

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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February 6, 1997

PATRICIA ANN VILLINES, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. CENT 96-28-DM
: :
COBRE MINING COMPANY, : SC MD 95-05
Respondent :
: Cobre Mine

DECISION

Appearances: Robert F. Turner, Esq., Deming, New Mexico, for
the Complainant;
Patrick M. Shay, Esq., Rodey, Dickason, Sloan, Akin
& Robb, P.A., Albuquerque, New Mexico, for
Respondent.

Before: Judge Maurer

This case is before me upon a complaint of discrimination brought by Patricia Ann Villines against the Cobre Mining Company (Cobre) under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 815(c).

The case was heard on November 6, 1996, in Truth or Consequences, New Mexico. For the reasons set forth below, I find that Ms. Villines was not terminated for engaging in activities protected under the Mine Act and, therefore, was not discriminated against by Cobre, in violation of section 105(c).

The Complainant was hired by Cobre on March 5, 1993 and fired on July 13, 1995. At the time of her termination, she was the safety office clerk.

She claims to have had no employment-related problems until May 19, 1995, shortly after her immediate supervisor, Mike Best, was fired.

On May 19, 1995, she received a Letter of Counseling from Mr. Trujillo, who was the human resources manager at Cobre and her immediate supervisor after Best's termination. This Letter of Counseling is contained in the record as Cobre Exhibit A and it recites several instances of nonfeasance and malfeasance by Ms. Villines. Basically, Mr. Trujillo was upset with the

operation of the safety department generally and Ms. Villines= work particularly.

The testimony from Mr. Trujillo and Ms. Dinwiddie (the office manager) at the hearing was all to the effect that Ms. Villines had to be constantly reminded to perform the duties of her job, and work that she did perform, was poorly done. They also testified concerning Ms. Villines= lack of skills in typing, filing, and administrative tasks generally. I note that this was the first and only clerical type job she has ever held.

Ms. Villines was given several opportunities to upgrade her skills, but she reportedly failed to take advantage of them. Specifically, for example, the office manager offered to take time to teach her the computer skills she needed to better perform her job, but she did not show up for the training.

The evidence is uncontested that the training department records were in a mess at the time Mike Best was fired, and Mr. Trujillo took over as the complainant=s supervisor. The feeling was that this was the complainant=s job and that Mr. Best had simply let her slide rather than insisting that she maintain these certification records in a proper manner.

Mr. Trujillo attempted to impress upon the complainant the importance of maintaining proper records within the safety department and specifically tasked her with putting these records in order. However, despite his more or less constant urging, she was not getting the work accomplished. Rather, she would find other work to do or other ways to occupy her time. Meanwhile, the federal and state mine inspectors were putting pressure on the mine management to get these records into shape for review.

Finally, after about a month of little or no progress and with the records still in extremely bad shape, the company sought the assistance of a technical specialist from the New Mexico Bureau of Mine Inspection to train the complainant along with Ms. Dinwiddie, the office manager, and Ms. Webb, the receptionist, to properly fill out and file the training records.

On July 12, 1995, at approximately 8:00 a.m., the state-provided training commenced. At about 10:30 a.m., Mr. Trujillo was advised that Ms. Villines was not cooperating with the trainer. She was coming and going in and out of the room, talking on the phone, and generally just not paying any attention to the training. This apparently was the last straw. The next day, July 13, 1995, Ms. Villines= employment was terminated.

A complainant alleging discrimination under the Mine Act establishes a prima facie case of prohibited discrimination by proving that she engaged in protected activity and that the adverse action complained of was 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 sub nom. *Consolidation Coal Co. v. Marshall*, 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). An 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. *Pasula*, 2 FMSHRC at 2799-800. 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. *Id.*; *Robinette*, 3 FMSHRC at 817-18; see also *Eastern Associated Coal Corp. v. FMSHRC*, 813 F.2d 639, 642, (4th Cir. 1987).

The complainant's only alleged protected activity is cooperating with MSHA by talking with an investigator concerning the termination of her former boss, Mike Best. However, her statement was not favorable to Mr. Best. Her understanding of why he was fired was because he was not doing his job and that's basically what she told the MSHA investigator. She agrees the safety office was a mess at the time Mike Best was fired. Furthermore, it was Mr. Trujillo, her new supervisor that requested that the MSHA investigator interview her. It was the MSHA investigator who told her that. Mr. Trujillo corroborates that portion of her testimony as well.

It follows logically then that if the company suggested that she be interviewed by MSHA concerning Best's case, and she in fact supported their firing of Best with MSHA during that interview, they would be unlikely to take adverse action against her for cooperating with MSHA (at their request).

Simply put, there is no evidence to support a prima facie case of discrimination by Cobre against the complainant, that is, adverse action causally related to protected activity. The complainant's own lack of productivity provided ample basis for discharging her.

ORDER

Accordingly, it is **ORDERED** that the complaint filed by Patricia Ann Villines against the Cobre Mining Company for a violation of section 105(c) of the Mine Act is **DISMISSED**.

Roy J. Maurer

Administrative Law Judge

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