

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 30, 2009

JAYSON TURNER,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEST 2006-568-DM
v.	:	
	:	
NATIONAL CEMENT COMPANY	:	Lebec Cement Plant
OF CALIFORNIA,	:	Mine ID 04-00213
Respondent	:	

DECISION

Appearances: Jayson Turner, Complainant, Pine Mountain Club, California, *pro se*;
Francina M. Segbefia, Esq., Ogletree, Deakins, Nash, Smoak & Stewart, P.C.,
Washington, DC, for Respondent.

Before: Judge Bulluck

This proceeding is before me on a Complaint of Discrimination filed by Jayson Turner against National Cement Company of California, Incorporated (“National Cement” or “NCC”), under section 105(c) of the Federal Mine Safety and Health Act of 1977 (“the Act”), 30 U.S.C. § 815(c). The complaint alleges unlawful discharge from employment in retaliation for having made safety complaints to National Cement.

Turner filed a Discrimination Complaint with the Mine Safety and Health Administration (“MSHA”) pursuant to section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2), on July 25, 2006. Ex. C-9.¹ In a letter to Turner dated August 18, 2006, MSHA notified him that, based on its investigation of the allegations contained in the Complaint, it had concluded that a violation of section 105(c) had not occurred. Turner, *pro se*, initiated this instant proceeding before the Commission on August 31, 2006, under section 105(c)(3) of the Act, 30 U.S.C. § 815(c)(3).²

¹ Section 105(c)(2) provides, in pertinent part: “Any miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against . . . by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination.”

² Section 105(c)(3) provides, in pertinent part: “If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary’s determination, to file an action in his

A hearing was held in Pasadena, California. The parties presented testimony and documentary evidence, and filed post-hearing briefs. For the reasons set forth below, I conclude that, although Turner engaged in activity protected by the Act, he has failed to prove that his protected activity served as the basis for his termination by National Cement; assuming, *arguendo*, that it did, National Cement discharged him for reasons that are wholly unrelated to his protected activity.

I. Factual Background

National Cement operates the Lebec Cement Plant in Kern County, California. Jayson Turner worked at the Lebec Plant as an electrician for 10 years and 3 months. Tr. 36. During the period relevant to these proceedings, Turner worked the swing shift, 2:00 p.m. to 12:30 a.m., Sunday through Wednesday. Tr. 65, 77. While employed by National Cement, Turner had a second job with Innovative Construction Solutions (“ICS”), a contractor that provided water treatment services to National Cement on the premises of its Lebec Plant. Tr. 32-33, 90-91, 110-11, 263. Turner’s job at ICS had flexible hours, with no set schedule. Tr. 116.

On September 24, 2003, Turner did not report to his job at National Cement for “personal reasons.” Ex. R-6. On that day, however, his supervisor, chief electrician Julius Wetzel, observed Turner at the ICS building. Tr. 528. Normally, during that time, Turner would have been working his shift at National Cement, instead of working for ICS. Tr. 62. In a letter dated October 1, 2003, Wetzel issued a “written verbal” reprimand to Turner, stating that on September 24, he was “absent from work without consent of the Company,” and warning him that if such an incident happened again, it would result “in more severe disciplinary action, including possible discharge.” Ex. R-6.³

On June 13, 2006, Turner informed Wetzel, orally and in writing, that he would be taking the following day off to go to a doctor’s appointment. Tr. 64; Ex. R-7. The following day, June 14, from approximately 10:30 a.m. until 1:30 p.m., Turner visited the ICS building to show the water treatment facility to his daughter, who was visiting Turner from out of town. Tr. 33-34, 68-70, 112-13.⁴ While at ICS, Turner engaged in work, and “logged in some activities.” Tr. 80, 114; Ex. R-4. After leaving the Lebec Plant property, Turner had lunch with his daughter and, at

own behalf before the Commission”

³ Turner’s Personnel File (containing this document at NCC 160), Safety Committee notes from February 2006 through June 2006, and Joseph Kowalski’s Personnel File were admitted into evidence after the hearing as ALJ Exhibit 1 (Ex. ALJ-1).

⁴ Turner offered conflicting testimony regarding his time of arrival at ICS. In direct testimony, Turner stated that he arrived at 12:30 p.m. Tr. 69. On cross examination, Turner was shown his discovery response to National Cement, in which he stated that he arrived at ICS at 10:30 a.m. Tr. 112. When pressed, Turner admitted that he arrived at the earlier time, 10:30 a.m. Tr. 113. I discredit Turner’s assertions at the hearing that he arrived at 12:30 p.m., and find that he arrived at 10:30 a.m.

4:00 p.m., went to his doctor's appointment. Tr. 69, 74-76.

On June 14, several National Cement employees informed Wetzel that "Turner was at the ICS water treatment plant." Tr. 532; Ex. R-8. Wetzel went to the ICS building and spoke with the supervisor there. He testified to being informed that Turner had been working:

A. I asked the supervisor if Mr. Turner was there.

* * *

He said, "No, he just left."

Q. Did you ask anything else?

A. I asked if Mr. Turner was working.

Q. And what was his response?

A. He said, "Yes."

Tr. 533. Wetzel reported his findings to his immediate supervisor, electrical manager Bill Russell, and to plant manager Byron McMichael, in a written statement dated June 15, 2006. Tr. 535; Ex. R-8. McMichael was ultimately responsible for deciding what disciplinary measures, if any, National Cement would take against Turner for the June 14 incident. Tr. 249-50. McMichael reviewed Turner's Personnel File (*see* Ex. ALJ-1) and, in a meeting with Turner, Wetzel, and union representative, Neal Janousek, announced his decision to suspend Turner "pending discharge." Tr. 282; Ex. R-1. McMichael subsequently decided to terminate Turner's employment and by notice dated June 23, 2006, provided Turner with the company's reason:

On Wednesday, June 14, 2006, you were on the premises of NCC working for Innovative Construction Solutions, Inc. The same day . . . you missed your entire shift (2:00 p.m. until 12:30 a.m.) at NCC. . . . As a result of your working for another firm on a day that you were absent from NCC and your less than acceptable performance, you are being terminated effective Friday, 6-23-06.

Ex. R-2.

II. Findings of Fact and Conclusions of Law

A complainant alleging discrimination under section 105(c) of the Act, 30 U.S.C. § 815(c), establishes a *prima facie* case of prohibited discrimination by presenting evidence sufficient to support a conclusion that the individual engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *See Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other*

grounds, 663 F.2d 1211 (3rd Cir. 1981); *Sec’y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981).

The operator may rebut the *prima facie* case by showing either that no protected activity occurred, or that the adverse action was in no part motivated by protected activity. *See Robinette*, 3 FMSHRC at 818 n.20. If the operator cannot rebut the *prima facie* case in this manner, it, nevertheless, may defend affirmatively by proving that it also was motivated by the miner’s unprotected activity and would have taken the adverse action for the unprotected activity alone. *See id.* at 817-18; *Pasula*, 2 FMSHRC at 2799-800; *see also Eastern Associated Coal Corp. v. FMSHRC*, 813 F.2d 639, 642-43 (4th Cir. 1987) (applying *Pasula-Robinette* test); *Boich v. FMSHRC*, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission’s *Pasula-Robinette* test). In determining whether a mine operator’s adverse action was motivated by the protected activity, the judge must bear in mind that “direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect.” *Sec’y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev’d on other grounds sub nom. Donovan v. Phelps Dodge Corp.*, 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.” 3 FMSHRC at 2510 (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. *Id.* at 2510-12; *see also Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 530 (Apr. 1991). The Commission has also held that an “operator’s knowledge of the miner’s protected activity is probably the single most important aspect of a circumstantial case” and that “knowledge . . . can be proved by circumstantial evidence and reasonable inferences.” *Sec’y of Labor on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (Sept. 1999) (citing *Chacon*). In *Bradley v. Belya Coal Co.*, the Commission enunciated several indicia of legitimate non-discriminatory reasons for an employer’s adverse action, including evidence of the miner’s unsatisfactory past work record, prior warnings to the miner, past discipline consistent with that meted out to the complainant, and personnel rules or practices forbidding the conduct in question. 4 FMSHRC 982, 993 (June 1982).

Before his employment was terminated, Turner repeatedly engaged in protected activity when he brought safety concerns to the attention of his supervisors.⁵ He testified that on at least four occasions he raised such concerns.⁶ He alleges that he requested that National Cement provide him with electrically rated tactile gloves. Tr. 19-20, 105-06. National Cement’s safety

⁵ Section 105(c)(1) of the Act provides, in pertinent part, that a miner cannot be discharged, discriminated against or interfered with in the exercise of his statutory rights because he “has filed or made a complaint under or related to this Act, including a complaint . . . of an alleged danger or safety or health violation.”

⁶ Turner withdrew his allegation that he made a fifth safety complaint concerning unsafe conditions existing on a blower. Tr. 123-24; Comp. Br. at 4.

manager, Randy Logsdon, testified that he told Turner that he had researched the availability of such gloves in his equipment catalogs, but could not find any thin rubber or latex gloves that had an electrical rating. Tr. 361-63. During January 2006, Turner complained to management that the lack of lights on a manlift made it unsafe to operate the equipment at night. Tr. 49-50. In late May 2006, Turner also complained that a medium voltage disconnect, which he mistakenly energized, was mislabeled and not properly locked and tagged out of service. Tr. 20-25; Ex. C-2. When Turner energized this piece of equipment, it caused the entire plant to lose power. Tr. 25-26. He was subsequently disciplined for his mistake in a written warning that was placed in his Personnel File. Ex. C-5; ALJ-1. Lastly, on June 12, 2006, Turner complained to management that he had been directed to troubleshoot ignition controls on Pre-Calcliner burners in an area that was very hot and gassy, needlessly placing him at risk. Tr. 43-45.

Although Turner raised these safety concerns in the months and days preceding his termination, he did not produce any evidence that these protected activities were in any way related to his termination. To the contrary, McMichael credibly testified that when he decided to terminate Turner, he knew nothing of Turner's concerns regarding electrical gloves, lack of lights on the manlift, or troubleshooting the Pre-Calcliner burners. Tr. 238, 272-73, 310. I also credit McMichael's testimony that, although he was aware of Turner having caused a plant shut down the previous month, he considered the incident a disciplinary matter in reaching his decision to discharge Turner, rather than an instance of Turner having raised a complaint about the safety of equipment. Tr. 237-38, 273-74. I also credit the testimony of Wetzel that his recommendation that Turner be discharged, was based upon Turner's "poor job performance and his activities during the incident with the [ICS] water treatment plant," and not on any safety complaints made by Turner. Tr. 527, 539.

Assuming, *arguendo*, that Turner's various complaints served as the basis for the decision by National Cement to discharge him, I find, nevertheless, that the company offered credible evidence, unrebutted by Turner, clearly establishing that he was discharged for legitimate, business-related reasons, entirely unrelated to any protected activity, and that the company would have taken the adverse action based solely on Turner's conduct respecting his outside employment at ICS.

Turner was fully aware that National Cement had placed limitations on his outside employment at ICS. Tr. 32-33, 245-47. On October 1, 2003, the company warned Turner that working for ICS in a manner that interfered with his employment at National Cement would result in "severe disciplinary action, including possible discharge." Ex. R-6. The work that Turner performed for ICS on June 14, 2006, occurred before he was scheduled to report for duty at 2:00 p.m. Tr. 69. National Cement terminated him, nevertheless, because "[h]e chose to give his services to ICS (his part-time employer) that day, rather than National Cement." Resp. Br. at 8 (citing Tr. 276-77, 334). McMichael testified that, in his opinion, Turner "could have scheduled [his] blood pressure test some other time and interrupted [his] work with ICS . . . and provided services for [National Cement] that day." Tr. 334. He also opined that Turner could have made "other arrangements to avoid missing work, he could have [come] to work and then left and [run] over and had his blood pressure checked and [come] back to work." Tr. 270. Wetzel testified that it was the company's position that Turner "could have scheduled his

doctor's appointment previous to the time he [was] supposed to be at work. . . . He had all morning to schedule the appointment some other time where it didn't interfere with his obligations at National Cement." Tr. 484. The company's position, that it was unnecessary for Turner to have missed his entire shift to have his blood pressure checked, was clearly conveyed to Turner at the time of his suspension, pending discharge. Ex. R-1. In other words, National Cement remains firmly entrenched in its expectation that if Turner was going to provide his services to anyone on June 14, 2006, a regularly scheduled workday, he should have worked for National Cement, his primary employer. *See also* Tr. 340-42.

One of Turner's fellow workers at the Lebec Plant, William Edminister, advanced Turner's position that National Cement should not have discharged him for having worked at ICS on June 14. Edminister testified that, "because this was on [his] own time before [his] shift. . . . What you do on your own time and off the clock is none of the company's business. You shouldn't have to answer [to] the company for what you do off the clock." Tr. 142-43, 171.

McMichael testified that requesting a full day of leave for a doctor's appointment is not an unusual occurrence at National Cement. Tr. 269. He explained that "the plant has what is referred to as a no-fault attendance program. The system really doesn't care whether you're there or you're not there. It's like a bank account. You put money in and you take money out. . . . So it's just a way of keeping a record that it's controlled." Tr. 271. Turner, himself, explored McMichael's rationale for firing him, given that he had taken the day off:

- Q. Why do you think it was necessary to fire me for – for doing what I did, for working the same day at the – at the water treatment plant because I had taken the day off?
- A. It was my opinion after having warned you about that prior to that, having worked for a contractor on our site, which is annoying to me to start with. We hire people to work for us, we want them to be there and perform their work and you deprived us of your work that day. And to me, that was very irritating and time for a change.

Tr. 252; see also Tr. 283-85.

Turner's poor performance – specifically, the incident involving the roller mill motor – also served as a basis for his termination. Ex. R-2. This incident occurred on May 24, 2006, when Turner energized a medium voltage disconnect that he mistakenly believed supplied power to a particular roller mill motor that would not start. However, the equipment that Turner energized was, in fact, the wrong equipment, and when he energized it, power to the entire plant was knocked out. Tr. 20-26. Turner complained to management that his error was due to the fact that the equipment was mislabeled and not properly locked and tagged out. Tr. 20-25; Ex. C-2. However, Bill Russell testified convincingly that the company had trained its electrical personnel on the power supply for the roller mill system, and opined that Turner should have been aware that he was about to energize the wrong equipment. Tr. 190, 205-06. As Russell explained: "The old raw mill had been out of service for at least five years when this

happened. . . . Everybody knew it was out of commission for the last five years. He shouldn't have been over there. The starter where you go [to energize] the physical roller mill *is in an entirely different building.*" Tr. 205-06 (emphasis added). I credit Russell's testimony that Turner should have known what equipment to energize and, given that the incident occurred 21 days before the ICS incident, I conclude that it served as a proper basis for consideration in Turner's termination.

At the hearing, Julius Wetzel testified that Turner's poor performance primarily motivated him to recommend to McMichael that Turner be discharged for his unauthorized work at ICS. Wetzel explained that Turner "doesn't listen. He's very hard to communicate with and he takes a lot of things personal that shouldn't be personal." Tr. 460. Wetzel also testified that Turner "didn't follow instructions. . . . The few other people in the shop expressed the concern that they would not work with him. They didn't like working with him." Tr. 488. Over the two days that this matter was tried before me, Turner repeatedly disrupted the proceedings, and consistently exhibited a disquieting lack of self control, for which he was repeatedly admonished on the record. *See, e.g.,* Tr. 96, 131-32, 185-86, 435-37, 465-66, 528-30. Based on my own observations of Turner's refusal to follow instructions and, having experienced, first hand, his general uncooperative nature throughout the entire hearing process, I fully credit Wetzel's testimony.

While it is clear that Turner was afforded the right to defend his behavior prior to his discharge, it is also evident that National Cement gave little weight to his protestation that he understood the company's policy to only prohibit work at his outside job during his normally scheduled shift. Tr. 82-86. The record supports a conclusion that Turner could well have misunderstood the breadth of National Cement's policy, and that he had considered his actions on June 16 to have been in compliance with the company's mandate that outside employment not interfere with the primary job, considering that the prior "written verbal" generally describes the prohibited conduct as "being absent from work without the consent of the Company," and fails to set forth in specific terms the violative conduct and the requirements of the policy. Ex. R-6. It is also evident that Turner's troubles as an outside contractor to ICS are rooted in the water treatment plant's location on the Lebec Plant's premises. It is highly probable, especially in light of National Cement's no-fault attendance program, that had Turner conducted his business away from the job site on his day off, none of his activities, before, during or after his shift ended, would have been called into question. While the decision to terminate Turner, rather than mete out lesser discipline, may appear to have been harsh, and even unfair, my task, under the Act, is to determine whether the adverse action was motivated in any part by Turner's protected activity. In this regard, it is well settled that "[t]he Commission and its judges have neither the statutory charter nor the specialized expertise to sit as a super grievance or arbitration board meting out industrial equity." *Chacon*, 3 FMSHRC at 2516. The weight of the evidence, as well as Turner's deportment during the hearing, compel me to conclude that Turner was a difficult employee, and that National Cement had ample grounds, unrelated to his protected activity, upon which to terminate his employment.

It is clear, based on the record in its entirety, that Turner's non-conformance with National Cement's policy regarding outside employment, and his less than satisfactory

performance, motivated National Cement to terminate his employment, and that he would have been terminated on the sole basis of his conduct respecting his work at ICS, irrespective of any protected activity.

ORDER

Accordingly, inasmuch as Turner has failed to establish, by a preponderance of the evidence, that he was discharged for engaging in activity protected under the Act, it is **ORDERED** that the Complaint of Discrimination of Jayson Turner against National Cement Company of California, Incorporated, under section 105(c) of the Act, is **DISMISSED**.

Jacqueline R. Bulluck
Administrative Law Judge

Distribution: (Certified Mail)

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