

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 25, 2003

BENNIE PITTMAN,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. SE 2003-39-DM
v.	:	SE-MD 2002-10
	:	
SOUTHERN EQUIPMENT CO., INC.,	:	White Pit II Mine
Respondent	:	Mine ID No. 31-01154

DECISION

Appearances: Bennie Pittman, Farmfield, North Carolina, *pro se*;
C. Matthew Keen, Esq., Ogletree, Deakins, Nash, Smoak & Stewart, P.C.,
Raleigh, North Carolina, on behalf of the Respondent.

Before: Judge Melick

This case is before me upon the complaint of discrimination filed by Mr. Bennie Pittman, 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,” alleging that he was discharged on April 23, 2002, purportedly in violation of Section 105(c)(1) of the Act.¹ At hearing Mr. Pittman alleged that he was terminated in violation of the Act because of seven purported safety complaints and because he did not get along with a co-worker, Jerry Harrell.

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

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by the Act.

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. Consolidated Coal Co.*, 2 FMSHRC 2786, 2797-2800 (1980), rev'd on grounds, *sub nom. Consolidated 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 (1981). The operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. If an operator cannot rebut the *prima facie* case in this manner, it may nevertheless defend affirmatively by proving that it would have taken the adverse action in any event on the basis of the miner's unprotected activity alone. *Pasula, supra*; *Robinette, supra*. See also *Eastern Assoc., Coal Corp. V. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987); *Donovan v. Stafford Construction Co.*, 732 F.2d 194, 195-196 (6th Cir. 1983) (specifically approving the Commission's *Pasula-Robinette* test). Cf. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 397-413 (1983) (approving nearly identical test under Nation Labor Relations Act).

The second element of *prima facie* case of discrimination is a showing that the adverse action was motivated in any part by the protected activity. As this Commission noted in *Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508 (1981), rev'd on other grounds *sub nom. Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983), “[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 or 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.”

At the time of his termination, Pittman had been working for the Southern Equipment Company, Inc. (Southern) for twelve years, running the sand pit and operating excavators, loaders and dump trucks. Pittman was also the lead man, overseeing other workers in the pit. As noted, he alleges seven purported protected activities. The first allegedly occurred in the Spring of 2000. According to Pittman, Ricky Gray, Southern's regional manager, sent to the pit a front-end loader which had no brakes. Both the loader operator, Jerry Harrell, and Pittman complained to Gray about the defect but were purportedly told to operate the loader anyway. Harrell then called North Carolina State Inspector, Scott Hartness who shut the loader down. Pittman speculated at hearing that he may have been blamed for the complaint made by Harrell because he, Pittman, was in charge of the pit.

There is no dispute that Harrell continued to be employed by Southern as of the date of hearing more than three years later and there is no evidence that he suffered any adverse consequences as a result of this complaint. Pittman also continued to work for Southern for two years after this incident without any apparent adverse action. Under these circumstances I do not find that Pittman has sustained his burden of proving that his discharge was motivated in any part

by any such complaints or by any mistaken belief by management that he, Pittman, had made a complaint to the North Carolina inspector. There is neither direct nor adequate indirect evidence from which unlawful motivation may be inferred.

The second purported safety complaint allegedly occurred in February 2002. Pittman testified that upon arriving on the job one morning he found that there were no pre-trip inspection forms on his excavator. Each equipment operator was required to fill out his own report each morning but Pittman had left his forms on his truck. Pittman therefore went to the loader operated by Harrell and removed Harrell's inspection forms. According to Pittman, Harrell then tried to take the forms back and, in an ensuing argument, grabbed Pittman's arm. Pittman later complained about this incident to his supervisor Buddy Davis, and called the "Federal Mine people" to see if they could reprimand Harrell for "putting his hands on me" (Tr. 49). The latter purportedly told Pittman that they could do nothing about it and that it was up to the company to resolve the argument. Under these circumstances I do not find that Pittman has established that this incident constituted any activity protected by the Act. Moreover, even assuming, *arguendo*, that such activity was protected, there is no direct nor sufficient indirect evidence that Pittman's subsequent discharge was motivated in any part by any possible safety related aspect of the incident.

The third alleged safety complaint occurred in February 2002. According to Pittman, he and Harrell were loading trucks and he observed that Harrell was digging up sand the wrong way. Pittman purportedly then jumped onto Harrell's loader to tell him to stop the loader. Harrell purportedly "drove off" with Harrell hanging onto the loader and Pittman had to cut the switch and disengage the gear to stop it. Pittman claims that he reported this incident to Quinn Vaughn, a supervisor over Davis. Vaughn purportedly told Pittman to "just get along" with Harrell. While Pittman's action in jumping onto an operating loader was clearly a dangerous act it was the result of Pittman's own intemperance. In essence then, Pittman is complaining that he reported his own unsafe activities and now asserts that this was protected under the Act. I do not however find the reporting of one's own unsafe acts as an activity intended to be protected by the Act. In any event, even assuming, *arguendo*, that the reporting of his own unsafe acts were protected, I do not find any direct or indirect evidence that Southern was motivated to discharge Pittman in any part by the fact that Pittman reported his own unsafe acts.

The fourth purported safety complaint alleged by Pittman followed the above incident when Davis and Vaughn purportedly told Pittman that it "probably would be the best thing if I just stayed off the loader" so I would stay away from Jerry Harrell. I do not find this statement by Davis and Vaughn to be a protected activity by Pittman. I also note that Pittman does not claim this statement to be an "adverse action" and, under the circumstances, I do not, in any event, find that it did in fact constitute an "adverse action."

The fifth purported safety complaint involved another incident with Jerry Harrell. Apparently sometime during March 2002, Pittman was attempting to use a grease gun mounted on Harrell's loader while Harrell was purportedly racing the motor. Pittman then proceeded to

cut the disconnect switch for the battery. According to Pittman, every time he would cut the disconnect, Harrell would get off the loader and reconnect it. Pittman complained about the incident to Buddy Davis the next day and complained that he could not get Harrell to do what he wanted him to do. Davis apparently told Pittman "either learn how to get along with him or leave" (Tr. 63). Even assuming, *arguendo*, that his report of this incident to Davis constituted a protected safety complaint it is apparent, based on Pittman's testimony alone, that Davis would not have been motivated to retaliate based on any safety related aspect of this incident. It is clear that, if anything, Davis was concerned about Pittman's continuing inability to get along with Harrell.

The sixth incident reported by Pittman allegedly occurred some four month's before his discharge, in November or December 2001. Pittman described the incident at hearings in the following colloquy:

A: . . . I was loading haul trucks for E.R. Lewis with the excavator.

Q: So you were operating a haul truck?

A: I was loading - - with the excavator, loading haul trucks. We had a contractor in there. E.R. Lewis does a lot of stripping for them. And it was a incident of where I was loading trucks and he was also loading haul trucks that haul the finished material to the plant.

Q: Who was this now?

A: Jerry Harrell.

Q: Harrell was also loading something?

A: He was loading with payload. Well, anyway, what I done was - - is I had the haul trucks coming in one way and him going out the other way.

So I told him, I said, "Jerry," I said, "you're going to have to fix another path," I said, "because there ain't no - - there's no way that I can send them trucks in there with me trying to load them the way the situation is. You're going to mess around and back into one of the haul trucks of E.R. Lewis's."

Well, instead of him stopping what he was doing and building a ramp the other way to load the trucks, he kept backing down in front of the haul trucks that were coming by where I was having to load them at.

So, anyway, when I done that, what he done is he just kept right on

to the point that I finally just threw dirt - - reached over there and moved the excavator, threw dirt and filled the hole up where that he couldn't load the haul trucks out of there, the trucks that were loading the finished product to carry to the plant.

Well, he goes and he calls Ricky, or he calls somebody, whoever he calls. I don't know where it was Buddy, Ricky or what it was. But, anyway, I was told by them that - -

- Q. Wait. Who's "them" again? He called somebody and somebody called you?
- A. They come out there.
- Q. Well, who's "they"?
- A. Buddy or Quinn Vaughn one come out this day.
- Q. Buddy and Quinn?
- A. Quinn or Buddy.
- Q. You're not sure who?
- A. No, Sir. I don't remember which one of them it was. But they come out there and they wanted to know the situation of why I couldn't load the haul trucks with him backing in and out of there, you know.

So, anyway, they told me the best thing to do was just move from where I was at and let him load the trucks where he was . And, I mean, it was holding up a lot - - it was costing a lot of time and everything else to do that, but I went on and done it.

And I had been told before, you know, that - - that particular day when they come out there, they told me, said, "Look" - - they had already told me about making trouble with Jerry was just going to cost me my job.

So, really, basically, what I'm saying is my hands were tied with anything I said or done because of the way Ricky was over him and - - and - -

- Q: What do you mean, again? Ricky over him, what do you mean?

A: Ricky was - - Ricky always looked out for Jerry because Jerry looked out for Ricky's - - Ricky's cousin, Ricky Teal. Ricky Gray being the man sitting over there and Jerry being the man sitting back yonder. (Indicating)

Q: So you think this was another reason why you were fired, that you couldn't get along with - -

A: Yes, sir. That I wouldn't get along with them. I couldn't get along with them, so there won't be no use in me working out there.

I do not find from this evidence that this disagreement between Pittman and Harrell or the reporting of this disagreement constituted a safety complaint. Again, even assuming, *arguendo*, that it was protected safety complaint there is no evidence to conclude that there was any retaliation for any safety related aspect of the incident. It is clear however that management continued to be concerned about Pittman's inability to get along with Harrell.

Finally, Pittman alleges, as his seventh protected activity, that he complained "so many times" to federal inspector Ron Lilly and to his own supervisors about Harrell working with "one eye." It is not clear exactly what concern Pittman had in this regard but the record shows that while Harold had one eye that was "weaker," he nevertheless was found qualified by the North Carolina motor vehicle authorities to obtain a license as a truck driver. There is no record evidence that Harrell's condition was unsafe or resulted in any citations. Under the circumstances it is not reasonably likely that Southern Management would have retaliated against Pittman for these complaints.

I also note that even assuming, *arguendo*, that Southern was motivated in part by any or all of the alleged protected activities in terminating Pittman, it is clear that Southern would have terminated Pittman in any event based on evidence that he was attempting to steal diesel fuel from the company. In this regard, Ricky Gray, Southern's regional manager testified that, based on past activity they had already suspected Pittman of taking diesel fuel off mine property. In this regard, in November 2001, division manager Quinn Vaughn told Pittman that three fuel containers found in Pittman's truck were not OSHA approved and warned him not to bring his own fuel cans onto mine property.

On April 23rd, 2002, Harrell reported to Gray that Pittman had received two five-gallon cans from Briggs (Briggs was a contractor on mine premises) and had filled one with diesel fuel and placed it in the back of his truck. Gray later saw Pittman with one five-gallon Briggs' can in his truck containing oil. Jerry Harrell later told Gray that Pittman had earlier had two five-gallon Briggs' cans in his pickup truck. Harrell also told Gray that he observed Pittman exiting in his truck from a side road. Gray later followed the truck tracks and foot prints from a point along that road and found a Briggs' five-gallon can containing diesel fuel hidden behind a tree. Harrell identified the can as one he had seen on the back of Pittman's truck earlier that day.

When confronted, Pittman told Gray that “I never had two five-gallon buckets.” At the same time he said he rinsed one out and could not explain the one he had filled with oil. The Briggs contractor also told Gray that he did indeed give Pittman two five-gallon cans and one was empty and one had oil in it. Gray also explained that there was no work-related reason for Pittman to be on the side road where the five-gallon can of diesel fuel was found behind the tree. Gray forwarded this information to Tom Morgan, Southern’s human resources manager, who then discussed the matter with Jay Lofton, Southern’s president. Based on that information, Lofton decided to terminate Pittman.

In *Bradley v. Belva Coal Company*, 4 FMSHRC 982, 993 (June 1982), the Commission discussed several indicia of legitimate of non-discriminatory reasons for an employer’s adverse action - - including the violation of personnel rules forbidding the conduct in question. The Commission has also stated that an affirmative defense should not be “examined superficially or preapproved automatically once offered,” *Harro v. Magma Copper Company*, 4 FMSHRC 1935, 1938 (November 1982), and has further enunciated that, in reviewing affirmative defenses, the judge must “determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed.” *Bradley*, 4 FMSHRC at 993. Southern in this case has established such an affirmative defense by abundant credible evidence. Clearly it was motivated to discharge Pittman by evidence of his participation in the attempted theft of Southern property.²

Under all the circumstances this Discrimination Complaint must be dismissed.

ORDER

Discrimination Proceeding Docket No. SE 2003-39-DM is hereby dismissed.

Gary Melick
Administrative Law Judge

² I find that there was a credible basis for Southern’s belief in Pittman’s attempted theft of diesel fuel in spite of the clearly inadequate comparison of footprints shown in the photographs (See Exhibits R-5E and R-5-6).

Distribution: (Certified Mail)

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