FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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October 31, 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of KEITH D. JAMES, Petitioner	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEST 95-226-D
v.	:	Cordero Mine
	:	48-00992
CORDERO MINING COMPANY, Respondent	:	

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Charles W. Newcom, Esq., Denver, Colorado, for Respondent.

Before: Judge Cetti

This case is before me upon the complaint by the Secretary of Labor on behalf of Keith D. James pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801, et seq., the "Act".

I

The Secretary alleges that Cordero Mining Company (Cordero) discharged the Complainant on October 6, 1994, in violation of section 105(c)(1) of the Act [1] because of his protected activi-

[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, represen-tative 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 this Act."

ties. The alleged protected activity includes safety complaints at several company meetings concerning dust on the roadway, complaints to MSHA which resulted in inspections (but no citations), distribution of Miners' Rights Handbooks, and use of the communication system in his assigned company vehicle to make other employees aware of safety hazards.

Cordero, while not disputing that Mr. James may have engaged in some protected activity, asserts Mr. James was properly disciplined for his own misconduct and ultimately discharged after exhausting the formal steps of the progressive disciplinary procedure in place at the Cordero Mine. Cordero further asserts there is a total lack of evidence of discriminatory intent against Mr. James or knowledge of asserted safety complaints by Mr. James on the part of those who made the decision to discharge him after Complainant had exhausted the formal steps of the company's formal steps of progressive disciplinary procedure. The final decision was made by the Production Supervisor Rick Woodard, Production Manager Dean Dvorak, Human Resource Manager Chad Anderson, and the company General Manager Dave Salisbury.

II

STIPULATIONS

A. Cordero Mining Company is engaged in mining and selling of coal in the United States and its mining operations affect interstate commerce.

B. Cordero Mining Company is the owner and operator of Cordero Mine, MSHA I.D. No. 48-00992.

C. Cordero Mining Company is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C.' 801 et seq. ("the Act").

D. The Administrative Law Judge has jurisdiction in this matter.

E. Keith D. James was employed as an equipment operator for the Cordero Mine in Gillette, Wyoming, from January 7, 1985, until he was terminated on October 6, 1994.

F. At the time of his termination, Keith James was earning $19.60 per hour and was working 40 hours each week plus an average of 6 hours of overtime.

G. Mr. James seeks back pay from the time of his discharge on October 6, 1994, until the present, less credit for payment received pursuant to agreed economic reinstatement beginning in February 1995.

H. The exhibits to be offered by Respondent and the Secretary are stipulated to be authentic but no stipulation is made as to their relevance or the truth of the matters asserted therein.

I. There is no history of discrimination complaints at this mine.

III

It is clear from the stipulations, as well as from the evidence, that Cordero is an operator as defined by section 3(d) of the Act and that Keith James, at all relevant times, was employed by Cordero as an equipment operator and was, therefore, a miner as defined in section 3(g) of the Act.

The evidence presented established that Cordero Mine, at all relevant times, had in place a progressive employee disciplinary policy. That policy provides for a four-step disciplinary procedure. The steps are: (1) verbal warning, documented in writing; (2) documented written warning; (3) written, formal probation notice stating correction measures; and (4) termination. (Tr. 40; Resp. Ex. 1).

The progressive four-step disciplinary procedure applies only to regular employees. It does not apply to temporary employees. Under the mine's established disciplinary policy, infraction of work rules by a temporary employee results in either counseling or termination. The temporary employees are not given the progressive four-step disciplinary procedure.

Mr. James was not a temporary employee. He was a regular employee and thus subject to the four-step disciplinary procedure as were all regular employees. The evidence presented established that Mr. James was properly disciplined and finally discharged when he exhausted the mine's progressive four-step disciplinary procedure.

In addition, the disciplinary policy provides that a serious violation of work rules such as "safety violations endan-gering others" may warrant immediate suspension or termination without proceeding through the positive four-step disciplinary procedure.

Step 1 discipline resulted from James's failure to come to work for a scheduled overtime shift. This was a violation of established company rules.

Step 2 discipline was for an accident early in February 1994 involving a mobile shovel. In this accident, James was admittedly at fault. James asked a shovel operator to swing out before making sure that he (James) was clear of the shovel. James's dozer was struck by the swinging counterweight of the shovel.

A second step 2 discipline was given to James for an accident resulting in property damage issued for improper operation of a dozer. James was found to be at fault.

A third step discipline was given to Mr. James in May 1994 when James backed the dozer he was operating into another dozer, striking it near the middle, below the operator's compartment and causing damage which included breaking off the fuel tank nozzle and causing a spillage of fuel.

This incident occurred only four days after James was involved in another property damage incident for which he received no discipline.

Mr. James's fourth step discipline and termination occurred in October 1994. James was operating his dozer to help pull out a haulage truck that had become stuck in mud in a pit. Mr. James failed to hold tight the cable that was tied from the back of the dozer to the front of the stuck truck due to his failure to keep his dozer in gear and his foot on the brake. The tracks of the dozer rolled backwards which resulted in the front wheels of the truck to raise up from the ground. The fact that the tracks of the dozer rolled backwards showed that the dozer was in neutral and the operator's foot was not on the brake.

Following this incident there was a fact-finding meeting to review the accident; Messrs. Chad Anderson, Rick Woodard and Dean Dvorak participated. Mr. James testified that they told him that he had allowed the dozer he was operating to "roll backward which, in turn, allowed the haulage truck's wheels to come off the ground which could have caused a serious accident." (Tr. 58).

It is not disputed that James engaged in protected activity. James testified that during the time period from 1990 to 1994 he made safety-related complaints over the two-way radio in the truck and other equipment he operated. He made complaints about "different items, like road widths, road conditions, too much

dust, high wall conditions and equipment failures." When asked how often he voiced these concerns, he testified as follows:

A. It would probably happen three to five times a month.

Q. And were you satisfied with the results after you made a complaint?

A. In most cases.

James also testified that during the time period 1990 to 1994 he made three phone calls to the Denver number of MSHA but never found out what happened as a result of those complaints. (Tr. 25, 26).

Petitioner presented evidence purporting to show disparity of treatment between Mr. James and other employees. The evidence presented is not persuasive. Petitioner's Exhibit 2 does not reflect which employees were temporary and, therefore, not subject to the formal four-step disciplinary procedure and which were regular employees who were subject to the progressive four-step disciplinary procedure. (Tr. 168-169). It satisfactorily appears from the record that the accidents and incidents for which Mr. James received discipline were only those incidents where the employer found Mr. James was at fault. Neither Mr. James nor any other regular employee was disciplined for accidents that were not the employee's fault.

APPLICABLE LAW AND ANALYSIS

Section 105(c) of the Act was enacted to ensure that miners will play an active role in the enforcement of the Act by protecting them against discrimination for exercising any of their rights under the Act. A key protection for this purpose is the prevention of retaliation against a miner who brings to an operator's attention hazardous conditions or practices in the workplace or engages in other protected activity.

The basic principles governing analysis of discrimination cases under the Mine Act are well settled. In order to establish a prima facie case of discrimination under section 105(c) of the Act, a complaining miner bears the burden of production and proof in establishing that he engaged in protected activity and that the adverse action complained of was motivated in any part by that protected activity. Secretary on behalf of Pasula v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 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 protected activity. If an operator cannot rebut the prima facie case in this manner, it may nevertheless defend affirmatively by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action in any event on the basis of the miner's unprotected activity alone. Pasula, supra; Robinette, supra. See also Eastern Assoc. Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987); Donovan v. Stafford Construction Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's Pasula-Robinette test). Cf. NLRB v. Transportation Management Corp., 462 U.S. 393, 397-413 (1983) (approving nearly identical test under National Labor Relations Act).

It has been stated many times that direct evidence of actual discriminatory motive is rare. Short of such evidence, illegal motive may be established if the facts support a reasonable inference of discriminatory intent. Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510-2511 (November 1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983); Sammons v. Mine Services Co., 6 FMSHRC 1391, 1398-1399 (June 1984).

Circumstantial indicia of discriminatory intent by a mine operator against a complaining miner include the following: knowledge by the operator of the miner's protected activities; hostility towards the miner because of his protected activity; coincidence in time between the protected activity and the adverse action complained of; and disparate treatment of the complaining miner by the operator. Chacon, supra at 2510. See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983).

In Chacon the Commission also explained the proper criteria for analyzing an operator's business justifications for an adverse action:

> Commission judges must often analyze the merits of an operator's alleged business justification for the challenged adverse action. In appropriate cases, they may conclude that the justification is so weak, so implausible, or so out of line with normal practice that it was a mere pretext seized upon to cloak discriminatory motive. But such inquiries must be restrained.
>
> The Commission and its judges have neither the statutory charter nor the specialized

> expertise to sit as a super grievance or arbitration board meting out industrial equity. Cf. Youngstown Mines Corp., 1 FMSHRC 990, 994 (1979). Once it appears that a proffered business justification is not plainly incredible or implausible, a finding of pretext is inappropriate. We and our judges should not substitute for the operator's business judgment our views of "good" business practice or on whether a particular adverse action was "just" or "wise." Cf. NLRB v. Eastern Smelting & Refining Corp., 598 F.2d 666, (1st Cir. 1979). The proper focus, pursuant to Pasula, is on whether a credible justification figured into motivation and, if it did, whether it would have led to the adverse action apart from the miner's protected activities. If a proffered justification survives pretext analysis ..., then a limited examination of its substantiality becomes appropriate. The question, however, is not whether such a justification comports with judge's or our sense of fairness or enlightened business practices. Rather, the narrow statutory question is whether the reason was enough to have legitimately moved that the operator to have disciplined the miner. Cf. R-W Service System Inc. 243 NLRB 1202, 1203-04 (1979) (articulating an analogous standard).

DISCUSSION AND CONCLUSION

The issue in this case is not whether the adverse action was just or wise or comported with my sense of fairness or enlightened business practice.

The record clearly demonstrates that the reasons given by the employer for the adverse action were not "plainly incredible or implausible." I conclude and find that the stated reasons for the adverse action taken by Cordero were not pretextual.

While it is undisputed that James engaged in protected activity, I find that Cordero in terminating James's employment was motivated by James's unprotected activity and would have taken the adverse action in any event on the basis of James's unprotected activity alone. I therefore find that discharge of James was not in violation of section 105(c) of the Act.

ORDER

This case is **DISMISSED**.

August F. Cetti
Administrative Law Judge

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