

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, NW, SUITE 9500
WASHINGTON, DC 20001

March 24, 2006

WILLIAM ARTHUR BOWEN,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	
v.	:	Docket No. KENT 2005-249-D
	:	PIKE CD 2005-03 and PIKE CD 2005-04
	:	
	:	Mine ID: 15-09724
SIDNEY COAL COMPANY, INC,	:	#1 Prep Plant
Respondent	:	

DECISION

Appearances: Wes Addington, Esq., and George Sanders, Esq., Appalachian Citizens Law Center, Inc., Prestonsburg, Kentucky, on behalf of the Complainant; Mark E. Heath, Esq., Spilman Thomas & Battle, PLLC, Charleston, West Virginia, on behalf of the Respondent.

Before: Judge Melick

This case is before me upon two complaints of discrimination filed by William Arthur Bowen pursuant to Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, the “Act.” The complaints were consolidated into the captioned case. Mr. Bowen alleged in his initial complaint to the Department of Labor’s Mine Safety and Health Administration (MSHA), filed February 2, 2005, that Sidney Coal Company Inc. (Sidney) violated Section 105(c)(1) of the Act when he was suspended on January 31, 2005, “because [he] complained about unsafe conditions at the mine.”¹ Mr. Bowen stated in his second complaint

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

filed with MSHA on February 7, 2005, that “[a]fter filing a discrimination complaint at the Mine Safety and Health Administration on February 2, 2005, I received a letter from the company on February 3, 2005, stating that I was terminated.”

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, (4th Cir. 1987); *Donovan v. Stafford Construction Co.*, 732 F.2d 194, 195-196 (6th Cir. 1983) (specifically approving the Commissions’ 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. Bowen began his employment with Sidney in 2001 or 2002 as a beltman and continued in that position until his departure. As a beltman he ordinarily worked a 12 hour shift, cleaning, maintaining and repairing the beltline. During the last three months of his employment with Sidney, he had been working on the belt in the area known as the R-2 cut-through. This was an area about 2,000 feet long and included a road about 40 feet wide and a 48 inch belt (the R-2 belt) passing beneath a highwall 180 to 200 feet in height. The highwall was nearly vertical and was composed of sandstone, slate and coal. It was not benched and it appears undisputed that it presented a hazard to exposed personnel. Indeed, a notice had been posted by Sidney sometime during 2003, warning employees not to walk through this area and to request a ride because of the dangers presented. Some eight days before Bowen’s separation from employment on January 31, 2005, a truck the beltmen had been using was removed and the beltmen were directed to obtain rides and not to walk the cut-through.

According to Bowen, during this eight day period when he would call his foreman, Tony Adkins to request a ride, Adkins would refuse the request and tell Bowen to walk the R-2 cut-through. Bowen testified that he first complained to Adkins about his failure to transport him through the R-2 cut-through area about five or six days before his separation. He purportedly informed Adkins that it was unsafe because a lot of material was falling off the highwall. “[T]here was a lot of ice, large pillars of ice falling from the highwall as well as rocks and other

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 this Act.

materials sliding off the highwall (Tr. 49). Plant mechanic Tommy Varney and bulldozer operator Jeff Brock confirmed that there was evidence of materials falling off the highwall (Tr. 188 and 250). Bowen claims that he continued for approximately six days asking for rides through this area and Adkins continued to refuse the requests (Tr. 56).

Bowen testified that he also complained in safety meetings about the condition of the highwall and, more particularly, he complained to Adkins in a safety meeting and asked if they were going to do anything about the condition of the highwall (Tr. 57). Adkins purportedly responded that the company was working on it (Tr. 58).

In response to these claims of protected activity, Respondent Sidney notes that Mr. Adkins denied that he ever refused Complainant's request for a ride (Tr. 276). Indeed, Adkins testified that each time Bowen called and asked him for a ride off the hill, he always picked Bowen up (Tr. 276). Sidney also challenges the credibility of the Complainant's allegations based upon his apparent inconsistent testimony. In this regard Respondent Sidney notes that the Complainant testified during his deposition that there were 30 to 40 times he requested a ride from Adkins and was denied (Tr. 112). During his testimony at hearing however, Complainant first stated that he asked for a ride close to 18 times during the last eight days of his employment and was denied each time by Adkins (Tr. 108). The Complainant later again changed his testimony and stated it was actually only four days in which he asked for a ride three times a day and did not receive a ride (Tr. 111). Bowen testified that, on all 12 occasions when he requested a ride, Adkins refused and told him to go ahead and walk the cut-through (Tr. 111).

Respondent Sidney also notes that the Complainant claimed that each time Adkins denied him a ride, he (Bowen) spent 10 to 15 minutes describing in detail the dangerous conditions of the highwall in the cut-through (Tr. 157). Complainant testified that, in response to this 10-to-15 minute description, Adkins would tell him to "just walk it" (Tr. 157). Complainant claims he had conversations with Adkins about the condition of highwall "several times" during the eight-day time period (Tr. 157). Respondent Sidney notes that Bowen failed to present any corroboration for any such conversations.

Indeed, Sidney notes that the Complainant claims that he made these requests over the radio, which would have been heard by six to eight people who were also on his channel (Tr. 111-112). It also notes that the Complainant further asserted that he told co-workers Tommy Varney, Terry Ratliff, Doug Rutherford, and Joey Scott, and Plant Superintendent Billy McCoy about Adkins not giving him rides through the R-2 cut-through (Tr. 48). Respondent argues that in spite of these assertions by the Complainant there was no testimony to support either that claim or Complainant's allegation that he was refused rides by Adkins.

In addition, Tommy Varney, the plant mechanic, heard the Complainant ask for rides "many times" over the radio prior to January 31, 2004, (Tr. 197). According to Varney, Adkins "always came over to get him, far as what I know" (Tr. 198). Electrician Douglas Rutherford testified that he heard the Complainant ask Adkins for a ride through the cut-through, and had

never heard Adkins refuse him a ride (Tr. 201). Wayne Grimmet was the dozer operator who worked on the same shift as the Complainant during the time in question. Grimmet testified that he never heard Mr. Adkins refuse to give the Complainant a ride (Tr. 208). According to Grimmet, when Bowen called for a ride, Adkins would typically respond that he would be there within a few minutes (Tr. 209).

In a somewhat related complaint, Bowen testified that he also spoke with, foreman, Rocky Fitzpatrick, and Plant Superintendent Billy McCoy about the conditions of the highwall and also spoke out during safety meetings, which were held once a week (Tr. 38 and 42). Adkins denies ever receiving any complaints from Bowen about the highwall (Tr. 310-311). Fitzpatrick denies receiving any written complaints from the Complainant and did not recall any specific conversations about the highwall or cut-through, other than general conversation in the lunchroom (Tr. 266-268). McCoy testified that he did not recall any safety complaints or discussions with Complainant about the highwall (Tr. 333-334).

Joey Scott, who runs the thickener at the mine, recalled Bowen discussing the highwall but that “[e]verybody talked about” the conditions (Tr. 176-177). Scott testified that the condition of cut-through was addressed during safety meetings which were conducted by foremen (Tr. 174-175). Indeed, according to Scott, Tony Adkins was the foreman who discussed the condition of the highwall during the safety meetings, “and everyone else started talking about it” (Tr. 175-176).

Tommy Varney testified that the condition of highwall and the R-2 cut-through were discussed at safety meetings, and “the foremen had told us of any changes or what to look for, any new condition” (Tr. 190). Varney recalled one occasion when Bowen complained over the radio that ice fell and came close to hitting him (Tr. 191). According to Varney, other miners talked about the condition of the wall and that the condition of the wall “was common knowledge” (Tr. 192-194).

Within the above framework of evidence, I find that indeed safety complaints were made by Bowen as well as many others regarding the condition of the highwall and that Adkins had to have been aware of them.² While it is clear that such complaints were made, it is also clear that it was common knowledge that the highwall was not safe. Under these circumstances, however, such complaints would hardly be expected to elicit a retaliatory response against only one person, especially one so severe as to result in termination. For purposes of this decision, I also consider the undisputed evidence of Bowen’s persistent requests to float out bulldozer operator Grimmet to be a protected “safety complaint.” These requests are discussed later in this decision.

Following the *Pasula* analysis, the next issue to be determined is whether Bowen’s protected activity resulted in adverse action. In this regard, it is essential to consider, in

² I do not, however, necessarily credit Bowen’s testimony regarding the frequency of his being denied rides through the cut-through.

particular, the testimony of Bowen and Adkins and to determine the weight to be given that testimony. According to Bowen, on January 31, he was working the 7:00 p.m to 7:00 a.m shift. He testified that Adkins drove him to the top of the hill past the cut-through along with bulldozer operator Wayne Grimmet. The events that followed were described by Bowen at trial in the following colloquy:

Q. [By Mr. Addington] What happened once you arrived at the Impound:

A. As we was getting out of the truck, Wayne Grimmet turned to me and asked me if I cared to come back at lunchtime and float him out, and I told him I didn't care a bit to. And at that time, I heard the truck door slam, and I turned, and Tony yelled for me to come to him. I walked to him. We approached the rear of the vehicle and he proceeded over toward the belt structure, and I'm guessing approximately 16, 18 feet from the rear of the vehicle. He first told me to, very angrily grabbed a shovel, and go to R-2 belt and shovel the spill that was there. And I turned to do that. And as I was walking away, he told me, "Wait a minute. I'm not thought." And he started yelling at me over aggravating Wayne.

He said, "You've aggravated Wayne for three days to float him out. If I wanted him floated out, I'd see to it he got floated out" something to that effect.

I told him that Wayne just asked me to come back at lunchtime and float him out. He more or less told me that was not true. And I told him that I didn't understand why he was doing this, because this was a normal duty that I had to float the operators out. There had to be more to it than that. It's not normal to reprimand an employee for doing things that he normally did on a regular basis as well as offering to help someone. That I had made, you know, several complaints about the highwall. I said, "Tony, you've not been picking me up every time I've ask you to. You're not picking me up. What's the problem?"

He screamed at me and told me that he was the boss, I'd do what he tells me to do, that I don't tell him what to do, something to that effect.

And I told him I was not trying to tell him what to do, I was trying to find out what was wrong, why he wasn't picking me up.

He told me that he was through with me, and told me I was fired. He said, "You're fired." He said, "I'm through with you."

I did get upset at that comment and I said, "Stick it in your ass." I said, "You don't have the authority."

And he told me that he was going to take it to Billy McCoy the next day and have me fired.

I asked him then, I said, "Just go ahead and take me off the hill."

And he started stepping backward and said, "No. I will not, " and turned and walked away from me and walked back toward his truck.

At that time I turned and started off the hill.

Q. During the conversation on the hill, did you tell Tony Adkins you quit?

A. No, sir. I did not.

Q. At the point that conversation ended, what did you think your employment status was with Sidney Coal?

A. That I was fired.

Q. Where did you go after the conversation with Tony Adkins ended?

A. Proceeded through the cut-through. I think I just started through the cut-through about the R-3 belt head somewhere through there. Tony went by the Gary Hatfield. I proceeded off the hill to the foreman's office, or the lobby area.

Q. Now, why did you go to the lobby area, foreman office?

A. To get my personal belongings.

Q. Why did you get your personal belongings?

A. Because I thought I no longer had a job.

Q. Mr. Bowen, where did you go once you went back down to the foreman's office/lobby area?

A. I went into the women's restroom.

Q. Arthur, is that used as the women's restroom?

A. No, sir.

Q. What is that room?

A. It contains lockers that, I think Tony Adkins might have a locker in there and Rock Fitzpatrick, myself, Terry Ratliff. That's generally where me and Terry change.

Q. So, your locker room wasn't located in the changing room?

A. No, sir, it was not.

Q. And did you get your belongings out of your locker?

A. Yes, sir. I did.

Q. Then where did you go?

A. I come out the women's door, bathroom door, and as I come out the door -- well, if I may back up. As I came into the lobby area, Tony hollered for me on the radio and advised me that once I get to the R-2 belt head call for him and he would come and pick me up. I then advised him I was already in the foreman's office. And he told me that he would be right there. I got my things, come out, and as I

was coming out of the women's restroom --

Q. Let me stop you for a second. You said Tony called you on the radio and asked you when you got to the R-2 cut-through to call and he would come and pick you up.

A. That's correct.

Q. What time was this when he called?

A. Approximately 7:30 thereabouts. I don't know exact.

Q. Did he usually call for you to tell you to call when you needed to be picked up?

A. No, sir.

Q. Had he ever called for you?

A. No, sir.

Q. When did you usually call for him?

A. Approximately ten or fifteen minutes before break and lunch. That would be 15 till 10:00, 15 till 1:00, 15 till 5:00, approximately.

JUDGE MELICK: Do you have portable radios?

A. Yes, sir.

JUDGE MELICK: Each miner had his own personal radio?

A. Yes. Similar to what we carry as a police officer. Two-way radios.

Q. You said you would normally call before the first break.

A. Yes.

Q. And that's approximately when?

A. Ten to fifteen minutes till 10:00.

Q. Would you ever call for a ride before that?

A. No, sir.

Q. So, why would Tony Adkins call you at 7:30?

A. I felt like that it was because of the incident on the hill.

Q. You can continue. Once you got your stuff out of your locker, where did you go then?

A. Stepped through the women's restroom door, and at that time Tony came through the front door of the lobby. He started, not really yelling, but with a loud voice continued to talk about what had happened up on the hill.

JUDGE MELICK: What did he say? What were his words?

A. That I was trying to tell him what to do and that he was the boss, and that he wasn't going to stand for that. I told him I was not trying to tell him what to do. And I pointed

out the fact that he was yelling at me. And I told him I said, "That's what I have a problem with there with you right now, you're yelling at me." And I said, "If you don't want me to yell at you, don't yell at me." We passed about halfway through the lobby during this time. I walked over to the exit door. Tony was still talking to me very angrily. I had turned toward him, he was standing about at the superintendent's office door, and he was still yelling. I then yelled back and told him that I didn't have to take it, he had done already fired me and that I was leaving.

About that time Rocky Fitzpatrick come through the door. If you'll notice, located above the storage room wall, that north wall of the storage room, he come through that door, he walked over, Rocky walked over toward me about where the storage room door is on the west side of the storage room, asked me what was wrong. I told him about the incident up on the hill and how Tony, over the past eight days, had refused to pick me up wherever I called for him on the radio. And about, we discussed about the dozer operator getting floated out. I think Rocky made a statement that he agreed with me that the dozer operator should get floated out, and that if Tony was doing that, that it was wrong of Tony.

(Tr. 66-74)

Q. You say you were talking to Rocky Fitzpatrick during the argument and Tony Adkins had stepped, where did he step to while you were talking to him?

A. He walked towards the foreman's office and stepped in the door for approximately eight to ten seconds maybe. It was very brief. And then he walked back into the lobby area.

Q. What happened after that?

A. He told me that I was a liar and told me that he was through with me, and was very verbal. I don't recall the exact words that were said, but I made a comment that I was, I said, "Tony, you already fired me. I don't have to stand here and take it. I'm leaving." And I left.

Q. You left?

A. Yes.

Q. During this argument, did he raise his voice?

A. Yes.

Q. Did you raise your voice?

A. Yes, sir.

(Tr. 80-81)

Maintenance foremen Tony Adkins described the same events at trial in the following colloquy:

Q. [Mr. Heath] I'd like to turn your attention to January of 2005 and particularly the last part of the month, okay. Now, do you recall Mr. Bowen calling and asking for a ride?

A. Yes, sir.

Q. How did you respond?

A. "I'll be there."

Q. Did you ever respond any differently?

A. No, sir.

Q. Did you ever refuse to pick him up or -

A. No, sir.

Q. Did you ever tell him to walk through the R-2 area?

A. No, sir.

Q. Who is Wayne Grimmet?

A. Wayne Grimmet was a refuse dozer operator that we hired.

Q. Whose shift did he work on?

A. He worked on my shift, sir.

Q. And I'd like to turn your attention to January 29.

Was Mr. Grimmet working?

A. He worked that night, yes, sir.

Q. What day was that for him on your shift?

A. That was his first day, sir.

Q. How did he get to the top of the hill?

A. I myself would transfer him up there, sir.

Q. And, where did he ride in your vehicle?

A. In the passenger side seat.

Q. Was there anyone else in the vehicle besides yourself and Mr. Grimmet?

A. Yes, sir, Mr. Bowen.

Q. And where was Mr. Bowen?

A. In the backseat. It was a king cab truck.

Q. And where would you take them to?

A. I would take them up to the R-4 head.

Q. And for identification purposes, looking at R-9, could you point out where the R-4 head is as you call it?

A. Yes, sir. It would be out here where you've got a head drive out here, where the refuse dumps are.

Q. How is it labeled on this map?

A. It says R-4 head, I believe.

Q. Is there also some words there near the end of the belt?

A. Yes. It says Sukey Branch Impoundment.

JUDGE MELICK: Could you pull the microphone closer. Speak closer to the microphone. Thank you.

Q. Is that basically on top of the Embankment?

A. Yes, sir.

Q. And, tell me about the first night that you took both Mr. Grimmet and Mr. Bowen up on the job.

A. Wayne, it was his first day, and I just normally chitchat. He was a new man. I was trying to talk to him. And we took him up to R-4 head and went through the box cut to the Impoundment.

Q. And did Mr. Bowen have any conversation on the ride up?

A. He wanted to float Mr. Grimmet out for --

JUDGE MELICK: I'm sorry. I can't - Could you repeat what you just said?

A. He explained he'd like to float Mr. Grimmet out for lunch. Float Wayne out for lunch.

Q. How did Mr. Grimmet respond?

A. He said, "No, I'm fine."

Q. On that first day, did Mr. Grimmet ask you to float him out or give him a break during the night?

A. No, sir.

Q. Do you leave that up to your employees to decide --

A. No, sir.

Q. You're talking about who does the floating out.

A. Yes, sir.

Q. But as to whether the actual operator wants a break or not, how do you handle that?

A. If an operator wants a break, he'll holler and I'll get somebody up there to float him out.

JUDGE MELICK: I'm sorry. I can't hear you.

A. When the operator wants floated out, I usually send someone up to float him out.

JUDGE MELICK: I see. And I don't think we've ever really had a clear explanation of what does floating out mean?

A. Oh, it's a slang term about --

JUDGE MELICK: Yes, I'm just concerned, we all understand here, but when somebody reads this transcript, they might not understand.

A. Okay. Well, it's to give him a break on his dinner.

Q. Someone else would come in and run that piece of equipment while the person eats lunch?

A. Yes, sir.

Q. And, then as a foreman, is it your job to determine who would actually float someone out if that employee wants to be floated out?

A. Yes, sir.

Q. Now, I'd like to turn your attention to January 30th, which would be the second day for Mr. Grimmet.

A. Yes, sir.

Q. Can you tell me about the ride up the hill that evening.

A. Just normal chitchat again when I took them up to the R-4 head, and ask him how he was liking the dozer and stuff.

Q. Did again Mr. Bowen get in the conversation?

A. Yes, Mr. Bowen was trying, yes, sir, he was in there.

Q. Did he ask anything, or what did he say?

A. He asked about floating Wayne out again, relieving Wayne out at dinner, sir.

Q. How did Mr. Grimmet respond?

A. He said, "No, I'm fine."

Q. Now, again going to January 31st, did you again take Mr. Bowen and Mr. Grimmet up on the hill?

A. Yes, sir.

Q. Did Mr. Bowen ask anything on the way up the hill?

A. Yes, sir. Yes, sir. He wanted to float Wayne out at dinner again.

Q. How many times did he ask?

A. Twice, two or three times, I guess.

Q. And each time how was Mr. Grimmet responding?

A. He kept saying, "I'm fine. I'm fine."

Q. How long was it on your crew until Mr. Grimmet actually wanted to be floated out or to be given, someone to run his machine during lunchtime?

A. It was a while. I mean, Wayne was new and he wanted to, it was a while, a month or something like that.

Q. And, when an employee first starts working, are they under any kind of a trial period or observation?

A. Yes, sir. Yes, sir. Wayne was nervous about the

job.

Q. So, was Wayne, in fact, going to be judged on his performance in his initial time of working for the Company?

A. Yes, sir.

Q. And that would include what his dozer work looked like; is that right?

A. Yes, sir.

Q. What do you have to do up on the Impoundment as far as placing refuse?

A. You have to put your refuse in one-foot lifts and get your compaction and keep the R-4 head from being gobbled off.

Q. By gobbled off, you mean blocked?

A. Right. With refuse.

Q. And what level of compaction does it have to get to?

A. Do what, sir?

Q. To what level is the material compacted?

A. I have no idea on that. I mean, it has to be compacted in one-foot lifts, I mean, it's got to be put in one-foot lifts and then run over with the dozer and compacted each time.

Q. Now, as soon as you got up on the hill - First of all, on this night, where did you let Mr. Grimmet and Mr. Bowen out at?

A. At the R-4 head.

Q. Did you talk to the dozer operator to let him know you were there?

A. Yes, sir. Yes, sir.

Q. What did you tell him?

A. I hollered and I said, "Come on back here old man, I've got you some relief there."

JUDGE MELICK: I'm sorry, I didn't get what you just said.

A. I just hollered, I said, "Come on back old man, I've got you relief. Wayne's here to relieve you out."

JUDGE MELICK: To whom did you say that to?

A. Gary Hatfield.

Q. Is he the day-shift dozer operator?

A. Yes, sir.

Q. Did he then move the dozer toward you all?

A. Yes, sir.

Q. What happened next?

A. He pulled over to where we was parked in the truck.

Q. And, did anybody get out of your vehicle?

A. Yes, sir. Mr. Grimmet and Mr. Bowen.

Q. Tell me what happened when they got out of the vehicle?

A. Wayne exited the vehicle and Trooper opened the door behind him on the back door and he said, "Holler at me if you want me to float you out," when they got out again.

(Tr. 276-283)

Q. [By Mr. Heath] How many times now had he then asked to relieve Mr. Grimmet on the way up the hill?

A. Twice, I guess. Twice. Several times.

Q. And is this time that you got out an additional time?

A. Do what, sir?

Q. Is the time that he asked this while getting out of the vehicle an additional time?

A. Yes, sir.

Q. How many times is that?

A. About three times.

Q. What did you do at this point?

A. I exited the vehicle on my side.

Q. How did you get out of the vehicle?

A. I opened the door.

Q. How did you close the door?

A. I just shut it back.

Q. Did you slam your door?

A. No, sir.

Q. So, you got out of the vehicle. What did you then do?

A. I hollered at Mr. Bowen and told him to come over to the side, I wanted to talk to him.

Q. Why did you want to talk to him?

A. Because I told him that I wanted to keep him from making Wayne mad about being floated out.

JUDGE MELICK: Sorry. Again, I missed that. What was that?

A. I told him to stop aggravating Wayne about being floated out, sir.

Q. So that's the reason you wanted to pull -
JUDGE MELICK: I'm sorry. My hearing is difficult -

Q. I believe he said he didn't want him to, to stop aggravating Wayne about floating him out.

A. Yes, sir.

MR. HEATH: You'll need to just speak a little slower and real clear.

A. Okay. I'm sorry. I ain't used to talking in a microphone and stuff.

Q. Have you ever testified in a hearing before?

A. No, sir. No, sir.

Q. All right. Mr. Adkins, you told me that that's the reason you wanted to talk to Mr. Bowen?

A. Yes, sir.

Q. Where did you talk to him at?

A. At the back of the pickup truck.

Q. Was this away from Mr. Grimmet and Mr. Hatfield?

A. Yes, sir.

Q. Why did you take him away from that?

A. Not to embarrass him in front of his coworkers.

Q. Now, if you would, please, walk me through the conversation that you had with Mr. Bowen there on the Impoundment?

A. I told Trooper, I said, "Come over here, I need to talk to you." And I said, "You need to leave Wayne alone." I said, "If he wants floated out, he'll holler at me and let me know."

And he said, "Well, he asked me to float him."

And I said, "No, he didn't. He said he was fine."

I said, "You need to stop aggravating him." I said, "You need to do your job."

And he said, "The man told me he needed floated out."

And I said, "No, he didn't. He said he was fine."

And he said, "Well, he just told me."

And I said, "No, he didn't."

And he said, "You kiss my ass." And, he started walking off.

And I said, "Hold it just a minute." I said, "You can't talk to me that way." And I said, "I'll take you to Billy McCoy," which is the plant superintendent.

And he turned around and he threw up both hands

and said, "Take me."

Q. Where did he go then.

A. He proceeded to walk up the belts.

Q. Did you suspend Mr. Bowen up there on the hill?

A. No, sir.

Q. Did you fire Mr. Bowen up on the hill?

A. No, sir.

Q. Did you believe that he was going about to do his job at this point?

A. Yes, sir.

Q. Did you tell him to do that?

A. Yes, sir.

Q. All right. Did you talk to anybody before you left that hillside or Impoundment?

A. I talked to Wayne and I told Wayne if he wanted floated out to holler at me, you know.

Q. And just so, that was a little blurred there, but I think he said - What did you tell Wayne?

A. I told Wayne if he wanted a break to let me know.

Q. Did you then take Mr. Hatfield off the Impoundment?

A. Yes, sir.

Q. Where do you recall seeing Mr. Bowen?

A. At R-3 head?

Q. Is that where he goes to do his exams?

A. Yes, sir.

Q. Now, did you then take Mr. Hatfield off of the hill?

A. Yes, sir.

Q. Where did you take him to?

A. I took him to the bathhouse, sir, to change.

Q. Up on the hill in your conversation with Mr. Bowen, was there any discussion of the R-2 highwall or the cut-through?

A. No, sir.

Q. Was there any discussion of giving him rides through the cut-through?

A. No, sir.

Q. Once you got back across the road, did you drop Mr. Hatfield off at the bathhouse?

A. Yes, sir.

Q. Did you also go in the bathhouse?

A. I went in, we come in the, we already come into the main office, yes, sir.

Q. Is that the area that you call the lobby area?
A. Yes, sir.
Q. And we're looking at R-1?
A. Yes, sir.
Q. What did you go into the bathhouse for?
A. Gary always goes in to change clothes and to put his shoes on, sir.
Q. Why did you go into the bathhouse?
A. I wanted to talk to Rocky Fitzpatrick.
Q. Did you, in fact, talk to Mr. Fitzpatrick?
A. Yes, sir.
Q. Tell me about your conversation with Mr. Fitzpatrick.
A. I told Rocky what happened with me and Mr. Bowen up on the hill.
JUDGE MELICK: Rocky is Mr. Fitzpatrick?
A. Yes, sir.
JUDGE MELICK: Let me just make sure we're all talking on the same wavelength. I've heard this from other witnesses, but Trooper is another nickname for Mr. Bowen.
A. Yes, sir.
Q. Has Mr. Fitzpatrick, I think you call him Rocky; is that correct?
A. Yes, sir.
Q. Has he been a foreman longer than you?
A. Yes, sir.
Q. Did you, in fact, talk to him about what happened?
A. Yes, sir.
Q. Tell me what you told Mr. Fitzpatrick.
A. I told him about the incident about Trooper wanting to float Wayne out and I told him to stop aggravating Wayne, and what Trooper said.
Q. Did you talk anything in particular as to what he had said to you?
A. Yes, sir.
Q. Any cussing that he had told you?
A. Yes, sir. I told Rocky about him telling me to kiss his ass.
Q. What did Mr. Fitzpatrick advise you to do?
A. To write him up.
Q. And, in fact, did you start to write him up?
A. Yes, sir.
Q. I'd like for you to look at what is in the book in

front of you at Tab 2. Do you recognize this document?

A. Yes, sir.

Q. Does it have your signature on it?

A. Yes, sir.

Q. Is this the document you started to fill out that evening on January 31st?

A. Yes, sir.

Q. What did you put down as the problem?

A. Insubordination.

Q. Did you make a recommendation as to whether or not Mr. Bowen should continue to work for this operation?

A. Do not retain, sir.

Q. What does that mean?

A. That means he wasn't to come back.

Q. Do you then have to submit this to the appropriate parties?

A. Yes, sir.

Q. Do you have the power to fire someone?

A. No, sir.

Q. Who handles that at the operation for you?

A. We go through proper channels, sir.

Q. Who are the channels?

A. It goes from plant foreman to plant superintendent, then from plant superintendent to H.R. and then to the president, sir.

(Tr. 283-290)

Q. [By Mr. Heath] Walk me through your conversation with Mr. Bowen on the radio.

A. I hollered at Mr. Bowen and I said, "Trooper, when you get to R-2 cut," I said, "holler at me and I'll come pick you up."

Q. And what did Mr. Bowen respond?

A. He said, "I'm already in the foreman's office.

Q. How did you respond?

A. I said, "I'll be right there."

Q. Did you, in fact, go to the foreman's office?

A. Yes, sir.

(Tr. 292)

Q. [By Mr. Heath] Now, so you said you asked him what he was doing. Now take me through the conversation at this point between you and Mr. Bowen in the Preparation Plant office.

A. I come to the door and I said, "What are you doing?"

And he said, "I'm quitting.

And I said, "You're quitting?"

And he said, "Yeah."

Q. Anything else said?

A. We passed each other, and we passed each other in the lobby area and he said he was tired of being treated like a child.

JUDGE MELICK: I'm sorry. I missed that again.

A. He said he was tired of being treated like a child.

Q. How did you respond to that?

A. I told him I didn't treat him like a child.

Q. What else?

A. And he explained about the, where Billy McCoy and where that refuse, about the R-4 where we had a spill and we had to clean it up and he said I didn't take up for him.

Q. Let's explain that just a little bit. When had this happened that there was a spill on the R-4 belt?

A. A week prior, actually. A couple of weeks prior.

Q. After this spill, was the spill cleaned up on your shift?

A. No, sir.

Q. Did you then meet with Mr. McCoy.

A. Yes, sir.

Q. Was Mr. Bowen involved?

A. Yes, sir.

Q. And, what was Mr. Bowen saying about this meeting with Mr. McCoy?

Q. He said that I never took up for him. I let Mr. McCoy talk to him, and like that.

JUDGE MELICK: And Mr. McCoy was in what position at that point?

A. Plant Superintendent, sir.

JUDGE MELICK: Go ahead, I'm sorry.

Q. And what else did he say about this meeting with Mr. McCoy?

A. He said I didn't take up for him. He said I let

Billy talk to him and I never took up for him. I never took none of the blame.

Q. What else did he talk about? First of all, what's his demeanor during this conversation?

A. Very agitated, sir.

Q. What's his voice like?

A. Loud.

Q. Is he shouting or is he just talking loud? What's your --

A. Shouting.

Q. And what's your voice like?

A. About normal.

Q. You have a very high pitched voice, don't you?

A. Yes, sir.

Q. Did, in this conversation, anybody else come in there?

A. Rocky Fitzpatrick.

Q. Did an individual by the name of Cobb or Mr. Blackburn come into the area?

A. Yes, sir.

Q. When did he come in?

A. He was in the bathroom, I think, sir.

Q. Where do you recall seeing him standing?

A. Over at the entrance to the bathhouse.

Q. Now, I think you told me Mr. Cobb is in that area where the door is to the bathhouse.

A. Yes, sir.

Q. Did Mr. Fitzpatrick, Rocky Fitzpatrick, come in?

A. Yes, sir.

Q. Okay. Tell me what else was being said during this conversation?

A. He explained to Mr. Fitzpatrick that, about Wayne needed floated out, that the man should have a brake [sic], and that he should have a break and that I wouldn't let him float him out.

Q. So, Mr. Bowen is telling everybody that he's still wanting to run the dozer during lunchtime?

A. Yes.

MR. ADDINGTON: Objection, your Honor. That's leading.

Q. Did you think that Mr. Bowen wanted to run the dozer or didn't want to run the dozer during lunchtime?

A. Mr. Bowen wanted to run the dozer.

Q. Now, did anyone else come in during this conversation?

A. Robby Hicks.

Q. When did he come in during the conversation?

A. Later on during the conversation.

Q. Where did he come in at, or what did he do?

A. He come in to use the bathroom.

Q. And I ask you to tell me, looking again at R-1, what door he would have come in through?

A. He would have come in through the main lobby area entrance.

Q. If you're looking at that building, on this map it's over to the left off the lobby area.

A. Yes, sir.

Q. Anything else that's being said in this conversation?

A. Mr. Bowen explained that all the guys on my shift didn't like me and that they should, that I should hear how they talk about me behind my back. And I said, "That's fine. That's okay."

Q. Anything else that you recall being said in this conversation?

A. That's, about how he was being treated on the job.

Q. Did Mr. Bowen at any point tell you that he quit?

A. Yes, sir.

Q. How many times do you think he said that?

A. Several, sir.

Q. Did he, in fact, leave the area?

A. Yes, sir.

Q. At any point during this conversation, did you step out of the room?

A. Yes, sir.

Q. When did you step out?

A. After we had the conversation about he explained, said nobody didn't like me and stuff like that, and I walked back to the foreman's office.

Q. Is that what's labeled Foreman's Office?

A. Yes, sir.

Q. How long did you stay in the foreman's office?

A. I just read the on-shift report and come back out.

Q. Any, during your conversation in the lobby area, did Mr. Bowen, in any way, discuss the R-2 cut-through?

A. No, sir.

Q. Did he discuss getting rides through the R-2 cut-through?

A. No, sir.

Q. Did he, in fact, ultimately leave the lobby area?

A. Yes, sir.

Q. What did you do at that point?

A. I observed Mr. Bowen walking across the parking lot.

Q. In going to the parking lot, where does he go?

A. From the plant office right there to a, there is a catwalk leading to the main parking lot?

Q. Is that, in fact, labeled on R-9?

A. Yes, sir. Right here's your walkway, here's your main office, and this is your walkway.

Q. For identification purposes, that's in the left hand corner of R-9 here.

A. Yes, sir.

Q. Now, did you call anyone or attempt to call anyone that night?

A. I called security.

Q. What did you tell them?

A. I told them not to let Mr. Bowen on the property.

Q. Did you also do any work with R-2, the form there?

JUDGE MELICK: Are you talking about Exhibit R-2 as opposed to the belt R-2?

MR. HEATH: Thank you, your Honor.

JUDGE MELICK: We have a lot of R's here.

Q. Looking at Exhibit R-2, when did you complete filling that out?

A. As I stated earlier, I signed it the next morning.

Q. Did you, first of all before we get to the next morning, did Mr. Bowen call you later that evening?

A. Yes, sir.

Q. About what time did he call you?

A. Approximate time, I've no idea.

Q. Can you give me a ballpark of how far into the evening?

A. I'd say about between, about 9:00 somewhere.

Q. So, can you tell me about your conversation with Mr. Bowen by telephone?

A. Mr. Bowen said that, he apologized about what happened.

Q. Anything else that he asked you to do?

A. No, sir. No, sir.
Q. What did you tell him about where things stood as far as any discipline?
A. I told him it was out of my hands.
Q. Why did you tell him that?
A. Sir?
Q. Why did you tell him it was out of your hands?
A. Because it was already, I had already filled the paper out.
Q. Once something like this happens, what are you required to do?
A. It has to go to the plant superintendent.
Q. And anything else that Mr. Bowen told you in this conversation?
A. No, sir.

(Tr. 295-303)

Adkins version of events as to the origins of the conflict at the impoundment was corroborated by dozer operator Wayne Grimmet. His testimony in this regard is noted in the following colloquy:

Q. [By Mr. Heath] And, sir, who are you employed by?
A. Sidney Coal Company.
Q. How long been at Sidney Coal?
A. Since the end of January.
Q. What is your work experiences as far as working the dozer?
A. Roughly 18, 20 years experience.
Q. Did you ret urn back to this area in January to your wife's home?
A. I did.
Q. What did you do prior to coming to Sidney related to dozer work?
A. I was a general foreman for a construction company in Hampton, Virginia.
Q. When did you start at Sidney?
A. Exact date?
MR. HEATH: Yes.
A. I think it was the 29th of January.
Q. Do you recall getting a couple days of training before that?
A. Day-shift training, I did.

Q. Do you recall then starting on second shift on the evening of the 29th?

A. Yes.

Q. And, what were your duties?

A. My duties were to run the Impoundment dozer, to spread the Impoundment in one-foot lifts in the direction I was directed to do so.

Q. And did you meet Arthur Bowen on your first night on the job?

A. I did.

Q. What did he ask you?

A. He asked me if I needed floated out, that he would float me out.

Q. Did he ask you anything about your dozer background or skills?

A. He asked me, he informed me that - He did. He asked me if I had, what experience I had and did I know how to read a topo map, that he had been passed over for the job and was wanting to know kind of why.

Q. He basically asked you what your skills were versus his?

A. I think so.

Q. That's the impression you got?

A. Absolutely.

Q. Okay. And then he asked you to float him out on the night of the 29th (sic) - First of all, how did you get up to your job on the 29th?

A. Tony would take us up, the foreman would take us up in the company vehicle.

Q. Where would you sit?

A. I always sat in the passenger seat.

Q. Up front?

A. Up front.

Q. Where did Mr. Bowen sit?

A. Back seat.

Q. On the way up the hill, is that when he asked you about floating out for lunch?

A. Yes.

Q. And, did you want to be relieved when you first started working in this operation?

A. No, I did not.

Q. Why not?

A. Because I wanted to make sure my duties that was

expected of me in my work was done and performed correctly, and I didn't know anybody to trust to leave me in a situation that I would have to work harder for to try to catch up or something, not knowing anybody else's experience.

Q. Are you basically, so this is your starting period. Are you sort of being graded as to how you're doing your job in this initial period?

A. I think I would be, yes.

Q. Let's go to the second night, which would have been the 30th. Are you again in the vehicle with Mr. Bowen and Mr. Adkins?

A. I am.

Q. Did Mr. Bowen ask you about running your dozer?

A. He asked again to float me out for lunch.

A. What did you tell him?

A. No.

Q. Same thing you told him the night before?

A. Correct.

Q. What was the tone of this conversation?

A. I don't think that there was a really negative tone. I think that, you know, just a normal tone, I expect.

Q. What happened on the 31st?

A. Again, the same journey up the hill. Mr. Bowen asked me to float me out for the dozer. I felt like, you know, getting maybe kind of irritated, I wouldn't let him do it, more persistent of doing so.

Q. Did he ask you more than once that night?

A. Yes, he did.

Q. Again, how did you respond to that?

A. I just told him I'd let him know, because I didn't want to directly say no. I just said, "I'll let you know." And I didn't feel it was my position to, you know, to okay that. I felt that would be the boss's position to okay that.

Q. Do you know how many times he asked you to run that dozer?

A. The last day up the hill?

MR. HEATH: Yes.

A. Not exactly how many times, but it was quite a few times going up the hill.

Q. At any point did you tell him, "Hey, I want you to run the dozer for me?"

A. No.

Q. Getting out of the vehicle at the top of the hill,

did you ask Mr. Bowen about him running your dozer? Did you request him to?

A. No, I did not.

Q. And did you ever fall asleep running the dozer?

A. No.

Q. And, when you got up on the hill, first of all, and we've got a map here, but where would you all get off to switch out the dozer?

A. Always at the stacker belt, at the end of the stacker belt or very close to it.

Q. Would that be somewhere around the end of R-4?

A. That's exactly right.

Q. For the record, we're looking at R-9 and what's labeled Sukey Branch Slurry Impoundment Embankment. Is that correct?

A. Yes.

Q. And that would be your work area?

A. Yes, that's correct.

Q. When you got out of the vehicle, what did you do?

A. I went to Gary Hatfield, as I do at the beginning of every one of my shifts, because he directs me on what direction the material is going to be pushed throughout the night.

Q. And Hatfield was the dozer operator.

A. Yes, he's the day-shift operator.

Q. While you're having your conversation with Mr. Hatfield, where is Mr. Bowen?

A. At that particular moment he was standing with us.

Q. Was he basically listening to what's being discussed?

A. Correct.

Q. Where was the last time you saw Mr. Bowen?

A. Going to his belt job, to what he did to belts. He was headed that way.

Q. And did Mr. Adkins talk to him up on the hill that you could tell?

A. Yes.

Q. Could you hear any of the conversation?

A. No.

(Tr. 202-208)

Foreman Rocky Fitzpatrick corroborated Adkins' testimony regarding events at the impoundment and when they later met in the plant office. His testimony in this regard is reported in the following colloquy:

A. We went in and he [Adkins] closed the door behind us and he proceeded to tell me that him and Trooper had had a confrontation on the Impoundment. He said that, I think Wayne Grimmet had only worked like, I think, three days at that time, and he said all three days on the way to the Impoundment that Trooper had, I'm not sure how he put it, I think he said had aggravated the tar out of the man or something about wanting to float him out for dinner and breaks. He said when he got to the Impoundment, said Trooper had been pressuring the guy and the guy had insisted that he didn't want a break, that he wanted to stay on the dozer and he'd eat something on the run, because he didn't want to get behind or whatever. Anyway, and Wayne's one of these guys that takes a lot of pride in his work. And he said Trooper had been aggravating the guy, I think is how he put it.

Anyway, when they got over there, he said that he called Trooper to the back of the truck, I think he said, and told him basically quit aggravating the man, he says he don't want you to break him out. And at that point, he said Trooper flew mad and started insisting that it wasn't fair for this guy to have to work 12 hour shifts and not get a break, and it just wasn't right. And I guess, I don't know why he got so upset about it, but anyway, the way Tony described it, he got very upset and was being very loud with him and insisted that it wasn't fair and that this guys needed a break like everybody else. I don't know what and all was said, but at one point he said that he told Trooper he was going to take him to Billy the next morning, and that Trooper said, "I don't know care what you do. You can kiss my ass."

And at that point, he left and came back to the office.

My advice to him was, I said, "Well --

Q. Let me clarify something. When you say "he left," are you referring to Mr. Adkins?

A. Tony. Tony. He got Gary Hatfield and they came back to the plant where he called me in there and was telling me this. Now, this is what he told me in the office.

Q. You started to say "my advice."

A. My advice to Tony was, I said, "Well," he insisted that he was going to take him to Billy, and I said, "Well, that's what you need to do." And my advice was, "If he comes over here and says one word to you," I said, "don't argue with him, don't fight with him, call security and have him put him off the property. We'll deal with him tomorrow." I said, "We can't fire no one, but we can have them removed from the property." I said, "You don't have to take that abuse," basically is what I told him.

I then left --

Q. Before you left, was there any discussion about any paperwork that needed to be filled out?

A. Oh, he had pulled a Disciplinary Action form out and the only part of it I seen him fill out was he wrote William's names on the top. He wrote "William Bowen." That's all I seen him fill out on the paper. It's a little pink form, a Disciplinary Action form. He did write his name down. I seen him do that.

Q. At this point did you understand Mr. Bowen was still working on the hill?

A. As far as I knew, he was still over there.

Q. Did Mr. Adkins say he had fired Mr. Bowen?

A. No. There was nothing said about anybody firing anyone. And we don't have this authority no way.

Q. Did he say he had suspended Mr. Bowen?

A. No. He hadn't suspended him. He merely was, he pulled the Disciplinary Action form out and put his name on it.

(Tr. 256-259)

A short time later Fitzpatrick, was at his locker in the changing room when he heard Bowen yelling in the lobby area. Fitzpatrick returned to the lobby area and saw that Bowen was "almost yelling or screaming, if you will, at Tony Adkins" and "kept insisting that it wasn't fair," that Grimmet did not get a break. Bowen then attempted to engage Fitzpatrick in a discussion about Grimmet getting a break so that Bowen could drive the dozer. According to Fitzpatrick, Adkins responded, "Well, you know, that's my place. That's not your place to worry about it. If the man needs a break, I'll give him a break."

Fitzpatrick testified that Bowen "was being very loud and aggressive," and using intimidating behavior: "[H]e had a pair of boots or shoes in his left hand, and he was standing with like his arm up on the file cabinet, and from time to time he would hit the boots and shake the file cabinets." According to Fitzpatrick, at one point during the dispute, Bowen told Adkins

that nobody on his crew liked him, and “he ought to hear what they said about him when he wasn’t in the room.” Bowen purportedly told Adkins he could not get along with him and told Adkins, “I quit.” Adkins responded, “Well, you’ve made your decision.” Fitzpatrick testified that during their argument Bowen said he quit “on two or three different occasions.” According to Fitzpatrick, there was no discussion about the R-2 cut-through during the argument.

Other Sidney employees were present during the exchange between Bowen and Adkins in the lobby of the preparation plant office. Loader and dozer operator Gary Hatfield was in the locker room getting ready to leave for the day, when he heard Bowen “hollering and screaming.” As Hatfield was leaving the locker room, Bowen was walking towards him, heading to the parking lot. According to Hatfield, Bowen was “mad,” and “hollering and raving” as he left the building. Hatfield testified that Bowen said he was not going to be talked to “like a child.”

Preparation plant worker Randall Blackburn had followed Bowen into the foreman’s office around 7:30 p.m. Blackburn testified that, as soon as Bowen entered the office area, he “started hollering at Tony Adkins, screaming”. Blackburn testified that Bowen was so angry that he slammed boots down and hit the top of the filing cabinet in the superintendent’s office. According to Blackburn, Bowen’s behavior became so threatening that Blackburn thought Bowen was about to strike Adkins. Blackburn testified in this regard that “I thought he was going to hit Tony when he brought his hand over, and he pointed his finger in his face and told him he could kiss his ass, he quit.”

Beltman Robert Hicks also heard Bowen tell Adkins to “kiss his ass” and saw Bowen walk off the job with his belongings. Jeffery Brock was a dozer operator at Sidney Coal. Brock testified that he left the prep plant office at the same time as Bowen and spoke with him in the parking lot. Bowen told Brock that he quit because “they treated him like a dog,” and “quitting was better than getting fired.” Significantly Bowen also admitted to Brock that he and Adkins had argued over leaving the dozer man alone and that he (Bowen) told Adkins to “kiss his ass, he quit” (Tr. 247-278).

I have evaluated the evidence in this case, some of which is obviously in conflict, and conclude, based on the credible evidence, that the Complainant in fact resigned from employment with the Respondent before he suffered any adverse action. It is not alleged that the Complainant was the victim of a constructive discharge and, under the circumstances, the complaint herein must be denied.²

I note, first of all, that the person who Bowen claims fired him i.e. Tony Adkins, denied under oath that he fired Bowen and denied that he told Bowen that he was fired (Tr. 283). While

² A constructive discharge is established when a miner who engages in protected activity shows that the mine operator created or maintained conditions so intolerable that a reasonable miner would have felt compelled to resign. *Dolan v. F&E Erection Co.*, 22 FMSHRC 171, 176 (February 2000).

Adkins did testify that, in response to Bowen telling him “You kiss my ass”, he responded “Hold it just a minute ...You can’t talk to me that way...I’ll take you to [Plant Superintendent] Billy McCoy”, that statement is not alleged to be an adverse action. I note, moreover, that Bowen himself admitted in a deposition that “I never said I quit, but I guess technically you could say I did because I did walk away from the job” (Tr. 147). This testimony also corroborates Adkins’ testimony that Bowen had, without authorization, just walked off the job and told him at the foreman’s office “I’m quitting”.

As previously noted, Bowen also admitted to former coworker Jeffrey Brock that after he (Bowen) and Adkins had an argument at the impoundment, Bowen said “he told Tony [Adkins] to kiss his ass, he quit” (Tr. 247-248). Additional corroboration of the finding that Bowen had resigned is found in the testimony of the other witnesses to the confrontation that took place later at the plant office. As previously noted, Mssrs. Fitzpatrick, Blackburn and Brock all testified to hearing Bowen say that he quit.

In any event, even assuming, *arguendo*, that Adkin’s statement to Bowen following their confrontation at the impoundment that “I’ll take you to [Plant Superintendent] Billy McCoy” (with the implication of recommending disciplinary action) could be construed as an adverse action, I do not find that the statement or the subsequent initiation by Adkins of the “Disciplinary Action Form” and the follow-through of disciplinary action by Respondent’s management, was motivated in any part by Bowen’s protected safety complaints. First, it is apparent that a number of employees other than Bowen had complained about the unsafe condition of the highwall adjacent to the cut-through and there is no evidence of retaliation against any of them. Indeed the record suggests that the highwall condition was a common concern among both hourly and management employees. Second, the confrontation at the impoundment immediately preceding Bowen’s resignation was clearly about Bowen’s purported harassment of bulldozer operator Wayne Grimmet and Bowen’s persistent efforts to operate Grimmet’s bulldozer over both Grimmet and Adkins objections. Bowen’s testimony, that he raised during this confrontation the issue of Adkins allegedly not giving him rides through the cut-through is also totally out of context with even his own description of, and reason for the confrontation. Third, Bowen admitted to former co-worker Jeffrey Brock that he had resigned because of the confrontation with Adkins concerning the relief of dozer operator Grimmet. Fourth, although the Complainant claims that the confrontation at the impoundment was a protected safety complaint, it is clear that the issue of his resignation or other adverse action was about the Complainant’s insubordinate behavior and not safety. Finally, Bowen’s exaggeration of, and conflicting testimony regarding the number of times he had been denied a ride through the cut-through seriously damages the credibility of his entire testimony.

However, even assuming, *arguendo*, that Adkins had been motivated in part by Bowen’s protected activity, the credible record would overwhelmingly support the affirmative defense that he was also motivated by Bowen’s unprotected activity and that Adkins would have taken the adverse action for the unprotected activity alone. See *Pasula*, 2 FMSHRC at 2799-2800. Clearly, Adkins’ statement - - “You can’t talk to me that way... I’ll take you to Billy McCoy” - -

was a direct, understandable and rational response to Bowen's perceived harassment of bulldozer operator Wayne Grimmet and Bowen's insubordinate response "you kiss my ass" (or, according to Bowen himself, "Stick it in your ass").

The Complainant, in his brief, essentially ignores the overwhelming evidence that he had already in fact resigned and appears to argue that the initiation of termination procedures by Adkins at the plant office shows that Adkins in fact had already fired Bowen and that the continuation of termination procedures by Sidney management confirms this argument.

Adkins testified in this regard that he had never previously initiated disciplinary action (Tr. 308) and that he began filling out the company's Disciplinary Action Form on the advice of Foreman Fitzpatrick (Tr. 289). Adkins explained that he was recommending that Bowen "wasn't to come back" (Tr. 302). Adkins completed the disciplinary action form by signing it on February 1, 2005, (Exh. R-2) and presented it to Acting Superintendent Joe Holt for further action in accordance with company procedures. Adkins acknowledged in his deposition that he also told Holt that Bowen had quit (Tr. 316). Thereafter, there were clearly communication problems among upper management as to whether Bowen had quit or was fired. In any event, on February 1, 2005, a letter to Bowen was sent under the signature of Vice President Arch Runyon (with the approval of company President Sid Young) advising Bowen of a "5 day suspension without pay with intent to discharge" (Exh. R-4).

These events occurred prior to MSHA advising Fitzpatrick and Young on the evening of February 1, 2005, about a complaint they received about a piece of ice almost hitting someone. Although Bowen was not identified by MSHA as the initiator of the complaint, there is no dispute that Bowen had, earlier that day, phoned a "103(g)" complaint to MSHA about the condition of the highwall (the Complainant's second alleged protected activity). According to Respondent's President, Sid Young, he had the suspension letter dated February 1, 2005, withdrawn when he learned that Bowen had previously voluntarily resigned. The letter confirming Bowen's resignation was thereafter issued on February 2, 2005. Even assuming, *arguendo*, however, that Respondent's management suspected that the Complainant had triggered the MSHA inspection on February 1, 2005, and therefore the letter dated February 2, 2005 was issued with such knowledge, the alleged adverse action of issuing the second letter is irrelevant since the Complainant had already resigned on January 31, 2005.

Alternatively, even assuming, *arguendo*, that Bowen had been discharged by the February 1st letter, any such discharge as previously determined in this decision would not have been motivated by Bowen's claimed protected activity and, since the letter dated February 1st also preceded the MSHA inspection, it too could not have constituted an adverse action triggered by Bowen's "103(g)" complaint to MSHA.

Under all the circumstances, this discrimination complaint must be dismissed.

ORDER

Discrimination Proceeding, Docket No. KENT 2005-249-D, is hereby dismissed

Gary Melick
Administrative Law Judge
202-434-9977

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