

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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December 12, 1996

PRABHU DESHETTY, : DISCRIMINATION PROCEEDING  
Complainant :  
 : Docket No. KENT 96-201-D  
 : BARB CD 96-05  
v. :  
 : Mine: No. 2  
MANALAPAN MINING CO., : Mine ID: 15-02002  
Respondent :

**DECISION**

Appearances: Timothy L. Wells, Esq., Hyden, Kentucky, for  
the Complainant;  
Susan C. Lawson, Esq., Harlan, Kentucky, for the  
Respondent.

Before: Judge Melick

This case is before me upon the complaint by Prabhu Deshetty under Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq., the "Act," alleging that the Manalapan Mining Company (Manalapan) discharged him on December 30, 1995, in violation of Section 105(c)(1) of the Act.<sup>1</sup>

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<sup>1</sup> 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

In particular Mr. Deshetty alleges that his discharge was a direct result of safety complaints regarding the mine access bridge, the availability and use of permissible pumps and the Respondent's alleged failure to properly evacuate miners during periods of ventilation fan shutdowns.

Deshetty has a bachelor's degree in geology and mining engineering and a master's degree in mining engineering. He also has 20 years experience in the mining industry including work as a section foreman and mine foreman. Deshetty was hired as Vice-President for Operations (in charge of both production and maintenance) by Manalapan President Duane Bennett on July 10, 1995. Bennett was looking for someone to take over and improve production.

Deshetty testified at hearing regarding his four alleged safety complaints made between the commencement of his work on July 10, 1995, and his discharge on December 30, 1995. Toward the end of July, about two weeks after he began working for Manalapan, as he was driving home from work he heard on his "CB" radio that there had been a power outage at the mine causing a ventilating fan stoppage. Returning to the mine and arriving about 30 minutes later, Deshetty met Ralph Napier, the overall superintendent of Manalapan mines. Napier told Deshetty that the miners were still underground and that the fan was still down. Deshetty observed that the law requires miners to be evacuated if the fan is down for 15 minutes. Deshetty described his meeting with Napier in the following colloquy:

Judge Melick: And What did you learn when you got back to mine property?

The Witness: The power was still off. That's when I asked Ralph, you know, "What are the people doing?" He said, you know, "They are still underground." . . .

The Witness: He said, "The power is off. They are still underground. They are working."

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applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has

Footnote 1 Continued

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."

Judge Melick: Any further conversation?

The Witness: Yes. I told him, you know, "I can't believe this. We are supposed to bring the people out after 15 minutes." And I cautioned him right then, you know, that it should not happen anymore.

Judge Melick: Were the men brought out at that time?

The Witness: No. Then the next question for me was -- I asked him, "How long will it take to get the power and the fans back on?" He said, "In about 15, 20 minutes, they will have the power back up, and the fan started."

Although he was in charge of the mine and Napier was his subordinate, Deshetty did not order the miners to be evacuated. Napier agreed with Deshetty that the mine should have been evacuated and agreed to evacuate the miners if a fan stoppage occurred again. Deshetty apparently maintains that his protected complaint occurred a few days later when he saw mine owner Duane Bennett and "mentioned that to him, you know, this has been going on, and I don't like it." (Tr. 18). Bennett agreed that the miners should be removed from the mine whenever there is a fan stoppage.

Subsequently, at the end of September, Deshetty's position had changed so that he was in charge only of maintenance. Carson Shepherd was then brought in to handle operations and production. Deshetty testified that when this change was made Bennett warned both he and Shepherd that if production did not improve they would both be removed.

Deshetty alleges that his second protected activity resulted from events in October 1995, regarding an intentional fan stoppage while power cables were being replaced. According to Deshetty, the fan had already been off for 15 minutes when he arrived and they began running another cable with the fan still off. When he complained to Shepherd about this procedure Shepherd purportedly responded only that "there is one more cable to be done" (Tr. 23). Deshetty maintains that when he later told Bennett about this incident, Bennett responded "I am not worried about something happening, because we don't have that much gas in these mines" (Tr. 25). Deshetty did nothing to stop this apparently unlawful procedure claiming that he was not then in charge.

The third alleged protected activity occurred sometime before the first week of November, 1995. A security guard had

reported to Deshetty that truck drivers had been complaining about the safety of a county-owned bridge providing the only access to mine property. Gary Tucker, Manalapan's resident engineer, told Deshetty that the bridge had a load limit of 3 tons and Deshetty was aware that the trucks using the bridge weighed 30 tons. Deshetty had also observed that one of the bridge slabs was so weak you could see it move when the loaded trucks passed over (Tr. 30). Deshetty accordingly directed

Tucker to contact the department of transportation regarding its safety. One of the bridge slabs subsequently collapsed and it was repaired by Manalapan.

Later, at a meeting with Bennett at which Larry Ellis, Olin Pennington and Carson Shepherd were also present, Bennett asked Deshetty if he had approached the "DOT" about the bridge. When Deshetty admitted that he had done so Bennett purportedly responded as follows:

You should not have done that. You should not have gone over my head. Don't do this in the future. . . . You know what happens if the bridge -- if something happens to the bridge . . . We both better hope nothing will happen to the bridge.<sup>2</sup>

The fourth alleged safety complaint occurred during the first week of December after a citation had been issued for a non-permissible pump in the return air course. Deshetty told Bennett of the need for a new permissible pump and Bennett purportedly responded "[h]ere we go again. . . . You want to spend more money" (Tr. 40). Deshetty nevertheless directed the purchasing department to obtain the pumps.

According to Deshetty, at the December 30 meeting at which he was terminated, Bennett told him that he had not accomplished anything and that he could not afford to retain him. Deshetty acknowledged that when hired he was told to increase production and reduce costs in the four existing mines and that he was to open a fifth mine. He acknowledged that he never did get the fifth mine operating in the three months he was in charge.

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

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<sup>2</sup> Bennett later testified that he was concerned that government officials might condemn the bridge, the only access to the mine, thereby shutting down operations.

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 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 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). *Cf. NLRB v. Transportation Management Corp.*, 462 U.S. 393, 397-413 (1983) (approving nearly identical test under National Labor Relations Act).

It may reasonably be concluded that the two conversations Deshetty had with Bennett concerning the fan stoppages and his conversation with Bennett regarding the need to obtain a permissible pump were protected safety complaints. Deshetty's initiation of complaints to the county government "DOT" concerning the safety of a bridge providing access to mine property is more problematic because the bridge was not in fact on mine property. Under Section 105(c)(1) a complaint is protected if it is "under or related to" the Act. Since the bridge at issue provided the only access over which coal haulage trucks could transport coal from the subject mine thereby exposing miners to a serious safety hazard, I conclude that the action of Deshetty in initiating safety complaints about that bridge were sufficiently "related" to the Act to be within its protections. Accordingly I find all four of Deshetty's claimed activities to have been protected under the Act.

As noted, 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 observed in *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), "[d]irect 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 that the operator's knowledge of the miner's protected activity is "probably the single most important aspect of the circumstantial case."

With the exception of Deshetty's complaint about the unsafe bridge access to mine property none of his alleged "safety complaints" to Bennett were made in a context from which one would expect retaliation. Indeed, with respect to the first fan outage incident, it was Deshetty's own responsibility as Vice President of Operations, after he learned that miners remained underground longer than the 15 minutes allowed by law, to have those miners evacuated. Deshetty merely cautioned his subordinate, Ralph Napier, that the miners should have been evacuated and warned him not to let it happen again. Moreover, in discussing this incident with his supervisor, Manalapan President Duane Bennett, the next morning, Bennett agreed that when the fan is "out" for more than 15 minutes, the miners should be evacuated from underground. Deshetty acknowledged moreover that Bennett was not angry at this meeting and there is in fact no evidence to suggest that Bennett bore any animus toward Deshetty as a result of this incident. I cannot therefore conclude that Deshetty's discharge about five months later was motivated in any part by this incident.

Deshetty's claimed protected activity regarding the second "fan stoppage" incident, in October 1995, was apparently his report of this incident to Bennett the next day. According to Deshetty, Bennett said, in response to his report, that he was not worried about anything happening because there was not much gas in the mine. Bennett denied making the statement. He credibly testified that he was at the mine when the new high voltage line was taken underground and the procedures were explained to him. Deshetty was also then present but turned and drove off apparently without comment. Deshetty fails to suggest any evidence of animus or reason to retaliate for this event. Under the circumstances it cannot reasonably be inferred that Deshetty's subsequent discharge was motivated in any part by this incident.

Around December 9-10, 1995, at a meeting with Mr. Bennett and all the foremen, Deshetty mentioned to Bennett that Manalapan needed to buy some permissible pumps for the No. 2 Mine. Bennett responded "here you go again, you want to spend more money." Deshetty nevertheless obtained quotes for the pumps and directed the purchasing department to buy the pumps at the lowest price. Deshetty acknowledged that Bennett did not refuse to authorize

the purchase of the pumps. Deshetty also acknowledged that Bennett liked to joke around from time to time and that when he made the noted comment Deshetty did not believe the statement would have any impact on his continued employment with Manalapan.

Chief Electrician Earl McKnight testified that when Bennett made the noted comment he thought Bennett was talking to him rather than Deshetty and interpreted it as one of Bennett's jokes because Bennett had a "friendly attitude" at the time. At Bennett's direction, McKnight obtained quotes and gave them to Deshetty. Thereafter, McKnight discovered a permissible pump already at the mine and this pump was utilized without the need to purchase a new one. There is again simply no evidence to suggest that this event had anything to do with Deshetty's discharge.

Clearly however Bennett showed hostility towards Deshetty's protected complaints about the unsafe county-owned access bridge, telling Deshetty that he "should not have done that" and that he "should not have gone over my head". Bennett also told Deshetty not to report problems with the bridge to governmental authorities in the future. Indeed Bennett himself testified that he told Deshetty that he should not get involved in the local politics because he, Bennett, had lived in Harlan County all of his life and it "came back to him." He was concerned that if the bridge was condemned then mine operations would have to close down. Bennett denied however that Deshetty's activities in this regard had anything to do with his firing.

There was also a close relationship in timing between this protected activity and the adverse action in that the bridge defects were apparently reported to the county in early November and on December 30th Deshetty was discharged. I therefore conclude that Bennett (and therefore Manalapan) was motivated, at least in part, by this protected activity. Deshetty has accordingly established a *prima facie* case of discrimination that is un rebutted.

In accordance with the *Pasula* analysis the issue then is whether Respondent has affirmatively defended by proving that it would have taken the adverse action in any event on the basis of Deshetty's unprotected activity alone. In this regard Bennett testified that Deshetty was discharged solely because he was not productive and that things were going from "bad to worse". In addition Deshetty had failed to open the new fifth mine during his tenure. Bennett testified that by August he noted in regard to production, maintenance and the "whole management of the mines" that "instead of things going forward, I saw them going

backwards" (Tr. 215-216). According to Bennett, July was a losing month and August was even a "much bigger loser." The average cost per clean ton in the first six months of 1995 had been \$15.73 and in July it went up to \$25.05. While costs came down to \$20.47 in August, to \$17.37 in September, to \$17.69 in October, to \$18.09 in November and to \$14.30 in December, Bennett observed that over the last six months of the year the mine lost over a million dollars. He noted that the \$15.73 average cost per clean ton in the first six months went up to \$18.01 for the last six months.

Bennett also noted, and it is undisputed, that, while Deshetty had been transferred out of production responsibilities and into maintenance around the end of September he told both Deshetty and Carson Shepherd (who assumed the production responsibilities) that they would both be removed if production did not improve. When production did not improve and Deshetty "never got a maintenance program off the ground" they were both removed. Bennett also found that Deshetty was not aggressive in getting things done.

Within this framework of evidence I conclude that indeed Respondent has sustained its burden of proving that it would have discharged Complainant in any event for unprotected reasons alone. In reaching this conclusion I am cognizant that Shepherd was subsequently retained in another capacity at another Manalapan mine. I do not however find that this evidence is of sufficient weight to alter my conclusion herein. This case must accordingly be dismissed.

**ORDER**

Docket No. KENT 96-201-D is hereby dismissed.

Gary Melick  
Administrative Law Judge

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