

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
(303) 844-3577/FAX (303) 844-5268

February 6, 1995

BLAKE SORENSEN, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. WEST 94-594-D
INTERMOUNTAIN MINE SERVICES, :
Respondent : Apex Mine

DECISION

Appearances: Blake Sorensen, Ferron, Utah, pro se;
Thomas J. Erbin, Esq., Prince, Yeates &
Geldzahler, Salt Lake City, Utah,
for Respondent.

Before: Judge Manning

This case is before me on a complaint of discrimination brought by Blake Sorensen against Intermountain Mine Services under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ? 815(c)(1988)("Mine Act"). For the reasons set forth below, I find that Mr. Sorensen did not establish that his discharge by Intermountain Mine Services ("Intermountain") was motivated by his protected activity. Accordingly, I find that Mr. Sorensen was not discriminated against by Intermountain in violation of the Mine Act.

Mr. Sorensen filed a discrimination complaint with the Department of Labor's Mine Safety and Health Administration ("MSHA") pursuant to section 105(c)(2) of the Mine Act, 30 U.S.C. ? 815(c)(2). MSHA concluded that the facts disclosed during its investigation did not constitute a violation of section 105(c). Mr. Sorensen then instituted this proceeding before the Commission pursuant to section 105(c)(3), 30 U.S.C. ? 815(c)(3). A hearing was held on January 11, 1995, in Salt Lake City, Utah. The parties elected not to file post-hearing briefs.

FINDINGS OF FACT

Mr. Sorensen was employed by Intermountain from June 21, 1993 through March 15, 1994. During most of this period he was a roof bolter at the Apex Mine, an underground coal mine. The mine is owned by Andalex Resources and operated by Intermountain. On the day shift on March 15, 1994, Mr. Sorensen and Scott Olsen,

another miner, installed roof bolts in an entry that had been mined with a continuous mining machine earlier that shift. After they finished roof bolting, they applied rock dust to the recently mined area using the rock duster on the roof bolting machine.

During the rock dusting operation, Mr. Sorensen slowly trammed the roof bolting machine back out of the entry and Mr. Olsen applied rock dust to the roof and ribs by holding the end of the hose attached to the duster. They were the only miners in the entry.

An MSHA inspector was at the mine on March 15, and Mr. Olsen was wearing a dust pump supplied by MSHA to sample for respirable dust. The shift began at 7:00 a.m. and was scheduled to end at 3:00 p.m. At about 10:00 a.m., Matt Brenemen, the miners' foreman, arrived in the entry along with the MSHA inspector. Olsen and Sorensen had bolted the area and were about finished rock dusting. They turned off the rock duster when Mr. Brenemen signaled with his cap light. Mr. Brenemen asked the crew, "What the fuck are you doing?" Mr. Sorensen replied that he was just doing his job, rock dusting like he always does. Mr. Brenemen told them that they could not rock dust while a respirable dust pump was on. Mr. Sorensen replied by saying "fuck you" to Mr. Brenemen. Mr. Brenemen then said, "if you say that to me again, you are out of here." Mr. Sorensen replied by saying "fuck you" again. Mr. Brenemen said "let's go" and told Mr. Sorensen to get his stuff. Mr. Olsen and the MSHA inspector were present during this conversation, which lasted no more than 20 seconds. (Tr. 23, 51).

A moment later, as they were preparing to leave the mine, Mr. Brenemen told Mr. Sorensen that he could not say that to him.

Mr. Sorensen replied by saying that if Brenemen could swear at him, then he could swear back at Brenemen. Mr. Brenemen escorted Mr. Sorensen out of the mine. While Mr. Sorensen was preparing to take a shower, Mr. Brenemen asked him what was bothering him.

Mr. Sorensen did not reply. After he showered and dressed, Mr. Sorensen filled out his time card and left the mine. It was Mr. Sorensen's understanding that he had been fired. He was not issued a discharge slip by Intermountain. These events are not disputed by the parties and are supported by the testimony of Sorensen and Olsen, and by Mr. Sorensen's statement to MSHA's special investigator, Ex. R-1. Mr. Brenemen is no longer employed by Intermountain and he did not testify at the hearing.

As a general matter, there is a lot of cursing at the Apex Mine. Mr. David Drips, president of Intermountain, testified that it is "a very crude society that takes place down there." (Tr. 58). He stated that the responsive "fuck you" is not "totally improper" and he has been responded to that way. Id. He went on to state, however, that when a supervisor tells an employee to stop cursing at him, he must do so or face disciplin-

ary action. (Tr. 55, 58). He testified that a miner cannot continue to curse his supervisor in front of other miners, after having been told to stop, because it will "erode his supervising capabilities." (Tr 55). He also testified that if a miner is told to leave the mine for continuing to curse at his supervisor after being warned not to do so, the miner would generally be given the opportunity to explain his behavior, to see "if we can understand what his problem was." (Tr. 55, 57, 59). In such a situation, the discipline, if any, is usually less than a discharge. Id. Mr. Olsen testified that he does not know of an instance in which a miner has continued to say "fuck you" to a supervisor after being warned not to do so. (Tr. 47). I credit the testimony of Drips and Olsen in this regard. There is no specific evidence as to whether any other miner has been discharged or otherwise disciplined by Intermountain for using similar language.

SUMMARY OF THE LAW

Section 105(c)(1) of the Mine Act protects miners from retaliation for exercising rights protected under the Mine Act. The purpose of the protection is to encourage miners "to play an active part in the enforcement of the Act" recognizing that, "if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation."

S. Rep. No. 181, 95th Cong., 1st Sess. 35 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 623 (1978).

A miner alleging discrimination under the Mine Act establishes a prima facie case by proving 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, 2799-2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 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 way motivated by the protected activity. Secretary on Behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). If an operator cannot rebut the prima facie case in this manner, it may nevertheless affirmatively defend by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. Haro v. Magma Copper Co., 1935, 1937 (November 1982).

Because direct evidence of actual discriminatory motive is rare, illegal motive may be established through circumstantial evidence or a reasonable inference of discriminatory intent.

Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510-11 (November 1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983). Examples of circumstantial evidence that tend to show discriminatory intent on the part of the mine operator include: (1) knowledge of the protected activity; (2) hostility or animus towards the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. Chacon, 3 FMSHRC at 2510.

DISCUSSION WITH FURTHER FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

There is no doubt that Mr. Sorensen had a statutory right to voice his concerns about the safety of his workplace without fear of retribution by management. It is evident that he believed that MSHA regulations required that the dust pump on Mr. Olsen be operating during the entire 8-hour shift, including when the crew was rock dusting. (Tr. 13, 30; Exs. R-1, R-2). It appears that he may have been concerned that if the crew obeyed Mr. Brenemen's order not to rock dust with the dust pump running, the health and safety of his work environment would have been adversely affected. His response to Mr. Brenemen's order could be construed as a safety complaint or a work refusal and, thus, protected activity.

Mr. Sorensen also presented evidence that Mr. Brenemen had asked him and other miners to work in an unsafe manner in the past. (Tr. 38, 61; Exs. R-1, C-2, C-3). He testified that he had confronted Brenemen when he was asked to do anything that was unsafe or illegal. Tr. 61. Such statements are protected activity. Based on the foregoing, and evaluating all of the evidence in a light most favorable to Complainant, I conclude that Mr. Sorensen engaged in protected activity.

I find, however, that the adverse action complained of was not motivated by Complainant's protected activity. I base this finding primarily on the evidence presented by Mr. Sorensen, but I also rely on credible evidence presented by Intermountain. First, Mr. Sorensen testified that he doubts that Mr. Brenemen terminated him because of his past safety complaints. (Tr. 39-40, 61-62). In addition, there is no other evidence in the record, including circumstantial evidence, linking Mr. Sorensen's past safety complaints with his termination. Although Mr. Sorensen stated, in documents submitted in this case, that Mr. Brenemen "did a lot of things that were against the law," he testified that he and Brenemen "got along all right." (Ex. R-2; Tr. 32-22). I cannot draw an inference from the evidence that Brenemen or Intermountain discharged Mr. Sorensen for his past safety complaints.

Second, I find that Mr. Sorensen has not established that he was terminated from his employment with Intermountain as a result of his protected activity on March 15. Mr. Sorensen contends that he was discharged because he questioned Mr. Brenemen's order to stop rock dusting while the dust pump was running. Mr. Sorensen testified, however, that he does not really know why he was terminated. (Tr. 14-15). He stated that he was just doing his job when Mr. Brenemen fired him "apparently" for rock dusting while Scott Olsen's dust pump was operating. Id. He testified that the crew always rock dusts an entry after bolting the roof and that he had followed that procedure while under Brenemen's supervision, including when a dust pump was operating. (Tr. 10, 12, 30). Mr. Olsen testified that he has rock dusted while wearing a dust pump and that, on at least one previous occasion, Brenemen has asked him to turn off the dust pump. (Tr. 47). Brenemen did not ask him to turn it off on March 15. Id.

It does not appear that any miner, including Mr. Sorensen, has ever been disciplined in the past for rock dusting an entry while a dust pump was operating. Because Brenemen did not testify at the hearing, it is not clear why he did not want the crew to continue rock dusting. I find, however, that the record does not contain evidence of past hostility towards or discipline to a miner who rock dusted while a dust pump was operating.

Mr. Sorensen testified that "more than likely" he would have kept on working without complaint if Brenemen had asked the crew, in a civil manner, to stop rock dusting the entry, or if Brenemen had similarly asked Mr. Olsen to turn off his dust pump. (Tr. 35). I find that Sorensen's rather aggressive and contemptuous response to Mr. Brenemen's statements was the direct result of the manner in which Brenemen addressed him. He believed that he had been cussed out by his supervisor and assumed that he had the right to curse him back. (Tr. 14, 23, 27; Ex. R-1). As he stated at the hearing, if "he cursed me, why can't I curse him." (Tr. 23).

I conclude that Mr. Sorensen continued to say "fuck you" to Mr. Brenemen because of Brenemen's language, rather than because Brenemen was telling him to turn off the rock duster. In turn, I find that Brenemen's response and subsequent actions were caused by Mr. Sorensen's contemptuous "fuck you" reply and his refusal to talk about the matter further before he left the mine. The evidence reveals that he might not have been discharged if he had talked about the matter with his supervisor before leaving the mine.

I also find that the evidence does not support an inference that Brenemen terminated Mr. Sorensen because he engaged in protected activity. In reaching this conclusion, I have considered whether Intermountain used Mr. Sorensen's contemptuous response

to Brenemen as a pretext for terminating him in order to mask the real reason for his termination: his protected activity. A mine operator cannot hide behind a miner's abusive language to shield an otherwise unlawful discharge. In this case, however, I find that Mr. Sorensen would have been discharged for his contemptuous response to Mr. Brenemen alone.

In support of his contention that he was fired for making a safety complaint, Mr. Sorensen introduced a copy of an unemployment compensation form entitled "Employer Notice of Claim Filed". (Ex. C-1). The form, which is addressed to Intermountain, advised Intermountain that Mr. Sorensen had applied for unemployment compensation and that he reported the reason for his termination as "[f]ired for obscene language." Id. In the part of the form to be filled out by the employer, Intermountain's Office Manager, John Drips, wrote that Mr. Sorensen was discharged for "insubordination in front of crew and inspector" and "failure to follow directions." Id. The Office Manager also stated: "I do not believe Blake was fired for obscene language..." Id. Mr. Sorensen relies on this language to support his claim that he was actually fired for raising a safety issue, rather than for cursing at his supervisor.

I do not believe that the form supports Mr. Sorensen's position. It is clear from the record that he was not discharged for using profanity, cursing is common at the mine. Rather, a preponderance of the evidence establishes that he was discharged for continuing to say "fuck you" to his supervisor in front of Mr. Olsen and an MSHA inspector, after being warned to stop. As David Drips testified, contemptuous responses like those of Mr. Sorensen will tend to "erode" the ability of a supervisor to manage his crew. (Tr. 55; Ex. C-1).

I do not have the authority to determine whether Mr. Sorensen's discharge was fair or reasonable. The "Commission does not sit as a super grievance board to judge the industrial merits, fairness, reasonableness, or wisdom of an operator's employment policies except insofar as those policies may conflict with rights granted under section 105(c) of the Mine Act." Delisio v. Mathies Coal Co., 12 FMSHRC 2535, 2544 (December 1990)(citations omitted). I conclude that Mr. Sorensen's discharge did not violate section 105(c) of the Mine Act.

ORDER

It is **ORDERED** that the complaint filed by Blake Sorensen against Intermountain Mining Services for violation of section 105(c) of the Mine Act is **DISMISSED**.

Richard W. Manning
Administrative Law Judge

Distribution:

Mr. Blake Sorensen, P. O. Box 54, Ferron, UT 84523
(Certified Mail)

Thomas J. Erbin, Esq., Prince, Yeates & Geldzahler, City Center
I, Suite 900, 175 East Fourth South, Salt Lake City, UT 84111
(Certified Mail)

RWM