

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001

July 30, 2004

RAYMOND GEORGE,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. CENT 2004-98-D
v.	:	DENV CD 2003-17
	:	
24/7 SERVICE AND SUPPLY, INC.,	:	Lee Ranch Coal Mine
Respondent	:	Mine ID No. 29-01879 5GB

DECISION

Appearances: Raymond George, Gallup, New Mexico, *pro se*;
Kenneth Chaffin, Grants, New Mexico, on behalf of the Respondent.

Before: Judge Melick

This case is before me upon the complaint of discrimination filed by Raymond George pursuant to Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, (1994) the “Act.” Mr. George alleges in his complaint that 24/7 Service and Supply, Inc. (24/7), violated Section 105(c)(1) of the Act when he was subjected to a lay-off on August 9, 2003.¹ More particularly, Mr. George states in his complaint filed with the Department of Labor’s Mine Safety and Health Administration (MSHA) on August 26, 2003, as follows:

¹ Section 105(c)(1) of the Act provides as follows:

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, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment 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 because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by the Act.

On or about August 09, 2003, I was given a lay-off notice by Virginia Chaffin, President and Wife of Ken Chaffin. Mr. Ken Chaffin was the one who hired me on July 14, 2003, as a Welder for the 24/7 Service and Supply, Grants, NM. The lay-off letter is attached as Exhibit A. Per the lay-off letter, it is indicated that I was being laid off “due to lack of work”; however, I feel the real reason for the layoff was not due to lack of work. It is my belief the lay off letter was because I asked a question about safety in confined areas, oxygen level checks, etc. on August 7, 2003. On August 8, 2003, there were messages on our home telephone to contact the office. I returned the calls on August 9, 2003 and was informed that I would no longer be employed and for me to pick up my tools. Anyhow, the question was asked out of concern for safety reason. When I asked the question, Mrs. Chaffin immediately asked me if I wanted to work there. She also asked if it was safe for me to work there. My response to her question was that I did want to work there and that I did not want to get cited and be in trouble with MSHA. Mrs. Chaffin then said that was just work for Lee Ranch Mine and Lee Mine takes care of their citations. Mrs. Chaffin went on to say that “We don’t want to start trouble with the Mine Company”

The other reason I had a concern was that I had an eye injury that I reported after the work shift at the Mine shop office on or about July 18, 2003. I went to the clinic on July 22, 2003 for this eye problem. There is doctor statement attached for this clinic visit. It is doubtful to me if this report of eye injury was ever documented.

During this time of employment, I noticed a safety issue involving an oxygen/acetylene hose on site that just had a hose clamp. I don’t know if this was corrected at any time.

Nevertheless, all the time that I was on the job, I did not see, talk to, meet with anyone that may have been a Safety Officer. The Safety Orientation was via a 15-minutes video tape.

Overall, I feel I was discriminated against because I raised a safety questions to the people that hired me, who also in the beginning indicated to me that if I had any questions, to go to them and ask them. Instead of responding to the safety question appropriately and professionally, Chaffin’s responses were inappropriately negative, defensive, and discriminate.²

² At hearing Mr. George acknowledged that he did not in fact report any eye injury to the mine shop office as he alleged in his complaint and alleges now that he only mentioned it to his supervisor. Because of Mr. George’s credibility problems also described, *infra.*, and in light of the evidence that MSHA special investigator Dan Velter found that George made no such complaints either to the mine office or to his foreman, I do not find that Mr. George has met his

This Commission has long held that a miner seeking to establish a *prima facie* case of discrimination under Section 105(c) of the Act bears the burden of persuasion that he engaged in protected activity and 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, 2797-2800 (October 1980), rev'd on grounds, *sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); and *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 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 the protected activity. If an operator cannot rebut the *prima facie* case in this manner, it may nevertheless defend affirmatively by proving that it would have taken the adverse action in any event on the basis of the miner's unprotected activity alone. *Pasula, supra*; *Robinette, supra*. See also *Eastern Assoc., Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987); *Donovan v. Stafford Construction Co.*, 732 F.2d 194, 195-196 (6th Cir. 1983) (specifically approving the Commission's *Pasula-Robinette* test). Cf. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 397-413 (1983) (approving nearly identical test under National Labor Relations Act.)

Mr. George has about 25 years experience in the mining industry as a welder and maintenance worker. He began working for 24/7 on July 14, 2003, as a welder at the Lee Ranch Coal Mine (Lee Ranch) located near Grants, New Mexico. 24/7 was a contractor for Lee Ranch furnishing labor as needed. The undisputed evidence shows that on July 16, 2003, George was working inside the dragline along with a Lee Ranch welder, cutting and re-welding cracked areas of steel flooring. According to George, they were working inside a box-like area about 6 feet wide, 6 feet long and at least 8 feet high. Because of the smoke created by their cutting and welding they requested, and were provided, fans to ventilate the area. They were also provided respirators.

The next relevant event occurred on August 7, 2003, when George went to the office to pick up his paycheck from 24/7 president Virginia Chaffin. George described the conversation with Mrs. Chaffin in the following colloquy at hearing:

JUDGE MELICK: All right. Now, you say, on August 7th, when you picked up your check, you had a discussion with Mrs. Chaffin with respect to the situation working in the dragline and that area where you say there was smoke.

Can you tell me exactly what you told her and what she said?

MR. GEORGE: Well, when I asked her why - - if the mine safety people, do they ever check - -

burden of proof that any such complaint was in fact made (Tr. 59-60). In addition, Mr. George does not allege nor did he testify that he reported the alleged clamp on an oxygen/acetylene hose to anyone or that he complained to anyone about not meeting a "safety officer" or about inadequate safety training. Under the circumstances I find insufficient evidence that these latter three alleged activities constituted complaints of any kind.

JUDGE MELICK: What exactly were the words that you spoke to her?
You said - -

MR. GEORGE: I asked her if the mine people or the safety people check the air supply.

JUDGE MELICK: You asked her if the mine safety people checked the air supply?

MR. GEORGE: The air supply or the oxygen, see, in the confined areas.

JUDGE MELICK: Are you talking about specifically the area where you were working?

MR. GEORGE: Well, anywhere.

JUDGE MELICK: You asked her, in general, do the mine safety people check the air?

MR. GEORGE: That's why I asked her, see, any - -

JUDGE MELICK: I'm trying to understand what words you spoke. You're saying that you asked her if the mine safety people checked air quality or - -

MR. GEORGE: Air supply - - air supply or oxygen level.

JUDGE MELICK: Air supply and oxygen levels?

MR. GEORGE: Uh-huh.

JUDGE MELICK: And what did she say to that?

MR. GEORGE: She responded to me that if it was safety - - or if it was unsafe for me. I just told her I just - - I don't want to - -

JUDGE MELICK: She asked you if it was unsafe for you?

MR. GEORGE: Yeah.

JUDGE MELICK: She asked you if - - what were you talking about? Were you talking specifically about working in the dragline?

MR. GEORGE: Yes, working in the dragline and in the confined area.

JUDGE MELICK: So she asked you if it was unsafe for you to work in that confined area?

MR. GEORGE: Yes.

JUDGE MELICK: Well, you had already finished working there; correct?

MR. GEORGE: I already did, yeah.

JUDGE MELICK: Okay.

MR. GEORGE: But I told her - - I mean, I'm just asking her.

JUDGE MELICK: And what did you say to her?

MR. GEORGE: I was just asking the question if they ever do check the confined areas.

JUDGE MELICK: And she said - - she didn't answer your question, then? She didn't answer your question whether mine safety checked air supply and oxygen levels?

MR. GEORGE: No.

JUDGE MELICK: She didn't answer it, but then she came back with a question and asked you if you felt it was unsafe for you to work in that area in the

dragline?

MR. GEORGE: Yes.

JUDGE MELICK: All right. And what did you say?

MR. GEORGE: Well, at that time I just told her that, yes.

JUDGE MELICK: Yes?

MR. GEORGE: Yes.

JUDGE MELICK: And what further conversation occurred? Did she say anything?

MR. GEORGE: No, I just told her that I don't want to get in trouble with the MSHA, working in the confined area, and get fined or something like that. I know the rules with the safety - - the MSHA people. That's all I asked her, and then I don't want to go any further, I just left from there. I just left it at that.

JUDGE MELICK: So that was the end of the conversation?

MR. GEORGE: Yes.

JUDGE MELICK: You just said you didn't want to get in trouble with MSHA?

MR. GEORGE: Yes.

JUDGE MELICK: So you were concerned with yourself causing a violation?

MR. GEORGE: With my - - with an MSHA violation, see.

JUDGE MELICK: Well, how would you be violating MSHA regulations?

MR. GEORGE: Well, if you don't have a - - I work in the mine, and then when - - you had to have a safety line if you're working in the confined area, in case of something - - if something happens to you - - see, that's how they used to do it over at Kerr-McGee, they have somebody right there to make sure that everybody is all right when they are working in an area - -

JUDGE MELICK: You mean, if you're working in an area where oxygen may be deficient - -

MR. GEORGE: Yes.

JUDGE MELICK: - - somebody can pull you out if you pass out?

MR. GEORGE: Yes.

JUDGE MELICK: And that's what you were talking about - -

MR. GEORGE: Yes.

JUDGE MELICK: - - having a line on you so somebody - -

MR. GEORGE: A safety line, or if they check the air supply, see, before you start working in there, too.

JUDGE MELICK: I see.

Now, did you mention to her - - to Mrs. Chaffin that no one was checking the oxygen levels or nobody had a safety line on you?

MR. GEORGE: I didn't say - - I didn't mention that, though.

JUDGE MELICK: I see.

MR. GEORGE: I just asked her about if they ever to the - - check the air supply before they start working in the confined area.

JUDGE MELICK: All right. And that was the end of the conversation, though?

You told her, yes, that you felt it was unsafe, and that you didn't want to get in trouble with MSHA?

MR. GEORGE: Yes.

JUDGE MELICK: And did she say anything in response to that?

MR. GEORGE: No.

(Tr. 31-36).

In the following colloquy on rebuttal Mr. George provided additional testimony regarding this conversation. It is noted that he here contradicts his prior testimony that he told Mrs. Chaffin that he believed the work at issue was unsafe:

JUDGE MELICK: And you told Mrs. Chaffin on August 7th that it was not unsafe working - - you felt it was not unsafe working in that dragline?

MR. GEORGE: I didn't say that.

JUDGE MELICK: What did you say?

MR. GEORGE: I said it - - I just asked her if the - - if they ever checked the oxygen level in the confined areas - - anywhere in the confined areas, and she asked me it was unsafe for me, but I just said, "No, I just wanted to see if they - - if the safety people around from the Lee Mine checked there." That's what I'm really saying, if they ever check the safety oxygen level in the confined areas and all of that.

JUDGE MELICK: So you told her that you did not feel it was personally unsafe, but you wanted MSHA to look at it? You thought MSHA should look at it?

MR. GEORGE: Well, the safety people, anyway - - the safety people at the mine - -

JUDGE MELICK: Yes.

MR. GEORGE: - - or the environmentalists, whoever does that.

JUDGE MELICK: But you agree that you told her that it was not unsafe?

MR. GEORGE: That's what I said, yeah.

JUDGE MELICK: Okay.

MR. GEORGE: See, when I used to work with Kerr-McGee, any - - any - - any confined area, even with big holes, the environmentalists or the safety people check the oxygen level before you can enter those areas.

JUDGE MELICK: Right. Okay.

(Tr. 98-99).

Mrs. Chaffin also described the August 7 conversation with George in the following colloquy at hearing:

JUDGE MELICK: So what happened, then, on Thursday the 7th?

MRS. CHAFFIN: Okay. Raymond came in, and he asked me if there is supposed to be air in the dragline. And I said - he said, "Is there supposed to be air in the dragline?"

I said, "Yes, there was."

And he said something - - I can't remember exactly what he said.

I said, "Well, was there?"

And he said, "Yes, there was."

And I said, "Well, did you feel like it was unsafe?"

And he said, no, that he did not feel it was unsafe. So I don't - - I didn't understand what he was even talking about. You know, why bring it up if it wasn't unsafe, and that was - - that was the whole end of the conversation, and I - - and then he told me he didn't want to have a violation with MSHA, and I said, "Well, if MSHA - - if the mine was doing something wrong, you wouldn't have been violated for it, the mine would be."

JUDGE MELICK: That's what you told him?

MRS. CHAFFIN: Yes.

JUDGE MELICK: And anything further on that discussion?

MRS. CHAFFIN: That was the whole conversation. That was the whole thing. And then he left.

JUDGE MELICK: Well, did you say anything to the effect of, "We don't want to start trouble with the mine company"?

MRS. CHAFFIN: I don't know what - - I never said that. I don't know what kind of trouble that would have been. I don't - -

JUDGE MELICK: Well, you never made a statement like that?

MRS. CHAFFIN: No.

JUDGE MELICK: And did you say something about that the Lee Mine takes care of their citations?

MRS. CHAFFIN: I told him that. When he said he didn't want to get a citation, I told him, "Well, if Lee Ranch was in the - - if you felt it was safe, and if Lee Ranch was doing something wrong, then" - - "you know, I never did understand what it was he was asking, but he kept on - - he wanted to know about the citation, and I said, "Well, if Lee Ranch was doing something wrong, Lee Ranch would have been cited for it, not - - not you. You were" - - and I never did really understand what it was he was - -

JUDGE MELICK: So that was the extent of the conversation?

MRS. CHAFFIN: That was the whole conversation. I never did really understand what it was he was - - what - - if there was air in the dragline and he didn't feel like it was unsafe, what was the - - and he said he did not feel it was unsafe, so I don't know.

JUDGE MELICK: So that was the extent of the conversation?

MRS. CHAFFIN: That was the whole conversation. I never did really understand what it was he was - - what - - if there was air in the dragline and he

didn't feel like it was unsafe, what was the - - and he said he did not feel it was unsafe, so I don't know.

JUDGE MELICK: And he didn't ask you to do anything with respect to making the condition safe?

MRS. CHAFFIN: No, no. He said he thought it was safe.

JUDGE MELICK: And did you know when he had worked on the dragline?

MRS. CHAFFIN: Yes, because I do all the time sheets. He had worked on the dragline in July. This was in August.

JUDGE MELICK: I see.

Did he make any other prior complaints to you about that condition?

MRS. CHAFFIN: No.

(Tr. 84-86).

It is noted that Mrs. Chaffin testified that she did not make the statement attributed to her in George's Complaint to the effect that "we don't want to start trouble with the Mine Company" (Exhibit C-1) and that Mr. George did not in his testimony dispute Mrs. Chaffin's denial in this regard.

In evaluating the record evidence I find that Mr. George's testimony is not only internally contradictory in several respects but that it is also contradictory in several respects to the allegations in his own complaint. His testimony is also inconsistent in significant respects with that of other witnesses testifying under oath. I find therefore that I can give George's testimony in significant parts, but little weight.

Under the circumstances I give the greater weight to Mrs. Chaffin's description of the critical conversation on August 7. As best synthesized it appears that Mr. George asked Mrs. Chaffin whether there was supposed to be air in the dragline and she responded "Yes, there was." She then asked him "Well, did you feel like it was unsafe?" and he responded, "No, that he did not feel it was unsafe." Mr. George then said that "he didn't want to have a violation with MSHA" and Chaffin responded "if the mine was doing something wrong, you wouldn't have been violated for it, the mine would be" (Tr. 84). Finally Chaffin explained that since George told her that he did not feel it was unsafe she did not understand what he was even talking about. In this regard she testified "You know, why bring it up if it wasn't unsafe" (Tr. 84).

Due to the ambiguous and innocuous nature of this conversation, I do not find that it constituted a protected safety complaint. However, even assuming, *arguendo*, that this conversation could possibly have been interpreted as an implied threat to report George's concerns (about whether the air inside the dragline was checked) to the Lee Ranch Mine or to the "MSHA people" and, therefore, constituted a protected activity, I do not find that his layoff was motivated in any part by this conversation.

The second element of a *prima facie* case of discrimination is a showing that the adverse action was motivated in any part by the protected activity. As this Commission noted in *Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508 (1981), *rev'd* on other grounds *sub nom. Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983), “direct evidence of motivation is rarely encountered; more typically the only available evidence is indirect.” The Commission considered in that case the following circumstantial indicia of discriminatory intent: knowledge of protected activity; hostility towards protected activity; coincidence of time between the protected activity and the adverse action; and disparate treatment. In examining these indicia the Commission noted the operator’s knowledge of the miner’s protected activity is “probably the single most important aspect of the circumstantial case.”

The ambiguous and innocuous nature of the conversation at issue, the fact that George’s statements were more in the form of an inquiry rather than a complaint and the fact that George finally acknowledged at hearings that he told Mrs. Chaffin that he did not feel unsafe regarding the matter, all suggest that the operator would not have been motivated to retaliate against Mr. George for such statements. I also find credible the testimony of the co-owner of the closely held corporation, Kenneth Chaffin, that when he met with Mr. George, about a week before George started working, he told him that he had only a temporary welding job for him that would last only two or three weeks. Chaffin explained that 24/7 is in the business of providing temporary help for the Lee Ranch Mine. He meets biweekly with the Lee Ranch foreman to determine their employment needs and provides from six to thirty or forty workers depending on those needs.

According to Chaffin’s credible testimony, on this occasion the Lee Ranch Mine had only a temporary need for a welder for two to three weeks to weld some bumpers and canopies. Chaffin testified credibly that George was hired with that understanding.³ In addition, according to the undisputed testimony of Chaffin, the welding job on the bumpers and canopies was completed by August 6th. Thus a credible reason or motive for George’s layoff was established when he was hired, *i.e.*, that he was hired only for a temporary job lasting two or three weeks and this was confirmed when the designated tasks were completed on August 6. This evidence further negates the suggestion that George’s layoff would have been motivated by his ambiguous and innocuous statements about conditions that he, in any event, did not feel were unsafe.

Chaffin also testified that he planned on advising George on August 7th that he would be laid off but that he was unable to meet with George because he (Chaffin) was working in the mine at the time. According to Chaffin it was his practice to meet personally with workers he was laying off. Virginia Chaffin testified that after Kenneth Chaffin, her husband, met with Lee Ranch superintendent Ralph Ortega on August 5, he told her to have a layoff letter and last paycheck ready for George. He also told her that he wanted to talk to George before announcing his layoff. According to Mrs. Chaffin their office help was unavailable at the time so she had to prepare the layoff letter and Mr. George’s final paycheck herself. She did not get around to this

³ George was equivocal in his testimony whether he could recall whether Chaffin told him that it would be a short term job (Tr. 96-97).

until August 9th . On that date Mr. George returned Mrs. Chaffin's telephone call of August 8th and was told he would be laid-off and that he was to come to the office to pick up his tools and final paycheck. He was told that his lay-off was due to a lack of work and that some other workers would also be laid-off. Mr. Chaffin was present when Mr. George came to the office. Chaffin told him he would be one of the first to be rehired. According to Mrs. Chaffin, additional layoffs were avoided when, shortly thereafter, two workers quit.

Under all the circumstances I do not find that Mr. George's statements to Mrs. Chaffin on August 7th constituted either a protected safety complaint or a motivating factor in his layoff. Accordingly, I do not find that he has met his burden of proving that his layoff on August 9, 2003 was in violation of Section 105(c)(1) of the Act.

ORDER

Discrimination Proceeding Docket No. CENT 2004-98-D is dismissed.

Gary Melick
Administrative Law Judge

Distribution: (Certified Mail)

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