

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
2 SKYLINE, 10th FLOOR  
5203 LEESBURG PIKE  
FALLS CHURCH, VIRGINIA 22041

September 20, 1996

HAROLD HOLTZ, : DISCRIMINATION PROCEEDING  
Complainant :  
v. : Docket No. CENT 96-7-D  
: DENV CD 95-13  
: Mine ID 32-00491  
FALKIRK MINING COMPANY, :  
Respondent :

DECISION

Appearances: Steven L. Latham, Esq., Bismarck, North Dakota for  
Complainant;  
Charles S. Miller Jr., Esq., Fleck, Mather, &  
Strutz, Bismarck, North Dakota for Respondent.

Before: Judge Fauver

This is a complaint under § 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., alleging discrimination on February 23, 1995, when Respondent notified Complainant that he was being placed on probation for six months because of an incident with its safety manager at a bar.

Holtz contends that the safety manager, Archie Gilliss, gave a false and exaggerated account of the incident as a means of retaliating against him because of his protected activities under § 105(c). He further contends that this was part of a pattern of false and exaggerated reports by Gilliss against him in retaliation of his protected activities. As evidence of a pattern, he cites two prior adverse actions in 1993 and 1994. Falkirk Mining denies any discrimination or hostility toward Holtz' protected activities and contends that the prior adverse actions are barred by the statute of limitations.

Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, probative and reliable evidence establishes the following Findings of Fact and further findings in the Discussion below:

FINDING OF FACT

1. On December 17, 1990, Harold Holtz was involved in a fatal accident at the Falkirk Mine, a surface coal mine operated

by Respondent Falkirk Mining Company in Bismarck, North Dakota. Falkirk is a subsidiary of the North American Coal Corporation. The mine produces coal for sale or use in or affecting interstate commerce.

2. The accident involved a collision between a large coal hauler operated by Holtz and a scraper. The operator of the scraper was killed. Holtz suffered shoulder injuries that required surgery and rehabilitation of several months.

3. Holtz had a substantial disagreement with management concerning the cause of the accident and safety rules he believed were necessary to prevent future accidents. Management did not find Holtz at fault in the accident. The disagreement arose from Holtz' belief that management was covering up its responsibility for conditions that led to the accident.

4. MSHA issued two citations on December 19, 1990, and a third on January 22, 1991, based on its investigation of the accident.

5. Holtz disagreed with MSHA's investigation report as well as mine management's account of the accident. He frequently expressed his complaints to management, especially to Archie Gilliss, the mine safety manager. Gilliss advised him to report his concerns to MSHA if he was not satisfied with the investigation or had more information to assist the investigation. Holtz had many contacts with MSHA concerning its investigation and its preparation for a hearing on its citations. Holtz was expected to testify at the hearing.

6. The citations were settled on September 22, 1992, with a 90% reduction in penalties and a major reduction in the charges. Holtz was very upset over the settlement and felt that it was a white-washing of serious violations. On a number of occasions, he expressed his opinion to persons at the mine and others, including MSHA officials, that there was collusion between Falkirk's management and MSHA, and that mine management and MSHA had engaged in a cover-up of serious safety violations.

7. On February 24, 1993, more than two years after the accident, MSHA inspected the Falkirk Mine following a complaint from an unidentified caller. During the inspection, in which no violations were found, Holtz asked to talk to the inspectors. Holtz met with Inspectors Larry Keller and James Beam and again complained about the investigation of the 1990 accident and settlement in 1992. This was not a new subject for the MSHA inspectors. Holtz had voiced the same complaints to Keller and other MSHA officials on a number of occasions. Holtz testified

that he had 8-10 conversations with at least three different MSHA officials prior to the February 1993 inspection.

8. Keller was concerned about Holtz' emotional reaction to the 1990 accident and investigation and Holtz' statement to him that he continued to have disturbing flashbacks when ever he drove by the scene of the accident. Keller was concerned that a person driving a coal hauler carrying 300 tons of coal at 55 m.p.h. needed to be concentrating 100% on what he was doing in order to operate the equipment safely.

9. At the conclusion of the February 1993 inspection, Keller talked to Archie Gilliss, mine safety manager, about Holtz' continued emotional reaction to the 1990 accident and investigation, his flashbacks, and how his emotional state might affect his ability to concentrate fully on operating the large coal hauler. Keller noted that the company had an employee assistance program and asked Gilliss if the company could provide Holtz some assistance, meaning professional counseling. Gilliss prepared a memorandum to his files concerning his discussion with Keller and reported the matter to mine management. After consultation with legal counsel, management decided to take Holtz off the equipment and place him on paid medical leave for psychological evaluation. The decision was a collective one and involved Falkirk's President, Falkirk's Manager of Human Resources, Holtz' line supervisors, and Gilliss.

10. Holtz was very upset with Falkirk's decision to require him to undergo psychological evaluation. He filed a § 105(c) discrimination complaint against Falkirk on March 22, 1993, contending that Gilliss lied about Keller's comments in order to retaliate against Holtz' protected activities.

11. MSHA investigated Holtz' discrimination complaint and determined there had been no violation of § 105(c). After receiving MSHA's decision, around November 1, 1993, Holtz elected not to pursue his complaint before the Review Commission.

12. In this proceeding, which involves a later discrimination complaint (in 1995), Holtz contends that Gilliss demonstrated a pattern of hostility toward Holtz' protected activities. As part of the pattern, Holtz contends, Gilliss lied to Falkirk's management concerning the extent of Keller's remarks to Gilliss following the February 1993 inspection. Holtz testified that he talked to Keller and that Keller had denied stating that he considered Holtz to be a safety risk to himself and his fellow miners or a "time bomb" ready to go off, as Gilliss had reported to management. Keller testified that he

expressed to Gilliss his concerns about Holtz' inability to put the accident behind him and the possibility that he was not able to maintain his concentration while operating the large coal hauler. Keller also testified that he mentioned Holtz' flashbacks and asked Gilliss whether there was something that Falkirk could do in terms of providing Holtz with counseling. In large part, Keller confirmed Gilliss' account of the conversation, although Gilliss may have exaggerated some of Keller's statements.

13. In March 1993, Holtz went on medical leave with full pay and benefits. Dr. Tello, the physician staffing Falkirk's Employee Assistance Program, referred him to Dr. Peterson, a clinical psychologist who was not connected with Falkirk. Dr. Peterson saw Gilliss and also had him see a psychiatrist, Dr. Thakor, who also was not connected with Falkirk. Following those consultations, Dr. Peterson reported to Falkirk that Holtz had unresolved psychological conflicts as a result of the 1990 accident and strongly recommended that Holtz receive counseling from either a psychiatrist or a psychologist. Dr. Peterson noted that there was a significant ongoing conflict between Holtz and the mine staff. He described Holtz as being a "worrisome, tense individual who is likely to be rigid and stubborn in relationships." He also reported that Holtz "is suspicious of others and has difficulty trusting." At the same time, however, Dr. Peterson reported that he did not consider Holtz to be a danger to himself or others in carrying out his job responsibilities.

14. Following Dr. Peterson's report, Holtz was returned to duty as a coal hauler operator, but was required to attend further counseling as recommended by Dr. Peterson. The additional counseling was performed by Dr. Hanlon, who was not connected with Falkirk. Although this situation was somewhat unique, Falkirk has taken similar actions with regard to other employees. In one instance, Falkirk required a dragline operator who was having emotional problems to obtain assistance and in other instances had referred personnel to its EAP program when there were unexplained problems with their job performance.

15. After returning to duty, Holtz' relationship with mine management continued to be poor. Holtz' immediate supervisor, Mr. Davison, wrote in Holtz' employee evaluation on October 7, 1993, the following:

Harold's basic attitude toward his job as a coal hauler is satisfactory. It is also satisfactory toward his supervisor. However, with respect of his attitude toward the company as a whole and particularly toward members of

management, it is much below average. Much if not all is manifest from his involvement in the fatal accident of 12/17/90 and a subsequent evaluation this summer. There have been times when Harold was emotionally upset that I believe Harold was not 100% committed to his primary job as Coal Hauler Operator. I feel Harold needs to put these incidents behind him emotionally and move on with his job and his future at Falkirk. [Ex. C-4]

16. On August 3, 1994, Gilliss had an incident with Holtz in the shift change area at the mine. Gilliss reported to Falkirk's management that Holtz asked him, "Have you talked to your high ranking MSHA official buddy that you are in cahoots with lately?" Gilliss stated in his report that when he asked Holtz what he meant, Holtz referred to Inspector Keller and the conversation between Keller and Gilliss that precipitated Holtz being sent for psychological evaluation. Gilliss also reported that when Holtz began talking about this subject, Holtz got red-faced and angrier and angrier, pointed his finger at Gilliss, and with a very hard and glaring stare, stated "I'll see you in court." Tr. 197-200.

17. Based upon Gilliss' report, management gave a written warning to Holtz on August 11, 1994. The written warning concluded:

Your comments and behavior towards Mr. Gilliss are totally uncalled for and is unacceptable behavior by one employee towards another at the Falkirk Mine, thus, any similar behavior in the future will result in stronger discipline, up to, and including termination.

You have been previously advised of your right to pursue legal action or avail yourself to the appropriate state or federal authorities if a problem exists but when you sue [sic] this as a device to threaten and intimidate other employees; this behavior is unacceptable and subject to disciplinary action. [Ex. C-5]

18. On the evening of February 21, 1995, Holtz happened to come across Gilliss in a bar at the Comfort Inn motel in Bismarck, North Dakota, about fifty miles from the Falkirk Mine. During "happy hour," Gilliss was in the bar with his brother-in-law and several of his family members who were staying at the motel. Holtz was in the bar with his wife and another couple. When Gilliss came into the bar, his party happened to take a table next to Holtz' table. Gilliss later reported to management that Holtz glared at him from Holtz' table and that at one point Holtz stood by Gilliss' table for several minutes and stared at

Gilliss without talking and, finally, when Gilliss acknowledged his presence (by saying, "Hello, Harold") Holtz simply walked away without comment. Gilliss reported to management he felt threatened by this conduct, particularly given the setting in which it took place and not knowing what might happen next.

19. Holtz testified that he simply stood a few moments at Gilliss' table for an opportunity to greet him, and then left. He denied he did so in a threatening or intimidating manner.

20. Several persons testified about the incident in the Comfort Inn in addition to Gilliss and Holtz: Gilliss' brother-in-law David Laber, Holtz' wife, and one of the individuals who was with the Holtz party, Mr. Robertson. Although there were some discrepancies in the accounts given by these witnesses as to exactly where persons were situated at various points during the evening and other like details, these discrepancies were not unusual. Considering the testimony of these witnesses along with the testimony of Gilliss and Holtz, I find that Holtz did pause at the table at which Gilliss was seated and did stare at Gilliss without speaking. Gilliss' report to management stated that Holtz stood near his table for "several minutes." I find that this was an exaggeration and that Holtz stood at the table about 30 seconds.

21. As a result of Gilliss' report to management, management made the decision, after consultation with legal counsel, to place Holtz on six months probation. The written notice of probation was given on February 23, 1995. The notice referred to the prior warning on August 11, 1994, and stated that he was being placed on probation because he had engaged in further objectionable conduct of an intimidating nature. Ex. C-6.

22. Holtz filed a second § 105(c) discrimination complaint against Falkirk, dated March 24, 1995, which is the subject of this proceeding. The complaint was investigated by MSHA, which concluded that there had been no violation of § 105(c).

23. During probation, Holtz continued working but was denied a wage increase and a yearly bonus paid to other employees. The wage increase was given as of the date of his completion of probation and the bonus for the prior year was then paid.

24. At the time of the hearing, May 1996, Holtz was employed at the Falkirk Mine and there had been no further incidents in his employment relationship. Management had installed traffic safety rules and Holtz was performing his job well.

## DISCUSSION WITH FURTHER FINDINGS, CONCLUSIONS

Section 105(c)<sup>1</sup> of the Act protects miners and others from discrimination because of the exercise of rights under the Act, including making safety complaints to the mine operator or to MSHA.

A miner alleging discrimination under § 105(c) establishes a prima facie case of discrimination by proving that he or she engaged in protected activity and the adverse action complained of was motivated in part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-800 (1980), rev'd on other grounds, sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co. 3 FMSHRC 803,817-18 (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. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it is also was motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. Pasula, 2 FMSHRC at 2799-2800; Robinette, 3 FMSHRC at 817-18; see also Eastern Assoc. Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987).

As the Commission and Courts have repeatedly noted, direct evidence of discriminatory motive is rare. Usually discrimination can be proven only by circumstantial evidence upon which the trier of fact draws an inference regarding the employer's motivation. Secretary of Labor on behalf of Chacon v.

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<sup>1</sup>Section 105(c)(1) provides in part:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner...because such miner...has filed or made a complaint under or related to this [Act] including a complaint notifying the operator...of an alleged danger or safety or health violation in a coal or other mine....

Phelps Dodge Corporation, 3 FMSHRC 2508, 2510 (1981).

The most common circumstances upon which such an inference may be based are the employer's knowledge of the protected activity, hostility towards the protected activity (animus), nearness in time between the protected activity and the adverse action, disparate treatment of the complainant and similarly situated employees, and the resort to pretextual grounds for the adverse action against the complainant.

Section 105(c) protects the exercise of rights under the Act, but not misconduct. Abusive or threatening conduct toward a supervisor or management staff in raising a safety complaint may run the risk that the operator will take disciplinary action for conduct that is not protected by § 105(c).

#### Protected Activities

Holtz was engaged in numerous protected activities. He disagreed with the company's account of the 1990 accident and raised complaints about safety rules needed to prevent similar accidents. His voicing of these concerns to mine management and the mine safety manager was protected against retaliation under § 105(c).

His numerous contacts with MSHA concerning its investigation and its preparation for a hearing on citations were protected under § 105(c). His status as a prospective witness at the hearing was protected.

His filing of a § 105(c) complaint of discrimination in 1992 was a protected activity.

Finally, his complaints about the 1992 settlement of the citations and penalties were protected activities to the extent that they raised questions of a violation of the Act or regulations for the proper enforcement and administration of the Act.

#### Disposition of the Issues

Holtz contends that Falkirk's probation decision was based on Gilliss' account of the incident in the Comfort Inn on February 21, 1995, and that Gilliss gave a false and exaggerated account to retaliate against Holtz because of his protected



activities. Holtz contends that Gilliss demonstrated a pattern of hostility toward his protected activities as evidenced by the probation decision and Falkirk's two prior adverse actions of placing Holtz on medical leave for psychological evaluation in 1993 and its written reprimand in 1994. Holtz contends that all three actions were based on Gilliss' accounts of the facts which were false or exaggerated by Gilliss to retaliate against Holtz' protected activities. The company denies any discrimination or hostility because of Holtz' protected activities and asserts that the 1993 and 1994 actions are barred by a 60 day statute of limitations.

The two prior adverse actions are not part of Holtz' present complaint of discrimination, and will not be adjudicated here as liability claims. However, they will be considered under the issue whether management through Gilliss demonstrated a pattern of hostility toward Holtz' protected activities.

1. Medical leave for psychological evacuation

In March 1993, Gilliss reported to management that MSHA Inspector Keller had expressed concerns about Holtz' emotional state and safety as a heavy equipment operator. Based upon Gilliss' account of Keller's remarks, management decided to place Holtz on medical leave for psychological evaluation.

Holtz testified that Keller told him that he did not tell Gilliss that Holtz was a danger to himself or others, or a "time bomb" waiting to go off, as Gilliss had reported to management. Keller testified that he expressed concerns about Holtz' inability to put the accident behind him and the possibility that he was not able to maintain full concentration while operating the large coal hauler. Keller also testified that he mentioned Holtz' flashbacks about the accident and asked Gilliss whether there was something that Falkirk could do in terms of providing Holtz with counseling. I find that the essence of the inspector's safety concerns about Holtz' emotional state was conveyed in Gilliss' report to management, even though Gilliss may have exaggerated or misstated some of Keller's remarks.

The evidence does not indicate that Gilliss' report to management was motivated in any part by Holtz' protected activities. Gilliss did not demonstrate hostility toward Holtz' protected activities. Instead, he recommended that Holtz contact MSHA if he had any further complaints or facts to assist the investigation of the 1990 accident. Gilliss' report about Keller's remarks was in March 1993, which was about six months after the settlement of the citations and almost two years after Holtz first started complaining to the company and to MSHA about

the accident and the investigation. There is no close relationship in time between Holtz' protected activities and Gilliss' report of Keller's remarks.<sup>2</sup> The evidence indicates that Gilliss was motivated to alert management to Keller's safety concerns about Holtz because of the significance of a federal mine inspector expressing concerns about the emotional state and possible safety risk of a heavy equipment operator.

2. Written warning on August 11, 1994

Gilliss wrote a memorandum to his files on August 3, 1994, concerning a confrontation with Holtz in the shift change area. Based upon Gilliss' report to management, management issued a written warning to Holtz on August 11, 1994.

This incident was long after the 1990 accident and 1992 settlement of the citations with MSHA. The evidence indicates that Gilliss' motivation in reporting the August 3 incident to management was his concern about abusive and intimidating behavior by Holtz rather than Holtz' protected activities.

3. Letter of probation on February 23, 1995

The controlling issue in this case is whether Gilliss' account of the Comfort Inn incident, which induced management's probation decision in February 1995, was motivated in any part by Holtz' protected activities.

On February 22, 1995, Gilliss prepared a memorandum of an incident with Holtz at the Comfort Inn bar on February 21, 1995. Ex. C-12. This memorandum was the basis of his report to management, which led to management's decision to place Holtz on probation for six months. Gilliss' report to management is an integral part of management's decision because it provided the facts accepted by management as the basis for its probation action. If Gilliss' report is found to be tainted by discrimination, management's decision would be similarly tainted.

Although Gilliss' memorandum of the incident contains some

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<sup>2</sup>Holtz' statements to Keller during the February 1993 inspection were protected activities. However, the evidence indicates that Gilliss' motivation in reporting Keller's safety concerns about Holtz was to alert the company to a federal inspector's concerns, not to retaliate against Holtz for protected activities.

exaggerations, I find that the essence of Holtz' conduct that disturbed him, i.e., standing at his table and staring at him without talking, was conveyed in his report. The evidence does not preponderate to show a nexus between Gilliss' report to management and any protected activities by Holtz. Instead, the evidence indicates that the motivation of Gilliss and management was to address conduct they perceived as intimidating and a violation of the August 11, 1994, written warning.

In summary, after proving his protected activities, Holtz had the burden to prove that there was some nexus between his protected activities and the challenged adverse action.

The evidence does not show a nexus between any of the three adverse actions (in March 1993, August 1994, and February 1995) and Holtz' protected activities. First, the evidence does not show that Respondent had hostility toward Holtz' protected activities. Gilliss and management on several occasions told Holtz that if he had continuing concerns about the 1990 accident or the investigation he should contact MSHA. The accident occurred in December of 1990 and the settlement of the citations was approved in September 1992. During this time Holtz had a number of contacts with both MSHA and Falkirk management and Gilliss concerning his complaints about the investigation and his perceptions that Falkirk had misrepresented the facts and covered up serious violations and was "in cahoots" with MSHA and its attorneys. Yet during this period Holtz was not disciplined by Falkirk and was given good evaluations for his job performance. Secondly, the evidence indicates that each of the three adverse actions had a close relationship in time with conduct that was not protected by § 105(c). The decision to place Holtz on medical leave for psychological evaluation in March 1993 directly followed the concerns raised by MSHA Inspector Keller about Holtz' emotional state and possible safety risk as a heavy equipment operator. The written warning on August 11, 1994, was triggered by an August 3 incident that the operator perceived as employee misconduct, not an activity protected by § 105(c). Finally, the probation decision on February 23, 1995 was based on conduct on February 21 that the operator perceived as a violation of the August 1994 written warning and not an activity protected by § 105(c).

For the above reasons, I find that the evidence does not establish a violation of § 105(c). Even if the evidence were found to prove that the probation decision was motivated in some part by Holtz' protected activities, I find that the operator affirmatively proved that it considered Holtz' unprotected conduct and would have put him on probation for that conduct alone.

Respondent's Motion to Recover Attorney Fees and Costs

Respondent contends that Holtz' discrimination complaint is without merit and was filed as a tactic to forestall or chill legitimate personnel actions and to re-litigate claims barred by the statute of limitations. It requests a finding that Holtz has abused the discrimination complaint process and moves for recovery of attorney fees and costs under the Commission's Rules of Practice, 29 C.F.R. § 2700.1, and Fed. R. Civ. P.11.

I find that the complaint rests upon substantive contentions, and was not frivolously brought. Holtz had good faith, substantial concerns about what he perceived to be management's failure to acknowledge its own role in contributing to the fatal accident, its delays in adopting and following traffic safety rules, and its participation in a "white-washing" settlement of MSHA's charges and civil penalties. Holtz also felt frustrated by management's failure to spend time with him after the accident to get his input on the facts and safety issues he perceived about the accident and concerns he felt about the loss of a co-worker's life. He felt isolated by management after a traumatic accident that he believed could have been prevented through the observance of proper traffic safety rules. On good faith grounds, although not meeting his burden of proof, Holtz believed Gilliss and management retaliated against him because of his protected activities. Factual issues as to the two prior adverse actions were relevant in considering whether Gilliss, a key management agent, demonstrated a pattern of hostility toward Holtz' protected activities. In sum, I find that Holtz has not abused the discrimination complaint process.

CONCLUSIONS OF LAW

1. Respondent's Falkirk Mine is subject to the Act.
2. Complainant, Harold Holtz, has failed to prove a violation of § 105(c) of the Act.
3. In bringing this action, Complainant has not abused the discrimination complaint process.

ORDER

WHEREFORE IT IS ORDERED that:

1. The complaint is DISMISSED.
2. Respondent's motion to recover attorney fees and costs is DENIED.

William Fauver  
Administrative Law Judge

Distribution:

Steven L. Latham, Esq., P.O. Box 2056, Bismarck, ND 58502-2056  
(Certified Mail)

Charles S. Miller, Jr., Esq., Fleck, Mather & Strutz, P.O.  
Box 2798, Bismarck, ND 58502 (Certified Mail)

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