

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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November 30, 1995

DEBORA BOYCE, : DISCRIMINATION PROCEEDINGS
Complainant :
v. : Docket No. WEVA 95-126-D
: MORG CD 95-01
CONSOLIDATION COAL COMPANY AND :
SUPERIOR SECURITY, INC., : Robinson Run #95 Mine
Respondents :
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Docket No. WEVA 95-127-D
MORG CD 95-01
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VILETTA M. MOORE, : Robinson Run #95 Mine
Complainant :
v. :
:
:
CONSOLIDATION COAL COMPANY AND :
SUPERIOR SECURITY, INC., :
Respondents :

DECISION

Appearances: Debora Boyce and Viletta M. Moore, Mannington,
West Virginia, *pro se*;
Elizabeth Chamberlin, Esq., Pittsburgh,
Pennsylvania for Consolidation Coal Company;
James B. Zimarowski, Esq., Morgantown,
West Virginia for Superior Security.

Before: Judge Melick

These cases are before me upon the complaints by Debora Boyce and Viletta M. Moore under Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 *et seq.*, the Act,¹ alleging discrimination in violation of Section 105(c)(1) of the Act.¹

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
Footnote 1 Continued

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 this Act.

In complaints of discrimination filed with the Department of Labor's Mine Safety and Health Administration (MSHA) on November 8, 1994, Boyce and Moore both allege in relevant part as follows:

During the past year, I have worked as a security guard at various facilities owned by Consolidation Coal Company. During that time I was exposed to various hazards which I believe were life threatening. At various times I complained about the hazards I encountered to my supervisor, Tom Davis. Because of my complaints, my time was reduced and what work I did receive was only at remote locations with no communications or sanitary facilities provided. When I questioned Tom Davis in regard to the lack of sanitary facilities at the job site, I was told that I could go to the woods, that it was my problem.

Brenda Fluharty is in charge of scheduling personnel for work at the various sites. After I made complaints regarding my health and safety to her (particularly regarding the lack of communications at remote locations), Mrs. Fluharty began reducing my work time. As the result, my time was diminished approximately 60% from what it was prior to my making health and safety related complaints.

Gary Fluharty, Superintendent for Consolidation Coal Company, who is the husband of Brenda Fluharty, was aware of the safety hazards at the various sites. I believe that Brenda informed Gary and visa [sic] versa of the hazards that were reported in our complaints.

The Commission has long held that a miner seeking to establish a *prima facie* case of discrimination under Section 105(c) of the Mine Act bears the burden of persuasion that he engaged in protected activity and that he suffered adverse action which was motivated in any part by that activity.

Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (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 (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 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.)

Respondent Superior Security, Inc. is in the business of providing security guards on a contractual basis. During the period of time at issue it was under contract to provide security guards at various Consolidation Coal Company (Consol) mines and, specifically, at remote pump sites to protect equipment while not in use. According to Thomas Davis, Secretary/Treasurer of Superior Security, Inc. they utilize both full-time and part-time or Aon-call@ guards. The complainants were hired as part-time Aon-call@ guards who were called for work only periodically and for short term assignments, usually for only one or two days but occasionally for up to two weeks when providing security at various remote pump sites. Ordinarily Superior Security received calls from Consol each day they determined that security personnel were needed at various pump sites. These sites are generally at more remote and less desirable locations than where the permanent full-time staff work. According to Davis Superior Security maintains a seniority list of part-time employees and when a request for a part-time security guard is made by Consol they proceed down the list in order of seniority, passing on those who cannot be reached or who are unavailable.

In their complaints in these cases Boyce and Moore allege that they suffered discrimination in the year preceding the filing of their complaint with MSHA on November 8, 1994, in that after they made their complaints of A life threatening@ hazards to Tom Davis, presumably those complaints associated with their being required to work as security guards at A very remote locations with no communication or sanitary facilities@, their work time was reduced and the work that they did receive was only at A very remote locations with no communications or sanitary facilities@. They also complain that when their supervisor at Superior Security, Tom Davis, was questioned in regard to the lack of sanitary facilities at the job sites, they suffered discrimination when he purportedly told them that they A could go to the woods@. They maintain that the Consolidation Coal Company (Consol) was also responsible for the discrimination they suffered in that Gary Fluharty, alleged to be a Consol superintendent, was the husband of Brenda Fluharty who was an

employee of Superior Security and who they claim informed her husband of their complaints.

Even assuming, *arguendo*, however, that the complainants had engaged in protected activity as alleged, they have failed to sustain their burden of proving that they suffered adverse action as a result of such activity. The undisputed evidence shows that both Moore and Boyce had always, from the beginning of their employment as part-time non-call security guards for Superior Security, been assigned to remote worksites primarily to guard pump equipment at various Consol mine properties. The communication facilities at some of these locations had always been limited to the voluntary use of walkie talkies and some apparently never had on-site bathrooms.² There is moreover no evidence that the conditions at these worksites were worse after the alleged health and safety complaints. Moreover, there is no record evidence to indicate that the complainants were assigned more often to these remote worksites after their alleged complaints.

In addition, while Boyce and Moore further allege that they suffered diminished work time approximately 60% from what it was prior to . . . making health and safety related complaints, Moore conceded at hearing that, upon its investigation, MSHA, in fact, found no significant reduction in their work time. Moore further acknowledged at hearing that she had no evidence to dispute MSHA's finding in this regard. Indeed neither complainant produced any credible evidence at hearing to show that their work time had, in fact, been reduced following their purported safety and health complaints.

Under the circumstances, wherein the complainants have failed to sustain their burden of proving that they suffered any adverse action, there is no need to pursue any further legal analysis. Those complaints must accordingly be dismissed.

ORDER

The complaints of discrimination by Debora Boyce and

² It is not disputed that Moore and Boyce had access to vehicles which they were permitted to use to transport themselves to sanitary facilities available near the remote locations.

Viletta M. Moore in the captioned proceedings are hereby dismissed as against both Consolidation Coal Company and Superior Security, Inc.

Gary Melick
Administrative Law Judge
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