). After MSHA determined that he was not discriminated against, Fletcher filed a complaint on his own behalf under section 105(c)(3) of the Mine Act. Following an evidentiary hearing, I determined that Morrill discriminated against Fletcher in violation of the Mine Act. *Fletcher v. Morrill Asphalt Paving*, 24 FMSHRC 232 (Feb. 2002).

Easley testified that neither Syria nor Drinkwater exhibited any signs of drinking after the meeting of February 8, 2000. As far as Easley could tell, these employees were no longer drinking on the job after that date. On May 12, 2000, Easley was interviewed by an investigator from L&I about Fletcher's WISHA complaint. An attorney for Morrill was present during the interview. Easley told the investigator that, although he did not have any proof that Fletcher was laid off because of his safety complaints, "[t]hat's just what he figured." (Ex. R-2 p. 7). Easley also told the investigator that Morrill had not retaliated against him for his involvement in any safety complaints. *Id.* Easley continued working for Morrill until May 26, 2000, when he was told that he was being laid off. Easley contends that he was separated from his employment because he talked to Thody about employees drinking on the job and, to a lesser extent, because he told the L&I investigator that he "figured" that Fletcher was laid off because of his safety complaints.

Mr. Harting testified that Easley's termination was not a result of his phone conversation with Thody about drinking on the job or by his statement to the L&I investigator. Harting and Gibbs testified that he was terminated because Morrill was dissatisfied with his skills as a mechanic.[*] Specifically, they testified that after Easley became the chief mechanic for the crusher, the crusher was down for repairs more frequently than when Warren Smithers was the chief mechanic. Morrill attributed this increased down time to Easley's lack of skill.

Harting and Gibbs also testified that Morrill's mechanics are required to bring basic tools for use at the crusher. Because Easley did not bring any tools to the crusher, he had to

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[*] At the hearing, counsel for Easley objected to the testimony of Gibbs because he was not included in Morrill's list of witnesses provided in response to the notice of hearing. (Tr. 102-05). Counsel for Morrill responded that the omission was an oversight. The parties did not conduct any discovery in this case. I allowed Gibbs to testify, but I scheduled the lunch break immediately following his direct examination so that Easley could prepare for cross-examination during the break.

borrow Harting's tools. Harting testified that Easley used his tools every day and lost some of them. Harting testified that he had warned Easley that he must bring his own tools for use at the crusher if he wanted to continue working for Morrill.

Harting testified that when Easley talked to him about employees being intoxicated at work, he discussed the matter with Drinkwater. Harting also testified that he could not smell alcohol on Drinkwater's breath and that Drinkwater denied that he had been drinking. Harting stated that after he told Gibbs about the incident, the February 8 meeting was set up to discuss alcohol abuse with crusher employees. Harting also testified that he made arrangements for a drug and alcohol testing program with the hospital in nearby Enumclaw, Washington, so that if an employee at the crusher was suspected of substance abuse, he could be sent there for immediate testing.

Gibbs testified that he made the ultimate decision to terminate Easley. (Tr. 133). He testified that the "straw that broke the camel's back" with respect to Easley's employment was an event that occurred a few days before he was terminated. (132). Harting told Gibbs that Easley failed to properly tie off when he was removing an electric motor from the cone screen. Jim Lyon, an equipment operator at the crusher, testified that Easley was wearing a safety harness as he was attempting to remove the motor which weighed more than 100 pounds and was about 20 feet above the ground. (Tr. 111). Lines from a crane were supporting the motor which would then lower it to the ground once it was detached from the cone screen. Apparently, Easley had tied off to the motor itself rather than to the frame of the cone screen so that he would have gone down with the motor, if someone else had not noticed the mistake. (Tr. 112). Gibbs testified that this unsafe act was not the direct cause of Easley's dismissal but is illustrative of his poor work performance and contributed to his decision to terminate him. (Tr. 132). Gibbs stated that he "structured it as a layoff" so that Easley could collect unemployment compensation. (Tr. 133). Gibbs testified that Easley was not really laid off for lack of work, but was terminated because of his poor job performance.

II. SUMMARY OF THE PARTIES' ARGUMENTS

A. Mr. Easley

Easley argues that it clearly established a *prima facie* case of discrimination. Easley engaged in a protected activity when he complained about employees being under the influence of alcohol at work and he suffered an adverse action as a result of these complaints. Easley contends that Morrill knew that Easley had engaged in these protected activities; Morrill was hostile to these activities; there was a coincidence in time between the protected activities and the adverse action; and Easley was disparately treated.

Easley further argues that Morrill failed to meet its burden of establishing that his termination was not motivated by his protected activities. Easley maintains that Morrill did not provide a credible explanation why it terminated him. Morrill told Easley and the state employment security department that he was laid off. Easley was never told by Harting or

anyone else that his performance was not acceptable. At the hearing in this case, on the other hand, Morrill maintained that Easley was terminated because he was responsible for increased down-time in production at the crusher. Easley contends that this post hoc rationalization should not be given any credibility. Easley points to the fact that under Washington law, unemployment benefits will not be denied for "mere incompetence, inefficiency, erroneous judgment, or ordinary negligence." (Easley Br. 5) (citation omitted). Thus, Morrill would not have put Easley's unemployment benefits at risk by telling the department of employment security that he was terminated for not properly maintaining the crusher. The only inference that can be drawn from Morrill's actions is that it had no real reason to terminate Easley other than to retaliate for his protected activities. Morrill's explanation that the crusher was shut down for repairs more frequently when Easley was the mechanic cannot be verified because Morrill's records for the crusher are "conveniently missing." *Id.* Easley points to the fact that Morrill was aware of his MSHA complaint long before it permanently shut down the crusher and it could have easily preserved these records. Fletcher and Partridge credibly testified, on the other hand, that Easley was a good mechanic.

Finally, Easley points to the fact that Morrill has a history of making up reasons for terminating employees. Its post hoc explanation of why it discharged Easley is simply pretext seized to cloak its discriminatory motive. The events in this case make sense only if discriminatory animus is added in as the motivating factor.

B. <u>Morrill Asphalt</u>

Morrill argues that its evidence demonstrates that Easley's termination was not tainted by Easley's single complaint that a co-worker smelled of alcohol on the job. It maintains that the evidence shows that Easley's termination, which occurred three months after his complaint, was the result of Morrill's continuing concerns regarding Easley's work performance. Thus, Morrill contends that it successfully rebutted Easley's *prima facie* case.

Morrill contends that Harting discussed Easley's work performance with him in April 2000 and on subsequent occasions. Morrill also relies on evidence that other employees complained to management about Easley's work performance. Gibb made the decision to terminate Easley after Easley had failed to secure himself safely when he removed the motor from the cone screen. Morrill contends that its evidence should be credited.

Morrill also argues that Easley did not present evidence showing that Morrill's stated reason for terminating Easley was pretextual. Morrill took immediate action to respond to Easley's complaint that a co-worker smelled of alcohol. Crusher employees were advised that a drug and alcohol screening program had been established at a nearby medical facility and that any employee who tested positive would be terminated. Easley admitted that he did not smell alcohol on anyone's breath after this program was established. In addition, Easley admitted in his L&I interview that Morrill did not take any action against him because he complained about alcohol use at work.

In his attempt to establish discriminatory animus, Easley relies on two statements made by Harting: Harting's admonition to Easley that he must bring his tools to work and his comment to Easley that "this back stabbing better stop." (Morrill Br. 7). First, all mechanics were required to use their own tools at work. In addition, Harting's "back stabbing" remark should be given little weight because it was an isolated event that occurred several months before Easley was terminated.

Finally, Easley's contention that he was discharged for talking to the L&I investigator about Fletcher's complaint in May should not be considered. This charge is contradicted by Easley's own testimony. Morrill maintains that there is no evidence to support this argument in any event.

III. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act. The purpose of the protection is to encourage miners "to play an active part in the enforcement of the [Mine] 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. 181, 95th Cong., 1st Sess. 35 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 623 (1978). "Whenever protected activity is in any manner a contributing factor to the retaliatory conduct, a finding of discrimination should be made." *Id.* at 624.

A miner alleging discrimination under the Mine Act establishes a *prima facie* case of prohibited discrimination by presenting evidence sufficient to support a conclusion that he engaged in protected activity and suffered adverse action motivated in any part by that activity. *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-800 (October 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981); *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998). 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 part motivated by the protected activity. *Pasula*, 2 FMSHRC at 2799-800. If the mine operator cannot rebut the *prima facie* case in this manner, it nevertheless may defend by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Id.*; *Robinette*, 3 FMSHRC at 817-18; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

A. Easley engaged in protected activity.

Mr. Easley engaged in protected activity when he complained about alcohol use by his fellow employees. This complaint was safety related because he feared that these employees could injure him as they operated heavy equipment. To the extent that he discussed safety issues, Easley's statements to the L&I investigator were also protected.

B. Easley established that Morrill's decision to dismiss him was motivated, at least in part, by his protected activity.

In determining whether a mine operator's adverse action was motivated by the miner's protected activity, the judge must bear in mind that "direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (November 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir 1983). "Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence." *Id.* (citation omitted). In *Chacon*, the Commission listed some of the more common circumstantial indicia of discriminatory intent: (1) knowledge of the protected activity; (2) hostility or animus towards the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. *See also Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 530 (April 1991).

There can be no dispute that Harting was aware of Easley's complaints about Syria and Drinkwater. Harting was also aware that Easley was interviewed by an L&I investigator on May 12, 2000, although he did not know what Easley said during this interview. Because counsel for Morrill was present at the interview, I conclude that Morrill was aware that Easley told the investigator that he "figured" that Fletcher was fired for making safety complaints. Easley's discrimination complaint in this case includes references to this interview so it is within the scope of my jurisdiction.

In *Fletcher*, I found that Morrill had demonstrated animus toward Fletcher's protected activities. 24 FMSHRC at 239-40. I specifically determined that "[c]ircumstantial evidence shows that Harting did not welcome the safety activities of Thody and Fletcher." *Id.* I concluded that Fletcher was terminated from his employment because of his safety activities. Easley's safety activities were much more limited, however. He raised concerns with Thody about employees drinking during a phone call in January 2000, after he had discussed the issue with Harting. Fletcher had initiated this call and Easley spoke only briefly about what he had observed during the evening shift. Unlike Fletcher, Easley did not have a prior history of reporting safety deficiencies and he did not have an ongoing relationship with Thody. The only safety complaint that Easley ever made was about drinking in January 2002.

I believe that Easley established that Morrill was hostile toward employees who reported safety problems to Mr. Thody. No animus was established with respect to employees discussing safety issues with Harting but, based on my findings in *Fletcher*, I find that Morrill was hostile toward employees who reported safety problems to Thody. Easley's contact with Thody was quite limited.

Easley established a coincidence in time between Easley's safety complaints and his layoff. The four month gap between his safety complaint and the adverse action is not significant in this instance. In reaching this conclusion, I also take into consideration Easley's testimony before the L&I investigator on May 12.

I also find that Easley submitted evidence that he was treated differently from other similarly situated employees. Although Morrill did not have a very extensive history of layoffs and dismissals, the fact that both Fletcher and Easley were singled out for termination establishes a *prima facie* case of disparate treatment in this instance. Although other employees complained about Syria and Drinkwater, including Partridge, only Fletcher and Easley discussed the issue with Thody.

I find that Easley established a *prima facie* case of discrimination. The circumstantial evidence establishes that the termination of Easley may well have been motivated at least in part by his safety activities. The motivation behind a termination is subjective and direct evidence is rarely encountered. I note, however, that Easley's *prima facie* case is not nearly as strong as the case established by Mr. Fletcher in his discrimination case.

C. Morrill established that it would have terminated Easley for his unprotected activities alone.

As stated above, Morrill presented evidence that Easley was terminated because his supervisors had become dissatisfied with his work as a mechanic. In addition, Harting previously warned Easley that he was required to bring his own tools to work for use on the crusher. Finally, Morrill argues that the incident in which Easley failed to properly tie off when he was working 20 feet above the ground also contributed to the company's decision to terminate him. Morrill maintains that it told Easley that he was being laid off so that he could be paid unemployment compensation benefits. I credit the testimony of Morrill's witnesses that Easley was not laid off but was terminated for cause.

I credit the testimony of Harting and Gibbs that Morrill was in the process of taking steps to address the drinking problem following the complaints made by Fletcher, Easley, and Partridge. Harting did not immediately discuss the matter with Easley because, when he approached Drinkwater after Easley's complaint, he could not detect any evidence that Drinkwater had been drinking. Harting did not want to make false accusations or create discord among the crusher employees. Gibbs believed that he could not take action against Drinkwater or Syria because he did not have objective proof that they had been drinking and they denied that they had been drinking. (Tr. 152-53). As a consequence, Morrill set up a program to test employees who are suspected of drinking rather than further investigating these particular incidents.

Given the series of events that occurred at the crusher, including the termination of Fletcher, I find that Morrill did not affirmatively establish that the termination was not motivated in any part by the protected activity. Harting's statement to Easley that "this back

stabbing better stop," indicates that he was hostile to an employee going over his head to discuss safety issues with someone in the corporate office, such as Thody. (Tr. 46, 80, 175).

If a mine operator cannot establish that the protected activity played no part in its decision to terminate the complainant, it may nevertheless defend by proving that (1) it was also motivated by the miner's unprotected activities, and (2) that it would have taken the adverse action in any event for the unprotected activities alone. I must analyze whether Morrill would have terminated Easley if he had not engaged in any protected activity.

I must carefully analyze the reasons given by Morrill for the adverse action to determine whether such reasons are simply a pretext. In *Chacon*, the Commission explained the proper criteria for analyzing an operator's business justification for an adverse action:

> Commission judges must often analyze the merits of an operator's alleged business justification for the challenged adverse action. In appropriate cases, they may conclude that the justification is so weak, so implausible, or so out of line with normal practice that it was mere pretext seized upon to cloak the discriminatory motive.
>
> The Commission and its judges have neither the statutory charter not the specialized expertise to sit as a super grievance or arbitration board meting out industrial equity. Once it appears that a proffered business justification is not plainly incredible or implausible, a finding of pretext is inappropriate. We and our judges should not substitute for the operator's business judgement our views on "good" business practice or on whether a particular adverse action was "just" or "wise." The proper focus, pursuant to *Pasula*, is on whether a credible justification figured into the motivation and, if it did, whether it would have led to the adverse action apart from the miner's protected activities. If a proffered justification survives pretext analysis . . . , then a limited examination of its substantiality becomes appropriate. The question, however, is not whether such a justification comports with a judge's or our sense of fairness or enlightened business practice. Rather the narrow statutory question is whether the reason was enough to have legitimately moved that operator to have disciplined the miner.

Chacon, at 3 FMSHRC 2516-17 (citations omitted). The Commission further explained its analysis as follows:

> [T]he reference in *Chacon* to a "limited" and "restrained" examination of an operator's business justification defense does not mean that such defenses should be examined superficially or be approved automatically once offered. Rather, we intended that a judge, in carefully analyzing such defenses, should not substitute his business judgment or a sense of "industrial justice" for that of the operator. As we recently explained, "Our function is not to pass the wisdom or fairness of such asserted business justifications, but rather only to determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed."

Haro v. Magma Copper Co., 4 FMSHRC 1935, 1938 (Nov. 1982) (citations omitted).

I find that Morrill's justification for dismissing Easley is credible and that Morrill would have taken this action even if Easley had not engaged in any protected activity. Both Harting and Gibbs believed that Easley was not competently maintaining the crusher. Lyon testified that Easley was not properly maintaining and repairing the crusher and he discussed Easley's poor work with Harting on several occasions. (Tr. 109-10). Lyon was especially critical of Easley's performance at welding. Lyon also believed that the crusher had to be shut down for repairs more frequently after Easley became the head mechanic. I agree with Easley that the disappearance of records that would have established whether the crusher had to be shut down more frequently may be viewed with suspicion. Nevertheless, the fact that Morrill permanently shut down and sold the crusher provides a rational explanation.

Morrill's concerns about Easley's workmanship is corroborated by the evidence. Whether Easley was, in fact, not a good mechanic is not nearly as important as whether Morrill management believed that he was not. I find that Harting and Gibbs genuinely believed that Easley was not maintaining the crusher as well as a head mechanic should have been. Once Easley became chief mechanic, Gibbs received phone calls "virtually daily" reporting that the crusher was down for repairs. (Tr. 125). Gibbs testified that he sent Roger Dagget, a mechanic at the Wenatchee shop, to the crusher in Maple Valley on a regular basis because he was concerned about Easley's ability to maintain the crusher. Gibbs testified that Dagget told him that he was "very unimpressed with
Mr. Easley's performance." (Tr. 157). Gibbs developed a maintenance check list for Easley to use specifically because of his concerns that Easley was not performing all of the required maintenance and was not reporting all of the work that needed to be done. (Tr. 129). Gibbs testified that the checklist was not properly completed much of the time with the result that he could not determine whether the maintenance was being properly performed. Unknown to Gibbs, Easley gave the checklists to Drinkwater to fill out. (Tr. 181). This fact tends to confirm Gibbs's concerns that Easley was not performing his work in a professional manner because he was not taking personal responsibility to keep Morrill management informed about the condition of the crusher through the maintenance check list.

Harting discussed his work performance concerns with Easley in April. For example, Harting reported that on April 19, 2000, Easley left the crusher packed with mud with the result that the production crew had to delay starting the crusher until they could clean it out. (Tr. 166; Ex. R- 3). Harting testified that he warned Easley on a number of occasions that he needed to improve his performance, but that he "tried not to overdo it." (Tr. 167). Harting testified: "I tried to promote, well, you're doing a good job more than bad, because I'd like to get him to try a little harder and do a little better." *Id.* I credit the testimony of Harting that he attempted to counsel Easley rather than bark at him. Easley denies that these conversations ever took place, but I believe that he simply did not understand what Harting was trying to communicate. I do not credit Easley's testimony on rebuttal that he was never advised that he had to improve his job performance. (Tr. 182-84).

Morrill required each mechanic to bring and use his own tools at the crusher. Morrill supplied specialty tools. Easley consistently failed to provide his own tools. All the other mechanics used their own tools, including Drinkwater. (Tr. 170). Harting believed that Easley owned a set of tools but that he did not want to use them. (Tr. 164). Harting testified that Easley was the only mechanic who consistently borrowed his tools and he believes that he lost a number of them. *Id.* Harting advised Easley that he must furnish his own tools several times before Easley complained about alcohol abuse. *Id.* Easley's refusal to bring in tools to use on the job contributed to Morrill's decision to terminate him. I do not credit Easley's rebuttal testimony on this issue. (Tr. 180-81).

The events of May provided the immediate impetus for Easley's dismissal. As stated above, Easley did not properly tie off when he was attempting to remove a motor from the cone screen. Although this event was not the reason for his discharge, it was a contributing factor and it led Gibbs to the conclusion that he was not an effective mechanic and should be let go. Gibbs made the decision to terminate Easley. At that time, he was not aware that Easley had been interviewed by the L&I investigator. (Tr. 133, 139). I reject any claim that Easley's friendship with Fletcher contributed to his discharge.

I find that Gibbs terminated Easley based on his perception that Easley's work performance and job skills were not acceptable for the job. Gibbs would have taken this action if Easley had not engaged in any protected activity. The fact that Gibbs labeled the termination as a layoff does not alter my findings. Gibbs did not have any "malice towards Mr. Easley" so he wanted to make sure that he would be entitled to unemployment compensation. (Tr. 133). He rarely terminated anyone and was not knowledgeable of the requirements for obtaining unemployment compensation.

IV. ORDER

For the reasons set forth above, the complaint filed by Cord Easley against Morrill Asphalt Paving under section 105(c) of the Mine Act is **DISMISSED**.

Richard W. Manning
Administrative Law Judge

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