

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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July 24, 2002

WILLIE RAY SHAFFER, : DISCRIMINATION PROCEEDING
Complainant :
 :
v. : Docket No. LAKE 2002-47-DM
 : NC MD 01-10
 :
GRAY QUARRIES INCORPORATED, :
Respondent : Gray Quarry
 : Mine ID 11-00073

DECISION

Appearances: Willie Ray Shaffer, Loraine, Illinois, *pro se*;
Thomas F. Hartzell, Esq., Hartzell, Glidden, Tucker and Hartzell,
Carthage, Illinois, on behalf of Respondent.

Before: Judge Melick

This case is before me upon the complaint of discrimination filed by Willie Ray Shaffer, 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. Shaffer alleges in his complaint that Gray Quarries Incorporated (Gray Quarries), violated Section 105(c)(1) of the Act when he was discharged on June 7, 2001, shortly after informing the mine superintendent that “the right people would be contacted to correct” certain problems.^{1 2}

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

In his handwritten complaint filed with the Department of Labor's Mine Safety and Health Administration (MSHA) on July 24, 2001, Mr. Shaffer alleged that, after performing hazardous work cleaning the catwalk beneath the scalper screens where 25 to 30-pound boulders were falling, he told mine superintendent Joe Richardson that "I was going to do the job even if it meant endangering my life but the right people would be contacted to correct these problems." More particularly, Mr. Shaffer alleges that at the beginning of his shift on June 7, 2001, he was directed by superintendent Richardson to perform hazardous work cleaning rocks off the catwalk beneath the scalper screen while the plant was in operation. It is undisputed that such work would be hazardous because rocks weighing up to 35 pounds could fall onto miners working on these catwalks. It is also undisputed that a chain customarily barring entry onto the scalper screen catwalk had been removed and that all employees, including Mr. Shaffer, had been warned against working on that catwalk while the plant was in operation.

At hearings, Shaffer testified that he had been working for Gray Quarries for seven years. He worked as a truck driver and performed manual labor at the quarry. On June 7, 2001, he was working the 6 a.m. to 5 p.m. day shift. When he appeared for work that morning expecting to drive "my Euc" he was apparently irritated by the fact that mine superintendent Richardson had given that Euclid truck to one of his relatives to drive. (Tr. 16). He was apparently further irritated when Richardson told him to check the air in the tires of another Euclid truck then at the shop. Shaffer claims that he had been driving that truck the night before and had told Richardson that a bearing on the truck had locked up the wheel. Shaffer believed Richardson sent him to the shop knowing that there was a court order pending to keep he and John Schrecke (the shop mechanic) away from each other. Shaffer appears to suggest that Richardson gave him this assignment, not to perform any necessary work function, but only to further aggravate Shaffer.³

Shaffer testified that he nevertheless went ahead and put air in the tires of the Euclid and determined from Schrecke that a new bearing had to be ordered for the truck so that he would not be able to drive the truck that day. Shaffer claims that he then returned to Richardson for further instructions and that Richardson directed him to clean the catwalk under the scalper screens. He testified that he saw Richardson remove the chain guarding this catwalk before instructing him to clean it. He maintains that while cleaning this catwalk he was nearly struck by three falling rocks.

on behalf of himself or others of any statutory right afforded by the Act.

² At hearing Shaffer also claimed he suffered adverse action in that he was also denied the right to a hearing test. However this adverse action preceded the protected activity here alleged and the Respondent produced at hearing a written document signed by Shaffer waiving this right (Exh. R-1).

³ The record shows that Schrecke had previously been convicted of criminal assault upon Shaffer and that as a condition of his bond Schrecke was not to have contact with Shaffer.

Shaffer claims that, upon completion of the cleanup work, Richardson told him to clean the other catwalks - - apparently not a hazardous job. Shaffer maintains that later, after the morning break, he assisted foreman Mike McMillan, in removing a bad bearing. Still, later that morning superintendent Richardson appeared. During the ensuing conversation Shaffer claims that he made the following statement to Richardson: "Joe, no matter what you tell me to do, I am going to do it even if it means endangering my life, but as of today, I'm going to talk to the right people." Shaffer later testified that he also stated to Richardson at this meeting as follows:

You got a kid that's been driving for eight weeks, and I've been driving approximately seven years, I should be in the Euc. If you want me to clean the catwalks off, that's fine, I'm going to do it, but I'm going to inform the right people . . . (Tr. 36).

According to Shaffer, Richardson responded by saying he was "tired of this fucking bullshit" and "went flying out of the shop area up the hill" to mine owner Bob Miller's office (Tr. 38). According to Shaffer, Miller came down from his office about 15 minutes later and told him that his services were no longer needed. He was told to go to the scale house and get his time card and paycheck. Shaffer testified that McMillan tried to intervene but Miller told him to "shut up, I've heard one side of the story and I'm not going to hear the other." (Tr. 40).

Gray Quarries foreman, Michael McMillan, testifying on behalf of Shaffer, stated that around 7:30 or 7:45 that morning, Shaffer complained to him that he had been working on the scalper catwalk, that "Joe" had told him to work there and that rocks were falling down. (Tr. 62-63). McMillan told Shaffer that it was not necessary for him to work on that catwalk if rocks were falling and that he should go to another section to clean catwalks. McMillan testified that he later saw Shaffer cleaning the catwalk at the "big screen," an area that was not unsafe. Still later, and at McMillan's request, Shaffer came over to the shop to help McMillan.

According to McMillan, mine superintendent Richardson later stopped by the shop and informed Shaffer that a transmission had just arrived for Shaffer's truck. Shaffer began complaining that they had been dragging their feet on replacing his transmission and a "heated exchange" followed. During this exchange he heard Shaffer say, in apparent reference to his working on the scalper screen catwalk, "you tell me to do something like that, I'll do it." (Tr. 70-72). Finally, Richardson said he was "not going to listen to this anymore" and departed. (Tr. 72). Later, mine owner Bob Miller appeared and told Shaffer, "you're finished down here, I want you to get your paychecks." (Tr. 73). McMillan testified that he tried to speak but Miller cut him off stating "I've heard enough, I'm not going to hear anymore sides to the story." (Tr. 73-74). McMillan testified that he was unable to speak a word during this exchange. (Tr. 75).

Mine superintendent Joe Richardson testified that, at the beginning of the shift on June 7, 2001, he and Shaffer were standing by the mine office and he directed Shaffer to first check the air in the Euclid tires and determine whether the truck was running. He maintains that he then also told Shaffer that if the truck was not running, then to go clean the catwalks. Richardson

testified that he did not tell Shaffer to clean any particular catwalk and noted that there were many catwalks at the plant including catwalks at the main screens and the chip plant as well as at the scalper. Richardson also testified that he was unaware that the chain guarding the scalper catwalk had been taken down. Richardson maintained that Shaffer, as well as the other employees, had been instructed to stay off the scalper catwalk while the plant was in operation because it presented a hazard from falling rocks. Richardson further testified that he never saw Shaffer working at the scalper catwalk and that, if he had seen Shaffer working at that location, he would have told him to get off. Shaffer never reported to him that he had been injured while working on the catwalk.

Richardson testified that later that morning, as he was carrying Shaffer's regular paycheck to him, he told Shaffer that the transmission for his truck had come in. According to Richardson Shaffer "blew up on me." According to Richardson this was not the first time Shaffer had done this and that he "kept blowing up" at various times. After this confrontation, Richardson proceeded to Miller's office. Miller was not in, so Richardson called him on the radio. He purportedly told Miller only that "I got a problem." They later met and, according to Richardson, as soon as Miller saw him, Miller said "it's Willie isn't it." According to Richardson he responded "yes." Nothing else was said and Miller went to the shop to talk to Shaffer. Mine owner, Miller, did not testify at the hearings. According to Richardson, Shaffer was fired because of his temper. Shaffer had "blown up" at him three or four times before and had intimidated other employees. "We just had enough of it." (Tr. 87).

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 the activity. *Secretary o/b/o Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-2800 (1980), *rev'd* on other grounds, *sub nom. Consolidation Coal Company v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981) and *Secretary o/b/o Robinette v. United Castle Coal Company*, 3 FMSHRC 803, 817-18 (1981). The mine 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 protected activity. *See Robinette*, 3 FMSHRC at 818 n.20.

On the facts of this case I do not find that Shaffer's discharge was motivated in any part by protected activity. Indeed, I do not find that Shaffer engaged in protected activity. I first find that, with respect to Shaffer's work assignment to clean the catwalks, both Shaffer and Richardson's testimony is largely credible. I find that Shaffer believed in good faith, but erroneously, that Richardson directed him to work only on the hazardous catwalk beneath the scalper screen. I also find however that Richardson actually directed Shaffer to clean the catwalks in general, without specifying the scalper screen catwalk in particular. It is not disputed that, because of the well-known hazards of working on the scalper screen catwalk, all employees, including Shaffer, had previously been warned not to work there while the plant was operating. There was no particular reason to assign Shaffer to clean only the hazardous catwalk when other catwalks could be cleaned and there was a serious reason not to assign him to that catwalk. I do

not believe that Richardson would have sent Shaffer to work where he could easily have been killed.

I consider the testimony of Shaffer's own witness, Michael McMillan, the most credible however with respect to the subsequent confrontation between Shaffer and Richardson. According to McMillan, Shaffer said, in a not unambiguous statement and in apparent but not clear reference to his working on the catwalks, only "you tell me to do something like that, I'll do it" (Tr. 70-72). McMillan notably did not corroborate Shaffer's claims that he also told Richardson that he would "talk to the right people" or that he would "do it [presumably work on the catwalk] even if it means endangering my life."

Within this framework of evidence I do not find that the credible version of events as presented by McMillan constitutes a protected safety complaint. Accordingly the Complainant has failed to meet his burden of proof and this case must be dismissed.

ORDER

Discrimination Proceeding Docket No. LAKE 2002-47-DM is hereby dismissed.

Gary Melick
Administrative Law Judge

Distribution: (Certified Mail)

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