

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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June 4, 2004

MICHAEL MILLER,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. CENT 2003-307-D
v.	:	DENV CD 2003-9
	:	
TXU MINING CO., LP,	:	Mine ID 41-02632
Respondent	:	Beckville Strip

DECISION

Appearances: Alan J. Marcuis, Esq., Hunton & Williams, LLP, Dallas, Texas, for Respondent
Michael E. Miller, Beckville, Texas, Complainant

Before: Judge Barbour

This case is before me on a complaint of discrimination filed by Michael Miller pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 ("the Act"), 30 U.S.C. § 815(c) (3).¹ Miller alleges that TXU Mining Co., LP., ("TXU") discriminated against him by terminating him for disciplinary reasons on December 5, 2002, as a result of his complaints about safety. A hearing was held in Carthage, Texas. For the reasons set forth below, I find that the Respondent did not discriminate against Miller, and dismiss the complaint.

FINDINGS OF FACT

Miller was employed as a mechanic by TXU at its Tatum Mine, a coal mine located in Tatum, Texas. He had worked for TXU for several years, and during that time had allegedly been harassed by management. Specifically, in 1997, while working at TXU's Beckville Mine, Miller was allegedly harassed by Don Johnson, a supervisor, and Dennis Watkins, a Human Resources representative. After this incident, Miller was transferred to the Tatum Mine. He attempted to file a complaint reporting the incident, but TXU refused to accept this complaint. Miller then began to compile a report to file with MSHA on the harassment issue believing the Agency had

¹ Pursuant to section 105(c)(2) of the Act, a miner may submit a complaint of discrimination to the Secretary of Labor, who must conduct an investigation and file a complaint with the Commission if she determines that the Act has been violated. Section 105(c)(3) provides that, if the Secretary determines that the Act has not been violated, the miner may file an action before the Commission on his own behalf. 30 U.S.C. § 815(c)(2) and (3).

jurisdiction. He was fired before he lodged the report. Tr. 18.

On November 6, 2002, Miller made a presentation on the alleged mistreatment that occurred at the Beckville Mine during a Career Development Meeting. Tr. 33. During this presentation he discussed the impact harassment by managers had on employees. Tr. 35. He spoke specifically about his experience at the Beckville Mine, and gave his suggestions on how to handle these situations. Tr. 35. Miller also named three supervisors, all of whom were present, he believed had a problem with harassing employees. The supervisors were Jerry Poland, Gibson, and Cooper.

On December 4, 2002, a monthly safety meeting was held at the Tatum mine. Tr. 59. During this meeting, Miller and the members of his crew were shown a safety video, which included scenes of violence in the workplace. Once the video ended, the foreman invited comments. At this time Miller stood to address those present. Miller believed that TXU mishandled employees with anger management problems and had not taken the proper actions in situations where employees had been harassed. It was Miller's opinion that both of these issues would lead to workplace violence, and thus cause an unsafe working condition. Specifically, Miller used his own situation as an example. He described how he believed managers had mistreated and belittled him. In discussing what he believed was a potential safety issue, Miller used abusive language and profanities to describe the two managers about which he had complained and directed other profanities at fellow employees.² That afternoon, Miller met with his direct supervisor Stanley Berry to discuss what he said during the safety meeting. Berry stated he would have to notify his direct supervisor Jerry Poland because Miller had used inappropriate language. Tr. 179. Upon finishing his shift, Miller met with Berry and Poland. At this time, Poland informed Miller that there would be an investigation of the incident, which could possibly lead to disciplinary action.

On December 5, 2002, Berry and Poland questioned members of Miller's crew who were present at the meeting the previous day. Tr. 184-85. The employees confirmed that Miller had used abusive language and profanities directed towards management and co-workers. Tr. 185. Also, they voiced their concerns about working with Miller. Some were unsure how to act around Miller, and believed he needed professional help. The group were most worried about what would set-off his next outburst. Next, Berry and Poland met with other members of management to discuss the issue further. The company discipline policy provided for a four-step process: an oral warning, a written warning, a final warning and termination. Tr. 188. However, under certain circumstances, if the violation is severe enough, the company can by-pass steps and terminate employment immediately. The group decided to terminate Miller because he violated both the

² Miller referred to Johnson and Watkins as "stupid son of a b****"; "g** d** stupid b*****"; sorry mother f***." Tr. 172.

Company's code of conduct and employee handbook, and had a prior history of similar acts.³ Tr. 185.

On May 13, 2003, Miller filed a complaint of discrimination with the Secretary's Mine Safety and Health Administration ("MSHA"), alleging that he had been discriminated against when he was terminated on December 5, 2002. He stated in his complaint that his termination was in retaliation for trying to complain about a safety concern. Miller believed that TXU mishandled employees with anger management problems and situations where employees had been harassed. It was his opinion that both of these issues could lead to workplace violence causing an unsafe working condition. MSHA concluded, on behalf of the Secretary, that no discrimination had occurred, and declined to file a complaint on Miller's behalf. On August 13, 2003, Miller then filed the instant complaint with the Commission.⁴

THE LAW

A complainant alleging discrimination under the Act typically establishes a *prima facie* case by presenting evidence sufficient to support a conclusion that he engaged in protected activity and suffered adverse action motivated in any part by that activity. *See Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d 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 way 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 was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Id.* at 817-18; *Pasula*, 2 FMSHRC at 2799-800; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642-43 (4th Cir. 1987) (applying *Pasula-Robinette* test).

While the operator must bear the burden of persuasion on its affirmative defense, the ultimate burden of persuasion remains with the complainant. *Pasula*, 2 FMSHRC at 2800; *Schulte v. Lizza*, 6 FMSHRC 8, 16 (Jan. 1984).

³ In 1994, Miller was placed in step one of the disciplinary process. In 1997, he was placed in step two. Both incidents involved threats, abusive language, and disrupting meetings. Tr. 189.

⁴ The Act mandates that such claims must be filed within 60 days of termination. Miller's complaint was filed well after the lapse of this deadline. In view of the fact that he was representing himself and the lack of demonstrative prejudice to the Respondent, I was reluctant to strictly apply the time-limit and allowed the complaint to be heard. Tr. 12.

PRIMA FACIE CASE

There is no dispute that Miller suffered an adverse action. Therefore, the principle issue is whether the activity resulting in the action was protected. For the reasons that follow, I find that it was not.

Section 105(c)(1) of the Act prohibits discrimination against any miner who complains to an operator or its agent about "an alleged danger or safety or health violation." 30 U.S.C. § 815(c)(1). Miller testified that he was terminated for reporting a safety violation. Tr. 15. He believed that when an employee is harassed by management or co-workers, hostility is created leading to a potentially violent situation. This possible violence is the unsafe working condition about which Miller was concerned. Miller was speaking from his own experience which, in his view, exemplified "how not to handle an employee." Tr. 39. Miller attempted to notify management of this potential problem during his November 6, 2002, presentation. He was also in the process of compiling a report to document the harassment he allegedly was subject to at the Beckville mine. Miller's final attempt to bring attention to this issue was at the safety meeting held on December 4, 2002.

The supervisors who terminated Miller testified that at no time during these attempts did he mention conventional safety concerns. Tr. 227-28. Both Poland and Berry stated that Miller never brought up traditional unsafe working conditions during the safety meeting or in their meetings with Miller just prior to his termination. Tr. 173, 181, 210. Rather, it was their believe that Miller was complaining about the way he was treated by Johnson and Watkins. Tr. 173.

From the record it is clear that the essence of Miller's discrimination complaint is that the company's failure to properly handle his and others employee harassment issues could cause anger induced violence in the workplace, and violence is a safety hazard. While the complaint is novel, it is not grounded on an alleged violation of a health or safety standard or on a hazardous mining-related condition or practice existing in the mine environment. Rather, it relates to what best is described as an unacceptable, unreasonable and idiosyncratic reaction to a personnel complaint. As such, it falls outside the penumbra of the Act, which is primarily concerned with conditions present in a mine that pose a threat to miners' physical health and well-being. Miller's attempt to equate irrational work place violence triggered by a personnel matter with protected activity is too attenuated to come within the statute. For this reason alone, Miller's complaint must be dismissed.

AFFIRMATIVE DEFENSE

Even if Miller were found to have engaged in protected activity, and thus to have established a prima facie case, I find the TXU defended affirmatively by proving that it was motivated by Miller's unprotected activity and would have dismissed Miller for the unprotected activity alone. The supervisors who terminated Miller - Berry, Johnson and Ralph Dick - credibly testified that their decision was based solely on the events of December 4, 2002, Tr. 227-28, and that Miller was terminated because he used "very abusive and profane language" toward

managers and co-workers during the comment portion of the monthly safety meeting. Tr. 172. Stanley Berry testified that TXU has a four-step discipline policy which culminated in termination, but under special circumstances termination can be used immediately. Tr. 188. The group concluded it would use immediate termination because Miller not only violated both the TXU's code of conduct and employee handbook, but also had a prior history of similar acts. Tr. 185.

It is clear from the evidence and the testimony that the company regarded Miller's profane and irrational outburst of December 4 as not only violative of the company's profanity and abusive language policy but also as a harbinger of other possible irrational behavior. The latter concern was not unreasonable, for it is also clear that some of Miller's co-workers were wary of him. Tr. 185-188. TXU thus had lawful business justifications for terminating Miller's employment and did not formulate a mere pretext to mask an unlawful motive.

ORDER

For the reasons stated above, I find that Miller did not engage in protected activity and therefore did not establish a prima facie case. I further find that even if Miller engaged in protected activity, T.X.U.'s decision to terminate him was based solely upon legitimate business considerations and did not violate the Act. Accordingly, the Discrimination Complaint is DISMISSED.

David F. Barbour
Administrative Law Judge
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