

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
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January 29, 1998

TOM SPERRY,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEST 97-248-DM
v.	:	
	:	Whitehill Sand & Gravel Pit
GRANITE CONSTRUCTION,	:	
Respondent	:	Mine I.D. 42-00381

DECISION

Appearances: Tom Sperry, pro se, Magna, Utah, for Complainant;
Roy Vlaovich, Jr., Gibbons & Reed Company, Salt Lake City, Utah,
for Respondent.

Before: Judge Manning

This case is before me on a complaint of discrimination brought by Mr. Tom Sperry against Granite Construction under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 815(c)(3) (the AMine Act@). The complaint alleges that Granite Construction terminated Mr. Sperry from his employment in violation of section 105(c). A hearing in this case was held in Salt Lake City, Utah. For the reasons set forth below, the complaint of discrimination is dismissed.

I. FINDINGS OF FACT

Granite Construction purchased Gibbons and Reed Company about three years ago. Granite Construction generally does business as Gibbons and Reed in the Salt Lake City area. Granite Construction operates a number of facilities in Utah, including the Whitehill Sand and Gravel Pit, on a seasonal basis. Mr. Sperry first worked for Gibbons and Reed in the summer of 1992. He worked for either Gibbons and Reed or Granite Construction every working season between 1992 and 1997. Mr. Sperry started working at the Whitehill Pit on May 6, 1997, as a scraper operator. When he arrived at the pit, he believed that there was no drinking water at the mine. He asked his foreman, Bruce Noel, if potable water could be provided at the pit. Later in his shift, he again asked Mr. Noel about drinking water. Sperry testified that Noel told him that pit superintendent Dan Bunnell was not sure if water could be provided. (Tr. 9). That evening,

Mr. Sperry contacted his union business agent about the problem. Mr. Sperry stated that Granite Construction provided water at the pit the next day.

Mr. Sperry testified that A[f]rom that point on, I felt pressures, pressures from the job and from outside pressures, to comply with the mine owner in the demands to forfeit my rights as a miner and a United States citizen.@ (Tr. 9-10). He stated that he Awas under constant pressure to not drink the water that was provided.@ (Tr. 10). When asked to describe these pressures, Mr. Sperry responded that these pressures were the result of Aoutside influence@ and stated that they were Aprobably government controlled pressures.@ (Tr. 12). He also felt that the company should have provided water at the job site without being asked. He believes that most miners brought their own water in plastic bottles.

Mr. Sperry also testified that in 1993 he worked at another Gibbons and Reed project where water and toilet facilities were not initially provided. (Tr. 17-18). He also stated that the service brakes on his scraper were not always properly adjusted by the maintenance personnel. He stated that in 1995, at another Gibbons and Reed project, the operator of another piece of equipment rammed his scraper and that management did nothing to protect him. (Tr. 19-20). Finally, he testified that he had to request drinking water at a project in 1996. (Tr. 21).

Mr. Sperry testified that on May 15, 1997, he was given two paychecks. (Tr. 15). When he asked Mr. Noel why he received two checks, Noel replied that the company was letting him go because it was not satisfied with his work. (Tr. 16). He then filed the present discrimination complaint.

Mr. Bunnell testified that Granite Construction provided drinking water at the Whitehill Pit prior to the date Mr. Sperry started working there. (Tr. 42-43). He stated that the mine office has a water faucet and equipment operators typically fill a half-gallon plastic container of water at the office upon their arrival at the pit and carry the water in the cab of their equipment. (Tr. 43, 50-51). The cabs are air-conditioned. (Ex. C-4). The mine office was about 2,000 feet from the area of the pit where the scrapers generally operated. (Tr. 47). Mr. Bunnell testified that after Mr. Sperry complained about the lack of water, potable water was provided in a Aten-gallon igloo type cooler@ in an area that was closer to the scraper operations. (Tr. 46-47). He testified that there was a one-day delay in providing this cooler after Sperry's request because the cooler needed to be sanitized and cups and other supplies needed to be purchased.

Bunnell testified that the work being performed at the Whitehill Pit required more highly skilled scraper operators than most of the company's other projects. Each scraper operator was required to work in conjunction with the other scraper operators to keep the dump area safe and the stockpiles in proper order. (Tr. 47; Ex. C-4). He stated that he decided to terminate Mr. Sperry because his skill level was not high enough for this particular job. (Tr. 45, 57-58; Ex. R-2). He testified that he would hire him again at other projects, but not at the Whitehill Pit. (Tr. 45). Finally, Mr. Bunnell stated that Mr. Noel advised Mr. Sperry on prior occasions that his operating skills were not sufficient for the job. (Tr. 48). Mr. Sperry denied that he was given any prior warnings.

II. DISCUSSION WITH FURTHER FINDINGS AND CONCLUSIONS OF LAW

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act. The purpose of the protection is to encourage miners to play an active part in the enforcement of the [Mine] 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., 2nd 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 of prohibited discrimination by proving that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-800 (October 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d. Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 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 the protected activity. *Pasula*, 2 FMSHRC at 2799-800. If the mine operator cannot rebut the *prima facie* case in this manner, it nevertheless may defend by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Id.*; *Robinette*, 3 FMSHRC at 817-18; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

A. Did Tom Sperry Engage in Protected Activity?

Sand and gravel operators are required to provide potable water at all active working areas. 30 C.F.R. § 56.20002. The failure of a mine operator to provide potable water can affect the health of miners, particularly in hot weather. Miners can become seriously dehydrated and suffer other health effects. For purposes of this decision, I hold that Mr. Sperry's complaint about the lack of potable water was protected activity under section 105(c) of the Mine Act.

B. Was Mr. Sperry's Termination Motivated in any Part by the Protected Activity?

In determining whether a mine operator's adverse action was motivated by the miner's protected activity, the judge must bear in mind that direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect. *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (November 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir 1983). Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence. *Id.* (citation omitted). Based on the evidence presented at the hearing, I find that Tom Sperry's termination was not motivated in any part by his protected activity. In making this finding I credit the testimony of Dan Bunnell, the pit superintendent.

A mine operator's knowledge of the protected activity is one factor to evaluate when determining whether an adverse action was motivated by protected activity. Mr. Bunnell had knowledge of Mr. Sperry's request for water. I credit Bunnell's testimony that potable water was available at the pit in the office. In addition, Granite Construction provided water closer to Sperry's work site the day after Sperry made his complaint.

Another factor is the mine operator's hostility towards the protected activity, often referred to as *animus*. There has been no showing that Granite Construction or Bunnell exhibited any hostility towards Sperry's protected activity. Mr. Sperry referred to pressures he felt after he made his complaint, but he was not able to articulate any specific examples. He attributed these pressures to outside influences and stated that such pressures were probably government controlled. Although he testified that he was pressured not to drink the water that was provided, he could not describe how this pressure manifested itself.

I find and conclude that Mr. Sperry's request for drinking water was not a factor in Granite Construction's decision to terminate his employment with the company. I credit the testimony of Mr. Bunnell that the company was not satisfied with his performance at the Whitehill Pit. In addition, the company did not take any adverse action against him when he complained about the lack of water at other Gibbons and Reed operations. There has been no showing that the adverse action was motivated in any part by the protected activity. Finally, I find that even if Sperry's complaint about the lack of potable water was taken into consideration when Respondent decided to terminate him, Respondent would have terminated him for his unsatisfactory work performance alone. That is, Granite Construction would have terminated Mr. Sperry for his work performance even if he had not complained about the lack of water.

III. ORDER

For the reasons set forth above, the complaint filed by Tom Sperry against Granite Construction under section 105(c) of the Mine Act in this case is **DISMISSED**.

Richard W. Manning
Administrative Law Judge

Distribution:

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