

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 13, 2001

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, on behalf of ANDREW J. GARCIA, Complainant	:	DISCRIMINATION PROCEEDING
	:	
	:	Docket No. WEST 2001-14-DM
	:	RM MD 00-12
	:	
v.	:	
	:	
COLORADO LAVA, INC., Respondent.	:	Antonito Plant
	:	Mine ID 05-04232

DECISION

Before: Judge Weisberger

Appearances: Mark R. Malecki, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Complainant; Mark Nelson, Esq., Harris, Karstaedt, Jamison & Powers, Englewood, Colorado, for the Respondent.

This case is before me based upon a Complainant of Discrimination filed by the Secretary of Labor (Secretary) on behalf of Andrew J. Garcia against Colorado Lava, Incorporated (Colorado Lava) alleging that the latter discriminated against Garcia in violation of Section 105 of the Federal Mine Safety and Health Act of 1977 ("the Act"). Pursuant to notice a hearing was held on December 19 and 20, 2000, in Taos, New Mexico.

Summary of the Testimony

I.

Andrew James Garcia, testified that he has operated various heavy mobile equipment, and has twenty-five years experience operating front-end loaders. According to Garcia, he started to work for Mountain West Colorado Aggregates (MWCA) in January 1997 operating a front-end loader. He also received training on a CAT D-8 loader. In June 1997 he was transferred to the truck division where he drove a truck from the mine site to the bagging facility. He also operated a front-end loader up to seven times a week on occasion. In January 2000, Garcia's job was eliminated, and his bid to work at the Antonito facility at the railroad yard loading cars was accepted. At the railroad yard Garcia worked with Robert Duran operating a loader loading railroad cars, and trucks. Garcia also greased the conveyor, cleaned railroad cars, and set them in place to be loaded.

In October 1999 while working at the Mesita Hill facility, Garcia attempted to set the

parking brake on a loader, and the brake did not work. He then tagged it out. The following day Garcia filled out a work order advising Earl Gonzalez, the supervisor, that the loader was tagged out. According to Garcia, on the following day he advised David McCarroll that the loader had been tagged out because of problems with the parking brake. McCarroll told him “you guys don’t need a park brake to run it. Go ahead.” (Tr. 31-32). (Sic.) Garcia indicated he continued to haul material that day. The following day an MSHA inspector issued a citation for the condition of the loader’s parking brake, and discussed the citation and a 110(c) violation with McCarroll.

According to Garcia, approximately a week later, in the lunch room, when he and McCarroll were alone, the latter, who was mad said, in a “high-toned voice”, (Tr. 35), “[w]hat’s this I hear you got an MSHA complaint of some sort on me.” (Tr. 34). Garcia indicated that he denied having made a complaint because he was afraid of what McCarroll would do. According to Garcia, McCarroll then said “you know all about it ... [b]ull it will all come out in the wash” (Tr. 34). Garcia indicated that between this incident and June 5, 2000, McCarroll refused to talk to him, did not engage him in social conversation, and no longer joked with him.

According to Garcia, in March 2000 he had been ordered by McCarroll to load some marble chips with the front-end loader at the railroad yard, but was unable to do this because the material was frozen. Instead, Garcia commenced to pile stock. Shortly thereafter McCarroll approached him, hollering in a loud tone, and putting his face in Garcia’s face and said as follows “you are nothing but a f---ing scum. What do you want? A free ride from the company?”. (Tr. 38). When Garcia attempted to explain what happened, McCarroll did not listen and eventually drove away.

According to Garcia, on or about June 1, 2000, he was informed that MWCA had been sold, and that he would be interviewed for a position by the new owner, Colorado Lava, an unrelated corporation. Garcia testified that on June 5 he was interviewed by Terry Kissner, who asked him about the various jobs that he had performed, and whether he had any disputes with anyone in the plant. Garcia testified that he told Kissner that he and McCarroll did not get along. Garcia indicated that at the interview he was not told that the position that he was applying for, i.e., to remain at his present work site, would be eliminated. Garcia testified that at the interview on June 5, he did not apply for any specific job, and that no particular job was discussed. He also brought an application to the interview but did not turn it in. Garcia testified that he did not know how the application was handled at the interview but that at the end of the interview he (Garcia) retained it.

Garcia indicated that he would have considered a different position, and based upon his experience he could have performed the following positions: heavy equipment operator, forklift operator, mechanic, and welder. He also indicated that in June 2000 he was being trained as a bagger, and three or four days he had filled in as a bagger.

On June 5, at approximately 6:30 p.m. Kissner called Garcia’s home and informed his wife that he was not hired by Colorado Lava.

The following day Garcia applied for and obtained a position with MWCA as a loader operator, and as of the date of the hearing he still works in that position. A few months after he was rehired by MWCA he was promoted to a leadman. He indicated that in order to arrive on time, he has to leave his house early in the morning, and does not get to see his children when they go to school. Also, he testified that the pay scale for his present position is less than the pay scale for a loader at the railroad yard, and there are fewer incentives. He also indicated that he had been close to the men who had worked at his former site.

Ronald Bjustrom, the eighty percent owner of Colorado Lava, learnt of the opportunity to purchase MWCA sometime in the spring 2000. He visited the subject site on four occasions prior to the time Colorado Lava purchased the site from MWCA. Bjustrom indicated that prior to June 5, based on his observations and his review of information regarding MWCA's productivity at the railroad site, he had concluded to eliminate one position at the railroad site in order to reduce the lost of unneeded labor.

On one of Bjustrom's visits at the site prior to its purchase by Colorado Lava, he asked McCarroll's opinion as to what positions could be immediately eliminated. In response, the latter indicated that a mechanic's position, and the rail loader helper position could be eliminated. Bjustrom also asked McCarroll to tell him which of Colorado Lava's employees were weak, and the latter mentioned Garcia at the railroad site and another four miners. McCarroll told Bjustrom that Garcia was not a good operator, and had filed grievances.¹ Bjustrom did not make any independent investigation to determine whether what McCarroll had told him was true or not. Bjustrom indicated that of the five employees whom McCarroll had described as weak only one was subsequently laid off by Colorado Lava. Bjustrom indicated that the conversation he had with McCarroll regarding weaknesses of employees did not have any bearing on the decision on June 5 regarding which employees of MWCA would be hired by Colorado Lava.

According to Bjustrom, although McCarroll was going to be responsible for supervising the individuals to be selected by Colorado Lava to remain on the site, he did not ask him to select these employees as he (Bjustrom) did not know him (McCarroll). Instead, Bjustrom asked Terry Kissner, who is not an employee of Colorado Lava but who had done all the hiring for Bjustrom for eight years, to make the selections. Bjustrom indicated that Kissner made the final decision regarding the selections, and he (Bjustrom) took no part in that decision.

According to Bjustrom, sometime prior to June 5, his banker, who had attended a seminar, gave him a training booklet on interviewing prospective employees. Bjustrom went over the questions in this booklet with Kissner, but otherwise did not give Kissner any direction regarding the interviews. Specifically, Bjustrom indicated that he did not give Kissner any

¹Bjustrom acknowledged that he had told an MSHA investigator that McCarroll had told him that Garcia was a trouble maker.

instructions as to what to look for, or how to rank MWCA employees at the interview.² Bjustrom indicated that he had not met Garcia prior to the date of the hearing.

Kissner testified that one or two days prior to June 5, Bjustrom told him to eliminate one rail loader and one mechanic, but that it was his (Kissner's) job to decide, specifically who would be hired by Colorado Lava. He did not have any knowledge of the applicants before he met with them on June 5. Kissner said that the only time that he talked to McCarroll had to do with ordering supplies. He stated that the questions contained in the booklet Bjustrom provided him were the same type that he normally asks.

On the morning of June 5, Kissner received a list of employees from McCarroll, but he did not consult with McCarroll before the interviews regarding the interviewees. Nor did he consult with McCarroll after the interviews. Nor did McCarroll provide him with any information regarding the interviewees. At the interview, he asked the same questions of everybody, and used the same sheet of questions, but asked the mechanics additional questions. He indicated that the interviews were a formality for most people, unless they said they did not want a job change, or did not like someone.

Kissner indicated that he wanted the best qualified employees hired for the front-end loader and mechanic positions. He reviewed all applications for the front loader and mechanic positions prior to making the decision regarding whom to hire. Kissner also looked at information regarding the applicants' work history, and how long they had been with MWCA.

According to Kissner, the first time he had heard of Garcia was the day of the interview. He asked both Duran and Garcia about their willingness to take another job, but Garcia did not say he would not accept another job. Kissner did make any determination if Garcia was qualified to work at another position. Nor did he view Garcia's personnel file, letters of recommendation, past safety record, or production levels. Kissner did not know of Garcia's work history at other sites, nor did he provide Garcia an opportunity to compare himself with Duran.

Kissner indicated that his decision to hire Duran, and not Garcia, was made after their interviews, about 3 or 4 o'clock in the afternoon on June 5. The decision was based on answers provided at the interview, their relative experience, and information contained in their applications. Specifically, he said that he decided to hire Duran because he had worked at the railroad site for three years, in contrast Garcia had only been there for six months. He indicated that the negative comments other interviewees made about Garcia were not a major factor in his decision. Kissner indicated that he did not consider Garcia for the position of a bagger because in his (Kissner's) experience this position was labor intensive, and he did not want to take the chance

²Subsequent to the interviews, when Kissner informed Bjustrom of the mechanic he selected, he told Bjustrom that although the other mechanic, Ernie Lucero, was not selected, it would be nice to keep him in another capacity due to his background as a mechanic. Lucero was then asked if he wanted to work at another location with a cut in pay. However, there was no discussion between Kissner and Bjustrom relating to finding another position for Garcia.

that Garcia would take the job, but then quit in a short time.

McCarroll, was the plant manager at the Antonito Plant for MWCA from June 1999 until June 6, 2000, when he commenced to work for Colorado Lava in the same capacity. He indicated that in October 1999 he learnt that Garcia had complained to MSHA about the parking brake on a front-end loader two days after Garcia had told him that he had tagged it out. On October 4, 1999, an MSHA inspector cited MWCA for this condition, and served the citation to McCarroll. The Inspector told McCarroll that he would be investigated. McCarroll testified that he was concerned that this could have led to a 110(c) citation being issued against him.

According to McCarroll, when Garcia had complained to MSHA regarding the parking brake he (McCarroll) was not angry, but he was upset because he felt that Garcia should be able to talk to him and resolve a problem rather than going to a third party. McCarroll conceded that from the time of this incident through June 2000 he was not on social speaking terms with Garcia, and did not like him. In essence, he agreed that he considered Garcia's having complained to MSHA as being an example of his being a troublemaker.

McCarroll indicated that during Bjustrom's second visit to the site in the spring 2000, he told Bjustrom that Garcia was a poor employee, that he tried to cause trouble between employees, that he was a poor operator, and that he had filed grievances. McCarroll indicated that Garcia had filed petty union grievances, all of which had been settled informally. McCarroll agreed that he had said nothing good to Bjustrom about Garcia. However, McCarroll testified that he did not tell Bjustrom that Garcia had made complaints to MSHA. He indicated that sometime after June 5, in the latter part of June 2000, he told Bjustrom that Garcia had filed a lawsuit based upon his not having been hired by Colorado Lava.

McCarroll indicated that he did not participate in the decision as to whether Garcia was to be offered a position with Colorado Lava. According to McCarroll, he first met Kissner on June 5, and never had any conversations with Kissner regarding Garcia.

Robert Duran, a loader operator, was assigned by MWCA to work at the rail site in January 2000 and he worked on that site through June 5, 2000. He indicated that he and Garcia switched off operating the loader.

Ernie Lucero testified but his testimony was not relevant to any of the issues.

II.

At the conclusion of the Secretary's case Colorado Lava made a motion to dismiss arguing that the Secretary had not established a prima facie case. After listening to argument, the motion was granted in a bench decision, which, except for corrections of matters not of substance, is set forth below as follows:

A complainant alleging discrimination under The Mine Act establishes a prima facie case of prohibited discrimination by presenting evidence sufficient to support a conclusion that the individual engaged in protected activity, and that the adverse action complained of was motivated in any part by that activity. The Secretary of Labor on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2788, (October 1980) (rev'd on other grounds, 663 F. 2nd 1211, 3rd Cir. 1981).

In the case at bar, the parties stipulated that the Complainant, Mr. Garcia, engaged in protected activity. The record establishes, that he complained to his supervisor at the time, Mr. McCarroll, regarding problems with a parking brake, and also complained to the Mine Safety and Health Administration.

There is some dispute between the parties regarding whether or not action adverse to Garcia was taken by Colorado Lava. I note that after the incident on June 5 wherein Mr. Garcia was not hired by Colorado Lava after it had taken over MWCA's assets and equipment at the site where Mr. Garcia had been working, Mr. Garcia was able to obtain another job with MWCA, his former employer, at another location, and without any loss of pay. However, Colorado Lava did make a determination on June 5 not to hire Mr. Garcia upon its assuming the operations at the subject site. That decision certainly was adverse to Mr. Garcia. It is not relevant that he was able to obtain employment from MWCA, a corporation not related to Colorado Lava and a stranger to these proceedings, without loss of wages, and without any financial loss at this point. The crux of the matter is that on June 5 Colorado Lava did take action adverse to Mr. Garcia. I thus find that it has been established that Respondent did take adverse action against Mr. Garcia.

Critically, in order to establish a prima facie case, the Secretary must establish "that the adverse action complained of was motivated in any part by that activity." Secretary of Labor v. Reading Anthracite Co., 22 FMSHRC 298, 301 (March 16, 2000).

There is some indication in the record of disparate treatment of Mr. Garcia by Respondent's agents. For instance, a Mr. Lucero, also a former employee of MWCA, was offered another job, but Mr. Garcia was not offered another job upon Colorado Lava's assumption of the equipment and assets at the subject site. Mr. Bjstrom indicated that he evaluated two jobs upon contemplating

assumption of the operations of the subject site, namely the mechanics' positions, and the positions operating the front end loader at the rail site, that being the work site of the Mr. Garcia. It can be said there was disparate treatment of Mr. Garcia because Mr. Bjustrom did not evaluate all the other jobs that were being performed at the time. Also, when a decision was made not to rehire Mr. Garcia, it was on the ground that there were two persons employed at the site operating a front end loader, Mr. Garcia and Mr. Duran, and the decision was made to retain Mr. Duran and not Mr. Garcia because Mr. Duran had more experience. On the other hand, a gentleman by the name of Mr. VanDrake was rehired, even though he had less experience than the competitor for the same job. These actions by Colorado Lava raise some inferences of disparate treatment of Mr. Garcia. However, there is a difference between establishing the existence of a fact based on an inference, as opposed to proffering evidence of sufficient probative weight to establish a fact in issue, i.e. that the adverse action taken was motivated in any part by protected activity.

In order to explore this issue we must focus next on who actually took the adverse action. The Secretary alleges that the adverse action was taken by Mr. Bjustrom in concert with Mr. McCarroll, although the Secretary has conceded that the latter did not make that determination. The record establishes that the determination to not hire Mr. Garcia was made solely by Mr. Kissner. Mr. Bjustrom was the overall majority owner of Respondent corporation. The authority in this case to hire was delegated to Mr. Kissner, and the evidence establishes that he acted alone in making a determination to retain or hire Mr. Duran, and not to hire Mr. Garcia. Mr. Kissner testified that his decision in this regard was based upon the application that Mr. Garcia had submitted, and responses to questions that were uniformly asked of all interviewees. There is absolutely no evidence in the record whatsoever that Mr. Kissner had any animus towards Mr. Garcia based upon the latter's having engaged in protected activities.

The only person among the universe of persons in this case who had animus towards Mr. Garcia regarding his protected activities was Mr. McCarroll. Mr. McCarroll, according to his own testimony, was upset when he found out that Garcia had complained to MSHA regarding the brakes. He also indicated that he had been told by the inspector at the time the citation regarding the brake condition was issued, that he (Mr. McCarroll), would be investigated. Mr. McCarroll indicated that he did not like Mr.

Garcia, and that after the incident in October of 1999 wherein Mr. Garcia had engaged in the protected activities of complaining about parking brakes he was no longer on social speaking terms with Mr. Garcia, and that these feelings had not changed in June 2000.

However, there is no evidence in the record that Mr. McCarroll in any way participated in the decision to not hire Mr. Garcia. He was not present during the interview that was conducted solely by Mr. Kissner. According to the credible testimony of Mr. Kissner and Mr. McCarroll, Mr. McCarroll did not communicate to Mr. Kissner any of his concerns regarding the fact that Mr. Garcia, when employed by MWCA, had made a safety complaint to him or to MSHA, and had engaged in protected activities.

Mr. Bjustrom, the eighty percent owner of Colorado Lava, had the ultimate authority to hire. He supported Mr. Kissner's decision on hiring Duran. There is no evidence in the record that Mr. Bjustrom had any knowledge of the fact that Mr. Garcia had engaged in protected activities when he was employed by MWCA. Mr. McCarroll had conversations with Mr. Bjustrom prior to the time that Colorado Lava assumed the operation of the subject site. During these conversations, Mr. McCarroll discussed with Mr. Bjustrom, on his own initiative, weaknesses of various employees. Mr. McCarroll indicated that Mr. Garcia was the only employee of whom he had only negative things to say. However, the negative things that he talked about had nothing whatsoever to do with the protected activities at issue. Mr. McCarroll indicated that he told Mr. Bjustrom that Mr. Garcia is a poor employee, that he causes trouble, that he talks to other employees trying to stir up trouble between them, that he is a poor operator, that he abuses his equipment, and that he has filed grievances.

In summary, there is no evidence in the record that Mr. Kissner, the person who took direct action in not offering a job to Mr. Garcia, had any knowledge, or notice, or should have known that Mr. Garcia had engaged in any protected activities when he was employed by MWCA, a corporation not related to Colorado Lava.

Although Mr. McCarroll had animus regarding these activities there's no evidence that Mr. McCarroll was engaged at all in any determination to not hire Mr. Garcia.

The Secretary relies on Secretary of Labor on behalf of Bernardyn v. Reading Anthracite Co. 22 FMSHRC 298 (2000) in support of the proposition that Mr. McCarroll's animus towards Mr. Garcia somehow should be imputed to Mr. Bjustrom in the sense that Mr. Bjustrom acted not to hire Mr. Garcia based upon information adverse to Mr. Garcia that Mr. McCarroll had provided to him. Although this information did not include any protected activities, the Secretary argues that, in essence, Mr. McCarroll's motivation in giving a negative reference about Mr. Garcia to Mr. Bjustrom was based upon his animus regarding Mr. Garcia's protected activities and somehow that should be linked up to the actions of Mr. Bjustrom. I find that Bernardyn, supra, does not provide any support for this proposition. Indeed, in Bernardyn, supra, the finding of the Commission Judge that the Secretary had established a prima facie case was not in issue. The issue before the Commission in Bernardyn, supra, was whether or not the operator therein had established its affirmative defense.

The Secretary relies upon the following language in Bernardyn, supra, at 22 FMSHRC "an 'operator may not escape responsibility by pleading ignorance due to the division of company personnel functions.' Metric Constructors, Inc., 6 FMSHRC 226, 230 n. 4 (Feb. 1984), quoted in Wiggins v. Eastern Associated Coal Corp., 7 FMSHRC 1766, 1771 (Nov. 1985)."³ However, since the issue of whether a prima facie case was established was not before the Commission, the quoted language in Bernardyn, Supra, was strictly dictum.

The Commission in Bernardyn, supra, was not faced with the issues presented in the case at bar, namely, whether animus of a person who worked for a corporation at a time prior to the date that the adverse action was taken, may be imputed to a non-related corporation that bought the assets of the former corporation and then took the adverse action. That particular issue was not presented before the Commission, and to impute the animus of Mr.

³The Commission in Wiggins, 7 FMSHRC, supra, quoted with approval from Metric Constructors, supra. However, it is significant that after quoting from Metric Constructors, supra, the Commission, in Wiggins, supra, at 1771, went on to discuss as follows: "In any event, the focus of our present analysis is not so much upon Freley's knowledge as it is upon the undoubted impact on his decision to fire Wiggins for a separate discriminatory act committed by his assistant, for which Eastern as the employing entity must assume responsibility." Hence, the principle enunciated in Wiggins, supra, quoting from Metric Constructors, supra, was not essential to its analysis and decision, and is thus dicta and not binding in resolving the issue presented in the case at bar.

McCarroll to either Mr. Bjustrom or Mr. Kissner is certainly going too far.

So for all these reasons I find that there is no authority to support the Secretary's position, and that the Secretary has not established its prima facie case.

ORDER

It is hereby **Ordered** that this case be **Dismissed**.

Avram Weisberger
Administrative Law Judge

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