

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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September 28, 2000

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| SECRETARY OF LABOR, | : | DISCRIMINATION PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. CENT 2000-75-DM |
| ON BEHALF OF JOHN NOAKES, | : | MSHA Case No. MD 99-03 |
| Complainant | : | |
| | : | |
| v. | : | |
| | : | Mine ID No. 23-02064 |
| GABEL STONE COMPANY, INC., | : | Gable Quarry |
| Respondent | : | |

DECISION

Appearances: Jennifer A. Casey, Esq., and Kristi Floyd, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Complainant;
Donald W. Jones, Esq., and Jason N. Shaffer, Esq., Hulston, Jones, Gammon & Marsh, Springfield, Missouri, for Respondent.

Before: Judge Hodgdon

This case is before me on a Complaint of Discrimination brought by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), on behalf of John Noakes, against Gabel Stone Company, Inc.,¹ pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). A hearing was held in Springfield, Missouri. For the reasons set forth below, I find that the Complainant was discharged by Gabel Stone because he engaged in activities protected under the Act.

Background

Gabel Stone Company, Inc., operates the Gabel Quarry in Howell County, Missouri. The company is owned by Gary and Joyce Gabel and is a small mining operation involving the mining, crushing, sizing and stockpiling of stone for commercial sale. Stone is obtained by blasting it from the quarry wall. It is then carried by front-end loader to the crusher, where it is reduced into smaller rocks. From there it is carried by conveyor belt to a scalper, roll crusher and

¹ The complaint was originally filed against Gary Gabel d/b/a Gable Stone Company because that was what the legal identity card on file with MSHA indicated. After the Respondent pointed out that the company was incorporated, the Secretary's motion to amend the caption was granted at the hearing. (Tr. 13-14.)

screen to be further sized and separated. The company employs five to six employees including the Gabels. The normal workweek is 45 hours.

John Noakes was hired by Gary Gabel as a loader operator on March 10, 1998. As loader operator, he moved stone from the areas where it was deposited by the conveyor belts to the area where it was stockpiled by size, loaded customer trucks and shoveled rock from underneath the conveyor belts, as needed. He also performed other duties, such as maintenance and welding, as required.

On November 10, 1998, Noakes filed a 103(g), 30 U.S.C. § 813(g), confidential hazard, complaint with the local MSHA office.² As a result of the complaint, MSHA Inspectors Allan Studenski and Stanley Sturgill arrived at the mine on November 17 to conduct an inspection. After a two day inspection, eight citations were issued, some of which related to allegations Noakes made in his complaint.

On November 30, 1998, Noakes was reassigned to the maintenance shop to perform welding and maintenance tasks. On December 3, 1998, Noakes was advised that there was no work available for him at the quarry, but that he should continue to call in to check on the availability of assignments. He never worked at the quarry again.

Noakes filed a discrimination complaint with MSHA on December 14, 1998. In it he alleged that he was “harassed, removed from my usual work-place and my hours were cut down and finally cut off” because he had filed a 103(g) complaint.³

Evidentiary Ruling

After the hearing, counsel for the Respondent filed a Motion to Supplement Record with a copy of the conviction of Michael Shoeman, a witness for the Complainant, for Failure to Pay Controlled Substance Tax, a felony in the state of Wisconsin, as Respondent’s Exhibit 76. This conviction was in connection with a misdemeanor conviction for possession of marijuana. The Secretary’s objection to the admission of the marijuana conviction was sustained at trial. (Tr. 371.) Not surprisingly, the Secretary also objects to the admission of this conviction pointing out, among other things, that the Wisconsin statute giving rise to the conviction was declared unconstitutional by the Supreme Court of Wisconsin in 1997. *State v. Hall*, 207 Wis. 2d 54 (1997).

² Section 103(g) provides, in pertinent part, that: “Whenever . . . a miner . . . has reasonable grounds to believe that a violation of this Act or a mandatory health or safety standard exists, or an imminent danger exists, such miner . . . shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger.”

³ The body of the complaint is set out in its totality as an Appendix to this decision.

While the proffer of this evidence raises a lot of interesting issues for discussion in a law review article, resolution of those issues is not necessary to the disposition of this case. Without considering the convictions to which I sustained objections at the hearing, or the one proffered now, I did not find Shoeman to be a credible witness and I did not consider his testimony at all in arriving at a decision in this case. Accordingly, the Secretary's objection to the admission of Respondent's Exhibit 76 is sustained.

Motion to Dismiss

The Respondent argues that the case should be dismissed because "the complaint was not furnished to the Respondent [as required by the Act], since Respondent only received Respondent's Exhibit 24 without factual allegations." (Resp. Br. at 74.) The company alleges that the Secretary violated the requirement in section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2), which states that: "Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the Respondent and shall cause such investigation to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint"

The company asserts that since it was only shown the first paragraph of the complaint, and not the 12 paragraphs of factual details following that paragraph, when the investigator came to investigate the complaint, it did not have sufficient information on which to defend itself. It also complains that the investigation was not begun within 15 days of receipt of the complaint. Neither of these claims has merit.

The Respondent cites no law to support the motion. With regard to the sufficiency of the information contained in the complaint, as shown to the Respondent during the investigation, there do not appear to be any cases on the issue. Nonetheless, since the paragraph furnished to the Respondent included the Complainant's name, the protected activity that he claimed to have engaged in and a description of the adverse action he claimed resulted from the activity, I find that the company was provided with adequate information to participate in the investigation. Therefore, it was furnished with a copy of the complaint.

Turning to the timeliness issue, even accepting the Respondent's calculations, the investigation was commenced on the 22nd day after receipt of the complaint by MSHA. And that assumes that an investigation is not *commenced* until the investigator goes to the mine. It is well settled that the time limits set out in section 105(c) are not jurisdictional and that a discrimination complaint is only subject to dismissal "if the operator demonstrates material legal prejudice attributable to the delay." *Secretary on behalf of Hale v. 4-A Coal Co., Inc.*, 6 FMSHRC 905, 908 (June 1996). Here, the delay was at most seven days; not a serious delay. Furthermore, between MSHA's receipt of the complaint and the investigator's arrival at the mine, the Christmas and New Year's holidays intervened. Finally, the Respondent has not alleged any prejudice at all resulting from the delay.

Accordingly, the request that the case be dismissed on procedural grounds is **DENIED**.

Findings of Fact and Conclusions of Law

Section 105(c)(1) of the Act provides that a miner cannot be discharged, discriminated against or interfered with in the exercise of his statutory rights because: (1) 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;” (2) he “is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101;” (3) he “has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding;” or, (4) he has exercised “on behalf of himself or others . . . any statutory right afforded by this Act.”

In order to establish a *prima facie* case of discrimination under Section 105(c) of the Act, a complaining miner bears the burden of establishing (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. *Secretary on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (October 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981); *Secretary on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842 (August 1984); *Secretary on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508 (November 1981), *rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983).

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 the 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 was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Id.* at 2800; *Robinette*, 3 FMSHRC at 817-18; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987); *Donovan v. Stafford Const. Co.*, 732 F.2d 954, 958-59 (D.C. Cir. 1984); *Boich v. FMSHRC*, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's *Pasula-Robinette* test).

There is no dispute that by filing a 103(g) compliant, Noakes engaged in protected activity or that he was discharged by Gabel Stone shortly thereafter. The issue is, then, whether Noakes' discharge was the result of his engaging in protected activity or whether he was terminated for a reason unconnected to the complaint, or, if it was associated with the complaint, whether he would have been fired for the non-protected activity alone. I find that the Complainant was discharged because of the complaint he filed, and that he is, therefore, entitled to relief under the Act.

Most of the pertinent facts are undisputed. On November 10, 1998, without discussing the matter with his boss, Noakes filed a 103(g) complaint with MSHA. He listed the following

hazards as needing to be addressed: (1) Lack of safety or first-aid meetings; (2) “Poorly guarded head and tail pulleys;” (3) “Working boulders in a running Jaw Crusher at least once a day, usually more often than that;” (4) “Exposed radiator fan and head pulley drive belts on roll crusher plant;” (5) “No ladder or hand rails on roll plant to get to where we start motor or engage clutch;” (6) “No ladder on little screening plant and exposed belts on screen drive motor and we do climb up there when running occasionally;” (7) “Only one fire extinguisher and it is on the fuel tank, none in the loaders;” and (8) “Loose boulders on down ramp into the quarry ready to fall at any time on wall side of ramp.” (Comp. Ex. 4 at 3.)

As a consequence, on November 17, 1998, MSHA Inspectors Allan Studenski and Stanley Sturgill went to the mine to conduct an inspection based on the complaint. They presented Gary Gabel with a sanitized copy of the complaint which contained only a listing of the eight allegations set out above. (Comp. Ex. 5.) After Gabel read the summarized complaint, he was “really aggravated” and knew who had made the complaint. (Tr. 659.) He asked the inspectors for the name of the complainant and said that he was going to get rid of him.

Gabel then shut down operations at the mine and had all of the miners come up to the shop. He then went with the inspectors to inspect the mine. As they walked past the employees, Gable “handed [the complaint] to Johnny [Noakes] and I said, here, this might be yours” (Tr. 663.) Gabel and the two inspectors went down into the mine and began the inspection. During the inspection, Gabel said to the inspectors:

I want to know the name of the man that done [*sic*] this, and [Studenski] said, well, I can’t do that, and I said, well, I think that I’m entitled by law — and I didn’t really know anything about the law, but I said, I’m entitled — I should be entitled by law to have the man’s name, and he said, what are you going to do, and I said, I’m going to fire him, and he just, no, no, don’t do that, Gary, don’t do that, so by then we had gone back up to the office then and I asked him again for the name

. . . .

And he said, you have miners’ rights and he has the right to do this, and before you do anything drastic, you call Charles Sisk, and he went to his car and got the number. He brought this little yellow book in with miners’ rights, and he said, read this; don’t do that; do not fire anybody

(Tr. 664.)

Gabel called Charles Sisk, the supervisor of the MSHA District Office in Dallas, Texas, and Sisk advised him that if he fired Noakes for making a safety complaint, that under the Mine

Act Noakes could file a discrimination complaint against him. When the inspectors returned on November 18, Gabel told them that he had talked to Sisk and read the Miners' Rights handbook and knew that he could not terminate Noakes for filing the complaint. However, according to Inspector Sturgill, he also said, "that the guy was going to lose his job. He might have to wait awhile, a week or two, but, you know, that he was going to get rid of him." (Tr. 261.)

The week after the inspection was Thanksgiving week. On the Wednesday before Thanksgiving, Gabel told all his employees, except Noakes, that working on the Friday after Thanksgiving was optional. He did not give that option to Noakes, but instead told him:

that he ought to take the weekend, talk to his family, discuss it. I said, it's obvious you're not happy here; you need to discuss it with your family and decide what you want to do; if you want to stay here, we're going to have to make some changes. If you don't want to be here, I'll understand that you need to pursue something else

(Tr. 683.) When Noakes returned for work the following Monday, November 30, he and Gabel had a discussion in the shop. At the end of the discussion, Gabel told Noakes: "I'm going to give you some work up here in the shop, but I think it would be a good idea if you could look for another job" (Tr. 698.)

Noakes worked in the shop through Thursday afternoon, December 3. He left at 2:30 p.m. Gabel told him that since it looked like rain on Friday, he should call in to see if they were going to work. It did rain Friday and no work was done. On Sunday, December 6, when Noakes called him, Gabel told him: "I've made up my mind, just go ahead and bring in your uniforms in the morning and Joyce will have your check, and I said, give her an hour or so in the morning, you know, to get there and do the payroll, and I said, we need to just be done with it." (Tr. 703.)

Sometime later in December, or early January, Gable had a safety and health conference with Charles Sisk concerning the citations issued during the inspection that resulted from Noakes' complaint. During the conference they also discussed Noakes. Gabel informed Sisk that Noakes had quit his job. (Tr. 280, 745-46.)

The Respondent argues that Noakes' discharge was in no part motivated by his protected activity but rather by the manner that he performed his job in the shop and further, that if Noakes' protected activity did enter into the motivation for firing him, the Respondent had reasons to terminate him which were not protected and which occurred prior to, and after, the protected activity and would have resulted in his discharge as soon as a state highway department contract had been completed, whether the protected activity occurred or not. (Resp. Br. at 74, 77.)

Clearly, the reason for Noakes' termination rests with Gabel's intent or motivation at the time Noakes was fired. However, it is very hard to discern what a person is thinking. Since the very first discrimination cases it considered, the Commission has recognized this problem and has set out guidelines for determining motivation. Thus, it recently stated:

We have acknowledged the difficulty in establishing a motivational nexus between protected activity and the adverse action that is the subject of the complaint. "Direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect 'Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence.'" *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983) (quoting *NLRB v. Melrose Processing Co.*, 351 F.2d 693, 698 (8th Cir. 1965)). In *Chacon*, we listed some of the circumstantial indicia of discriminatory intent, including (1) knowledge of the protected activity; (2) hostility or animus towards the protected activity; and (3) coincidence in time between the protected activity and the adverse action. *Id.* We also have 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." *Id.*

Secretary on behalf of Baier v. Durango Gravel, 21 FMSHRC 953, 957 (September 1999).

The Complainant has clearly established a *prima facie* case of discrimination. That he engaged in protected activity is undisputed. That he was discharged is undisputed. Nor is it disputed that Gary Gabel had knowledge of the protected activity, he admitted that he knew Noakes had made the complaint, that Gary Gabel expressed hostility toward the protected activity, he admitted that he said to the inspectors that he would fire the person who made the complaint, or that there was a coincidence in time, less than three weeks, between the Gabel's learning of the complaint, November 17, and Noakes' discharge, December 7. The Respondent has failed to rebut the case by showing that Noakes was terminated solely for his unprotected activity and it has also failed to affirmatively establish that even though the protected activity provided some motivation for discharging Noakes, it would have discharged him anyway for his unprotected activity.

The company presented evidence, mainly through the testimony of Gary and Joyce Gabel, but also somewhat corroborated by Gabel Stone employees, Tommy Havens and David Cancel, that Noakes was on medical leave during the month of September 1998 and that when he returned on October 5, his attitude had changed and he became a poor employee. Some of the examples of his poor attitude given were his refusal to work on Saturdays, his failing to properly

weld a plate on the back of a bin to keep material from leaking out, his failure to check the battery terminals on his loader before complaining that it would not start, his leaving work early to babysit while his wife went to a medical appointment, his failure to properly build guards on the equipment associated with the new scalper, occasional lateness for work, his failure to complete assigned jobs and his generally acting sullen.

The Respondent asserted that it had determined to terminate Noakes prior to the November 17 inspection but had not done so because of a contract for chip rock awarded it by the state highway department. The contract was awarded sometime prior to November 4 and was canceled "the end of November, first of December." (Tr. 573.) The operator claimed that he wanted to fulfill the contract before letting Noakes go.

On its face, this argument is somewhat compelling. The problem is, however, that the facts suggest that this reason for Noakes' discharge was arrived at after the fact, when the company learned that Noakes had filed a discrimination complaint. By Gabel's own admission, other than asking Noakes if anything was wrong a few times and getting a negative response, he never counseled Noakes concerning his bad attitude or his poor work performance. He never took any disciplinary action for Noakes' alleged failures. He never had it indicated on the time cards that Noakes had been late for work. Furthermore some of these alleged failures turned out not to be failures at all. For instance, Noakes advised Gabel *prior* to the Saturdays he did not work of the reasons he would not be working and was excused.

Additionally, in early November the company shut down to put guards on the conveyors servicing the new scalper. Gabel assigned Noakes to perform this task because he considered him the best man he had for building guards. He had him perform this task essentially unsupervised. Between the time the guards were built and the inspection, Gabel apparently never inspected them or informed Noakes that they needed work. This assignment and trust are certainly inconsistent with the portrayal of Noakes as a poor performer.

Further, Noakes only worked in the shop for four days. By his own admission, he failed to complete one of the tasks assigned him. However, once again Gabel never so much as advised Noakes that he had not finished a job, let alone counseled or disciplined him for the failure. Even when he terminated Noakes, he did not tell him that it was because of his poor performance.

In addition to these reasons, there are several other factors which indicate that the company's professed reason for discharging Noakes is pretextual. The first is Gabel's anger and undisputed statement that he would fire the person who made the safety complaint. The second is his statement to the inspectors, even after he had been advised by both them and their supervisor that he could not fire someone who had made a safety complaint, that he would wait a

few weeks and then get rid of Noakes.⁴ A third is that Gabel encouraged Noakes to quit several times between the inspection and Noakes termination in an apparent attempt to avoid the consequences of firing him. A fourth factor is that Gabel did not assert at the hearing that the reason he fired Noakes was because the state contract had been canceled so he could finally take the action he had planned to all along.⁵ Finally, the fifth, and most significant, reason, is Gabel's statement to Sisk during the conference on the citations that Noakes had quit. This undoubtedly indicates guilty knowledge on Gabel's part that he should not have discharged Noakes for filing the safety complaint and was obviously an attempt to withhold that information from the man who had told him not to.

In conclusion, the Complainant has made out a very strong case that he was discriminated against, and the Respondent has failed both to rebut it or affirmatively defend against it. Consequently, I conclude that Noakes was discharged on or after December 3, 1998, in violation of section 105(c) of the Act and is, therefore, entitled to the remedies prescribed by that section.

Order

Having determined that Noakes was discharged unlawfully, it follows that he is entitled to the relief sought in his complaint. He is not seeking reinstatement, but he is entitled to back pay, reimbursement of any other reasonable and related economic losses or expenses incurred as a result of his discharge and to the expungement from his personnel file and company records of his discharge and all references to the circumstances involved in it. He may also be entitled to other damages. In addition, the company is liable for a civil penalty.

Accordingly, the parties are **ORDERED** to confer within **21 days** of the date of this decision for the purpose of arriving at an agreement on the specific actions and monetary amounts that the Respondent will undertake to carry out as remedies necessary to restore Noakes to the situation he would have occupied but for the discrimination, as well as the amount of civil penalty the Respondent will pay.⁶ If an agreement is reached, it shall be submitted within **30 days** of the date of this decision.

⁴ Gabel denied having made this statement. However, there is no reason not to believe Inspector Sturgill. He has no stake in the case, he did not investigate the complaint and he does not even work in that area of the country anymore. No evidence was presented that Sturgill was unworthy of belief. Indeed, when discussing credibility issues in its brief, the company does not even address this statement.

⁵ It is not clear from the evidence whether the contract had even been canceled at the time Noakes was discharged.

⁶ Such an agreement will not preclude either party from appealing this decision.

If an agreement cannot be reached, the parties are **FURTHER ORDERED** to submit their respective positions concerning those issues on which they cannot agree, with supporting arguments, case citations and references to the record, within **30 days** of the date of this decision. For those areas involving monetary damages on which the parties disagree, they shall submit specific proposed dollar amounts for each category of relief.⁷ With regard to disagreement concerning a civil penalty, the parties should propose an appropriate civil penalty based on the civil penalty criteria set out in Section 110(i) of the Act, 30 U.S.C. § 820(i), with a discussion of how the criteria apply in this case. *Secretary on behalf of Johnson v. Jim Walters Resources, Inc.*, 18 FMSHRC 552, 556-60 (April 1996). If a further hearing is required on the remedial aspects of this case, the parties should initiate a telephone conference call to set forth their reasons for such a request and to discuss setting a hearing date.

The judge retains jurisdiction in this matter until the specific remedies Mr. Noakes is entitled to are resolved and finalized. Consequently, **this decision will not become final** until an order granting specific relief, awarding monetary damages and assessing a civil penalty has been entered.

T. Todd Hodgdon
Administrative Law Judge

⁷ The proper method of calculating interest on back pay is: *Amount of interest=The quarter's net back pay x number of accrued days of interest (from the last day of that quarter to the date of payment) x the short-term federal underpayment rate. Secretary on behalf of Bailey v. Arkansas-Carbona Co.*, 5 FMSHRC 2042, 2052 (December 1983), as modified by *Clinchfield Coal Co.*, 10 FMSHRC 1493, 1505-06 (November 1988). The applicable interest rates and daily interest factors may be obtained on the Internet at: www.nlr.gov/ommemo/ommemo.html.

Discrimination Complaint of (name(s))
John Noakes

Case Number

Summary of Discriminatory Action

I John Noakes am filing this discrimination complaint in pursuance to title 30 section 105(c) of the Federal Mine Safety And Health Act of 1977. In this complaint I will document the events which I believe were brought upon me as A result of my filing a complaint under title 30 section 103(g) of the Act. I sent the complaint to Mr. Feeney, the supervisor of the Rolla office. I described what I thought to be safety violations that needed immediate attention. As a result I was harassed, removed from my usual work-place and my hours were cut down and finally cut off. Gary Gabel has not yet told me if I was laid off, fired or suspended. The following is a chronological record of events which occurred after M.S. H.A. inspectors arrived at Gabel Stone Company on Nov. 17th, 1998.

Nov 17, 1998.

On Nov 17 my co-workers and myself were crushing rock when our drill operator Came down and told us to shut down and go to the shop. We waited at the shop for quite some time not knowing what was going on. Finally Gary Gabel (Owner/Operator) came out of his office, he looked very upset. He walked by all of us as he was headed to the hole and handed me the complaint form and said "is this yours." I did not reply. My co-workers and I stayed at the shop discussing the matter while Gary Gabel went with the inspectors down into the hole to inspect. While we were eating lunch the inspectors drove by and said they would be back tomorrow to watch us work for awhile. A few minutes later Gary Gabel came from his office and told us there was nothing wrong in the quarry. He also said that none of the allegations were true. And that we could run, and if someone did not feel safe at this time they could leave now.

Nov 19,1998.

On Nov 19 we started up as usual. As we were letting the engines warm up, Gary Gabel called all of us over to talk to us. He explained that he had nothing to hide and that we were to run like we normally do with the exception of me. He explained that I was to only load trucks and stockpile. He said that I was not to be on or around the other equipment. My job was to start the generator and bring it up to running voltage, start the screening plants and most of the time the roll crusher. Later that day A coworker mentioned that I should be careful that Gary Gabel was going to fire me for any reason.

Nov 20,1998.

On Nov 20th at lunch period Gary Gabel came out of his office and explained to us that we would quit at two-thirty and since that we had quit at two-thirty on Thursday that would be forty hours. He then explained that we would no longer work forty-five hour weeks, because this inspection cost him quite a bit. He said we would no longer get to work overtime.

Signature(s) of Complainant(s)
Date

Nov 23, 1998.

On Nov 23d I was in the hole working on guards to cover some tail pulleys. Later that morning Gary Gabel came down to see how far along I was. He asked how I was getting along, then walked around like he was doing some serious thinking. He then started to describe to me how costly this inspection was and how it really kept the truck drivers from wanting to come to his quarry. He then gave me an example that included A good customer Steve Abby and how he was afraid to come back until the inspectors left. Later a co-worker said that Gary Gabel was telling the truck drivers that they did not have to come back that day if they did not want to. Later that day Gary Gabel again explained to everyone how costly this inspection was and how much business was scared off.

Nov 25, 1998.

On Nov 25th I found out what I believe to be the reason for the events on Nov 23rd. I discovered that Gary Gabel had said that he was going to sue me for malicious intent to do harm to his business. I also heard that Gary Gabel said he was going to approach me and offer me a chance to pay him five thousand dollars to let this go and if I didn't he was going to take everything I had and he wanted to see my family go hungry. I also heard that Gary Gabel called the Texas M.S.H.A. office and that he knew that it was me by what was said in the complaint. Toward the end of this day Gary Gabel called everybody together to talk to us. He explained that was absolutely sure that this was a deliberate attempt to hurt his business. He said he knew this because nothing was discussed with him before or after the inspection. He also said that he had left us to guard the devices in any way we thought necessary. This is not true he gave specific instructions on how he wanted these devices guarded and that we were NOT to even start guarding the surge bin head-pulley unless we had time to finish it. He continued to say that there was too much tension and that this business could not operate like this because everyone has had to watch their backs. He then made it clear that today would be the end of it. He then told Everyone who he had talked to earlier to come in Friday to work. I found later that this was everyone but me.

Gary Gabel then told me that he wanted to speak to me alone. We walked over to my loader to close up the doors. As we approached the loader Gary Gabel said that he wanted me to take the next two days, go home and discuss with my wife about what we really wanted to do about this. He said that he didn't like the tension and that he knew that I didn't like the tension. He repeated that I should really go home and talk things over with my wife. He then said that I could come in Monday morning and that Joyce Gabel would be there around 9:00 and that she could have my check ready and that I could drop my uniforms off. He said that if I wanted to work somewhere else that would be fine with him. And that if I wanted to stay there that things would have to change.

Nov 30, 1998

On Nov. 30th I arrived at the quarry, waited by the shop for a few minutes then went to the hole to fuel my loader. Gary Gabel drove down into the hole and talked to some co-workers, then drove out never saying a word to me. I decided to go to the shop and see what he had planned for the day. I asked what he wanted me to do today, he said he wanted me to talk to him. We went into the shop and sat down. Gary Gabel started the conversation by asking me what I was doing here today. I asked why wouldn't I be here? He said he really didn't expect me to show up today. He then said don't you feel the tension? I replied yes, but I came in with this complaint anonymously. You instantly assumed it was me and stirred things up. We then debated whether or not this was over safety matters or not. I explained that it was not just the safety violations but the safety attitude. I reminded him about him saying that he was going to take the guards off and that only a dumbass would get caught in a tail-pulley. I then said so you think I'm a dumbass because I was injured? He said yes John you are, you are a dumbass. He then explained that he'd been in the business so many years and never been injured. He asked me if I didn't feel safe in the hole? I explained that when I was running from plant to plant, crawling into a moving jaw, and shoveling under tail-pulleys that no I didn't feel safe. He then tried to convince me that I had been doing a poor job since Oct 12th. I asked him to explain why. He brought up the how I messed up the screening plant putting screens in wrong. This is not true, you can look at these screens how and there still wrong even after two other guys worked half a day on it, the screen deck has dropped to low, not my fault. He tried with a couple of more examples but they were not true. He then said so were stuck with each other. I Said yes. He then told me not to go in the hole that he'd find me something to do up here in the shop.

Dec 01, 1998

On Dec 1st Gary Gabel told me to take off at 4:00 I was not finished with the loader bucket yet and to my knowledge everyone else worked until 5:00. Before leaving I asked Gary Gabel if he knew where my uniforms were, I had forgot to get them Monday. He replied that he had them and was going to keep them because this was probably my last week, that this was not going to work. I asked him what would happen on Friday, he said that he didn't know. He said he was going to give me some time to find another job. He said that if I didn't come with something that he might be able to find something for next week.

Dec 3, 1998

On Dec 3rd I worked on a dozer. When done I went to the office and asked Joyce Gabel if she would call down to tell Gary Gabel that I was done with the dozer and ask what he would like for me to do next? He called back saying that he did not have anything else for me to do and to just go ahead and go home. He also said he didn't know what tomorrow was gonna be like with the rain, for me to call in around 8:00 am and see what was going on. I left at 2:30 pm.

Dec 4, 1998

On Dec 4th I called Gary Gabel at the quarry to ask if he had anything for me to do. He replied that he didn't and that he didn't foresee anything next week, but to call him Monday or even Sunday evening and see if things had changed.

Dec 6, 1998

On Dec 6th I called Gary Gabel at his house to see what was planned for Monday. He said that there was nothing for me to do but I could get my check and bring the rest of my uniforms in.

Dec 7, 1998

On Dec 7th I went to the quarry around 11:30 to pick up my check and return the one uniform I had found. While Joyce Gabel was finding out how much my missing uniforms would cost Gary Gabel asked me into his office. He asked if I had found another job, told me he had seen some ads for work in the paper we then just talked normally for awhile. I eventually asked him what the deal was, if he was just cutting me off from work or firing me or what? He then said that he had nothing for me to do because I said that I didn't feel safe in the hole doing my job. I told him that I didn't say that, I was referring to before the safety matters were addressed, and since he limited me to the loader only I was fine with that. He repeated that he could no longer have me working in the quarry because I didn't feel safe. Gary Gabel then said that he remembered my saying that my friends turned their back on me at twin bridges sand and gravel, and now there were three men outside that didn't want anything to do with me and that two of them wanted to "beat your ass". He continued with asking if I had ever thought that the problem was me. I thought for a second then replied yeah it could be me, because I don't go for that sociological bullshit attitude of oh well that's just how it is, or just suck it up and drive on. Or maybe because I don't crawl\ into the back of someone's pocket just because they have money. I then said if your done with me I take my check and leave. He then said what Im about to say is for your benefit, I hope that after this that things are done between me and you. I replied no, I don't think so. He seemed to get upset and stood up. He then asked me when I thought I was going to get my settlement from my hand, I replied that it would be six months before I go back to the doctor, why? He said he was just curious, he then asked how much I thought I was gonna get, I replied not very much, but you'll not get it. I then asked for a receipt for my uniforms and left. I called back Tuesday the 8th and Wednesday the 9th he told me that he did not see anything for me for the rest of the week.

I am seeking backpay from the time I was discriminated against to until I find an equal paying job.

Distribution: (Certified Mail)

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