FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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March 21, 2003

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

DECISION ON REMAND

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.

Before: Judge Weisberger

INTRODUCTION

This case is before me based upon a decision by the Commission, *24 FMSHRC 350 (2002)*, vacating and remanding for further proceedings, my initial decision, which had granted Colorado Lava, Inc.'s motion to dismiss a discrimination complaint filed by the Secretary of Labor on behalf of Andrew Garcia.

I. Factual and Procedural Background as Found by the Commission.

The Commission, 24 FMSHRC supra, at 351 - 353, set forth its findings relating to the facts in this case as follows:

> The complainant, Andrew Garcia, worked as a front-end loader operator at Mountain West Colorado Aggregates ("MWCA") from January to June 1997. *23 FMSHRC at 213*. He then worked as a truck driver in MWCA's truck division from June 1997 to January 2000, and subsequently as a front-end loader operator at the railroad shipping yard in MWCA's Antonito bagging facility from January to June 2000. *Id.*; *Tr. 21*. Robert Duran was also employed a loader operator in MWCA's railroad yard. *23 FMSHRC at 213*.

In October 1999, Garcia tagged out a loader because the parking brake did not work. *Id. at 213-14*. The following day, Garcia told David McCarroll, the plant manger and Garcia's supervisor, that the parking brake on the loader was not working. *Id. at 214*. McCarroll responded that the loader did not need a parking brake, and ordered Garcia to continue using the loader. *Id.* Garcia complied and later complained to MSHA. *Id. at 214, 218*. As a result, MSHA came to the Antonito site to inspect the loader, issued a citation to MWCA, and initiated an investigation to McCarroll under section 110(c) of the Mine Act, *30 U.S.C. § 820(c). Id. at 214.*

Shortly after the incident, McCarroll learned of Garcia's complaint to MSHA, and when he was alone with Garcia, asked him "in a high toned voice" about the complaint. *Id*. Garcia denied filing the complaint. *Tr. 34.* According to Garcia, McCarroll responded, "You know all about it," and "Bull. It will all come out in the wash." *Tr. 255-56.* Garcia also testified that on another occasion in March 2000, when he was unable to load some marble chips because they were frozen, McCarroll swore at him in a loud voice. *23 FMSHRC at 214.* McCarroll testified that the was upset with Garcia for complaining to MSHA, acknowledged that he considered Garcia's complaint an example of his "trouble mak[ing]," and stopped speaking to Garcia socially. *23 FMSHRC at 214, 217; Tr. 224-27*.

Sometime in the spring of 2000, Ronald Bjustrom, the eighty-percent owner of Colorado Lava, became interested in purchasing MWCA's Antonito facility. *20 FMSHRC at 215*. Bjustrom visited the facility on four occasions prior to Colorado Lava's purchase on June 5, 2000. *Id*. During this time, Bjustrom decided to eliminate several positions, and asked McCarroll his opinion as to what jobs could be eliminated. *Id.* McCarroll suggested a railroad yard loader operator position and a mechanic position. *Id.* Bjustrom also asked McCarroll which MWCA employees were weak. *Id.* McCarroll told Bjustrom that Garcia and four other employees were weak,[1] and that Garcia caused trouble, tried to stir up trouble between employees, was a poor operator, abused equipment, and had filed union grievances. *Id*. Garcia was the only employee about whom McCarroll said only negative things. *Id*. Bjustrom testified that his conversations with

[1]However, loader operator Duran testified that he supervised Garcia at the rail yard, and found him to be a satisfactory worker. Tr. 291-92.

McCarroll had no bearing on which MWCA employees would be rehired by Colorado Lava. *Id.*

In late May or early June 2000, prior to the interviews on June 5, Bjustrom told McCarroll that he would be retained as the plant manager. Tr. 100-01. Also prior to June 5, Bjustrom retained Terry Kissner, who was not an employee of Colorado Lava, to do the hiring. *23 FMSHRC at 215-16.* Kissner had done hiring for Bjustrom in the past.[2] *Id. at 215*

On June 5, Kissner interviewed the MWCA employees individually according to Bjustrom's instructions, which included asking the applicants the same questions from the booklet, asking the mechanics additional questions, including whether they would accept another position, and eliminating one railroad year loader operator position and one mechanic position. *Id. at 215-16; Tr. 174*. Kissner testified that, with respect to Garcia, he did not look at his personnel file, letters of recommendation, past safety record, or production levels, and that the interviews were a formality. *23 FMSHRC at 216*. He also testified: that he did not review the personnel files of any of the employees he interviewed; that before the day of the interviews, he had never visited the Antonito facility; that he had no personal knowledge of the MWCA employees; and that while he spoke with McCarroll "as few as three times," he did not meet McCarroll until the day of the interviews and never discussed the MWCA employees with him. *Id. at 215-16 Tr. 159, 178.* Bjustrom testified that Kissner made the final decision about which employees to rehire, and that he (Bjustrom) did not participate in that decision, although he retained the ultimate authority to hire. *23 FMSHRC at 215, 220.*

Garcia testified that on June 1, 2000, he was told of the sale of MWCA's Antonito facility to Colorado Lava and that all employees would be rehired, but was not informed that any jobs would be eliminated. *Tr. 39-40.* Garcia also testified that on the morning of June 5, Bjustrom gave the employees application packets, and scheduled each employee for an interview. *Tr. 40-41*. At the interview, Kissner did not inform Garcia that one loader operator position at the rail yard was being eliminated. *Tr. 42, 177.*

On June 6, 2000, Colorado Lava purchased MWCA and

[2]Bjustrom received from his banker a booklet of interview questions, which he have to Kissner, to use during the interviewing of the MWCA employees. 23 FMSHRC at 215.

rehired all of the MWCA employees except Garcia, and Ernie Lucero, a mechanic. *23 FMSHRC at 216 & N.2.* After Garcia learned that he was not going to be rehired, he secured a job with MWCA which is farther from his home, has a lower pay scale, and fewer incentives than his former position at the Antonito railroad yard facility. *Id. at 215.* Bjustrom testified that he first learned about Garcia's complaint to MSHA about a week or two after the decision was made not to hire him. *Tr. 143-44.*

II. The Commission's Decision

The Commission found that substantial evidence supported the initial decision that Garcia had engaged in protected activity when he complained to McCarroll and MSHA that the parking brake on the front-end loader was operational, and also that the operator, Colorado Lava, took adverse action against Garcia when it declined to hire him. Thus, the threshold issue before the Commission, and on remand, is whether the Secretary established its prima facie case that the adverse action taken by Colorado Lava was motivated in any part by Garcia's protected activity. The Commission noted that in a prior decision, *Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510, (Nov 1981), rev'd on other grounds, 709 F. 2nd 86 (D.C. Cir. 1983)*, supra, it had identified several indicia of discriminatory intent "... including: (1) knowledge of the protected activity; (2) hostility or animus toward protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant." *24 FMSHRC at 354.*

The Commission held that the record evidence of disparate treatment toward Garcia by Colorado Lava was not considered fully. The Commission, *id.*, restated the finding in *Bradley v. Belva Coal Co. 4 FMSHRC 982, 992 (June. 1982),* that circumstantial evidence of discriminatory motivation and reasonable inferences drawn therefrom may be used to sustain a prima facie case. The Commission, 24 FMSHRC, supra, at 354 -355, noted that the initial decision pointed to evidence of indicia of disparate treatment *e.g.:* (1) Doran was chosen over Garcia for the loader operator position because Doran had more experience than Garcia, on the other hand Vondrak who had less experience than Lucero was hired over Lucero as a mechanic; (2) that Lucero, the only other employee not rehired was offered another position at Colorado Lava, but Garcia was not; and (3) when considering which positions to eliminate Bjustrom only evaluated the loader operator and mechanic positions, and not other positions at the site. In addition, the Commission noted other evidence of record that "could" support a finding of disparate treatment *(24 FMSHRC at 355).* The Commission referred to findings in the initial decision that Kissner wanted to hire the best qualified employees for the loader operator and the mechanic positions, and testified that he reviewed the applications for these two positions prior to making his decision. It was found in the initial decision that Kissner stated that he looked at work history and tenure when he decided to hire Doran other Garcia for the loader operator position but admitted that he did not review Garcia's personnel file, letters of recommendation, safety record, or production level when considering whom to hire.

In addition, the Commission found that the record indicates that on approximately June 7, 2000, after Colorado Lava assumed ownership of the subject operation, McCarroll hired Jeremy Gallegos, a former MWCA employee who was not working for the company at the time of its purchase by Colorado Lava, to fill a bagger position that had been vacated prior to Colorado Lava's purchase on June 5. The Commission noted that Gallegos apparently had experience as a bagger. The Commission also noted that Garcia, while still employed at the Antonito facility was being trained as a bagger and had filled in as a bagger three or four times prior to June, but was not considered for the vacant position. The Commission cited as fact that although Gallegos had experience as a bagger, Garcia was also experienced as a bagger and more specifically with operations at the Antonito facility. The Commission concluded that "despite Garcia's availability when the bagger position was open, he was not considered for the position." *(23 FMSHRC at 355.)* Additionally, the Commission noted that in spite of McCarroll's recommendation that Bjustrom retain only one rail yard employee after assuming operations at the Antonito facility Colorado Lava continued to use two employees at the rail yard; that McCarroll testified that after June 5 a second employee of the Antonito facility worked at the rail site with either Doran or himself, including George Ruybal, Brian Kent, and Joe Padiolo, who were former MWCA employees rehired by Colorado Lava; that McCarroll testified that prior to June 5 Ruybal and Kent did not have experience operating the front-end loader and were being trained. The Commission noted that Doran confirmed McCarroll's testimony that two employees continued to work at the rail yard site after June 6.

The Commission, 24 FMSHRC, *supra*, at 555 directed that, consistent with Chacon, supra, ... "the Judge should consider all the evidence tending to show improper motivation, including that of disparate treatment of the miner." In a footnote, *24 FMSHRC at 356, n. 6,* the Commission indicated that the initial finding that Kissner lacked knowledge regarding Garcia's protected activity and animus towards him is not dispositive of the prima facie case issue. The Commission also stated that "... before the Judge again reaches a conclusion regarding the strength of this rebuttal evidence, we would expect him to consider the Secretary's arguments for imputing McCarroll's knowledge of and animus toward Garcia's safety complaints to Bjustrom or Kissner." *Id.*

III. DISCUSSION[3]

The Commission, *24 FMSHRC supra, at 355,* held that in the initial decision the analysis of motivation was incomplete under *Chacon, supra*, and that, "consistent with *Chacon, supra,* the Judge should consider all the evidence tending to show improper motivation, including that of disparate treatment of the miner". In compliance with this holding and directive, cognizance is taken of the following indicia of discriminatory intent which had been initially listed in *Chacon, supra,* as follows: (1) knowledge of the protected activity; (2) hostility or animus toward protected activity; (3) coincidence in time between the protected activity and the adverse activity;

[3]Subsequent to the hearing the Secretary proffered Sec. Ex. 5 along with a motion in support of its admission. This proffer was not objected to by Colorado Lava. Accordingly the record is re-opened for the limited purpose of admitting in evidence Sec. Ex. 5.

and (4) disparate treatment of the complainant.

A. Knowledge of the Protected Activity, and Hostility or Animus Toward Protected Activities

Garcia engaged in the following protected activities while an employee of MWCA prior to the time it was purchased by Colorado Lava, a totally independent entity: (1) Garcia informed his supervisor, Earl Gonzales, that a loader was tagged out because the brake did not work, and (2) Garcia told McCarroll, another supervisor at MWCA, that the loader had been tagged out because of problems with the parking brake. These two individuals were the only agents of MWCA who had actual knowledge of Garcia's protected activities. There is no direct evidence that any of Colorado Lava's agents had actual knowledge of these specific activities. The only individual who had expressed any animus towards Garcia was McCarroll. These expressions of animus occurred while both were employees of MWCA, prior to its purchase by Colorado Lava. Bjustrom, who has an 80 percent ownership interest in Colorado Lava, had the ultimate authority to hire former employees from MWCA. However, he delegated that decision to Terry Kissner who subsequently interviewed employees of UMWA, and did not select Garcia. I observed Bjustrom's demeanor while testifying and found him to be a credible witness. Accordingly, I accept his testimony that, prior to the time Colorado purchased MWCA, McCarroll had told him that Garcia was a weak employee, not a good operator, and had filed grievances, but this information did not have any bearing on the decision on June 5 regarding which employees of MWCA would be hired by Colorado Lava. Further, based on observations of Bjustrom's demeanor, I find his testimony credible that he not did take any part in the hiring decision, and that it was Kissner who made the final decision in that regard, and that he had delegated this task to Kissner, as the latter had done the hiring for him (Bjustrom), for eight years.

I also carefully observed the demeanor of Kissner, and found him to be a credible witness. I therefore accept his testimony that he did not have any knowledge of the applicants from MWCA before he interviewed them on June 5; and that the only time he had talked to McCarroll prior to June 5 had to do with ordering supplies. I also accept his testimony that he did not consult with McCarroll before the interviews regarding the interviewees; did not consult with McCarroll after the interviews; and that McCarroll not provide him with any information regarding the interviewees. I therefore find, that Kissner alone took the adverse action in not hiring Garcia on June 5, but that he did not have knowledge of Garcia's prior protected activities. Neither he nor Bjustrom manifested any animus toward Garcia prior to June 5.[4]

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[4]In a footnote, the Commission stated that before a conclusion is reached regarding the strength of rebuttal evidence "... we would expect him to consider the Secretary's arguments for imputing McCarroll's knowledge of and animus towards Garcia's safety complaints to Bjustrom or Kissner." (Emphasis added.) (24 FMSHRC *supra*, at 356 n.6)

The graveman of the Secretary's argument in its post remand brief, on the issue of imputation of McCarroll's animus and knowledge of protected activities, relates to their imputation to the new corporate entity Colorado Lava on the basis of agency. I find this argument to be without merit as it is beyond the scope of the remand. Also, most importantly, I note that on the date of the adverse action

B. Coincidence in Time Between the Protected Activity and the Adverse Action

The protected activities engaged in by Garcia occurred in October 1999. It was also on or about that time that McCarroll had expressed animus towards Garcia relating to these protected activities. McCarroll indicated that he continued to dislike Garcia. However, it is significant to note that no adverse action was taken by MWCA against Garcia. Indeed, the adverse action that was taken subsequently by Colorado Lava on June 6 was more that seven months subsequent to the dates Garcia had engaged in the protected activities. I thus find that the Secretary has not established a sufficiently close coincidence in time between the protected activity and the adverse action to support an inference of improper motivation.

C. Disparate Treatment of the Complainant.

As discussed above, based upon the findings of the Commission, which have become the law of the case, I am constrained to find that it may be inferred that Garcia was the subject of disparate treatment.

D. Conclusions

The posture of this case before the Commission was whether Colorado Lava's motion to dismiss, made at the conclusion of Complainant's case-in-chief should have been granted. The quantum of evidence sufficient to establish a prima facie case at this point in a trial, is "[e]vidence which, standing alone and unexplained, would maintain the proposition and warrant the conclusion to support which it is introduced. An inference ... until proof can be obtained or produced to overcome the inference." Black's Law Dictionary, (6th ed., 1990), at 1190. As set forth by the Sixth Circuit, in order to establish a causal link, a plaintiff is required to proffer evidence sufficient to raise the inference that her protected activity was the likely reason for the adverse action. EEOC v. Avery Dennison Corp. 104 F 3d 858, 861 (6th Cir. 1997), (quoting Zanders v. National R.R. Passenger Corp., 898 F 2d 1127, 1135 (6th Cir. 1990), (quoting Cohen

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taken by Kissner, i.e. June 6, McCarroll had not yet been hired by Colorado Lava, and hence there was not any principal agent relationship at that time. Also, I reject the Secretary's arguments that, in essence, Bjustrom's delegation of the authority to hire to Kissner, and the manner in which Kissner conducted the interviews raised inferences of improper motivation, and Bjustrom's and Kissner's knowledge of Garcia's protected activities, and McCarroll's influence on the decisional process based on his animus towards Garcia. I find this line of reasoning to be too speculative, without foundation in the record, and outweighed by the direct testimony of Kissner and Bjustrom, whom, based on their demeanor, I find to be most credible witnesses.

v. Fred Meyer, Inc., 686 F. 2d 793, 796, (9th Cir. 1982)).[5]

However, in the case at bar, subsequent to the Commission's decision, Colorado Lava elected to rest on the basis of testimony elicited from the Secretary's witnesses, Bjustrom, Kissner, and McCarroll. Accordingly, at this stage of the proceedings, since Respondent has adduced rebuttal evidence, in order to prevail the Secretary must "....overcome the additional obstacle of [Respondent's] rebuttal and convincingly demonstrate the existence of discrimination. At that stage, he not only must present facts and evidence allowing inferences to be drawn in his favor, but also must present a case that allows those inferences to be of significant force as to overcome the [Respondent's] rebuttal or prove the rebuttal pretext" *Id*. In the same fashion, it is established Commission case law that the Secretary has the ultimate burden of proof of establishing discrimination under the Act. Secretary of behalf of Robinette v. United Coal Co., 3 FMSHRC 803, 817 (1981), Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2799 (Oct. 1980), rev'd on other grounds, sub nom. Consolidation Coal Co. v. Marshall, 663 F 2d 1211 (3rd Cir. 1981). Hence, in order to prevail herein, the Secretary must establish, by a preponderance of the evidence, that the adverse action was motivated in any part by the protected activities.[6] *Id.*

In analyzing the indicia of discriminatory intent as set forth in *Chacon, supra,* it might be inferred that Garcia did suffer some degree of disparate treatment. However, I find that an inference of discriminatory intent, based on disparate treatment, to be diluted to a high degree by the lack of knowledge of the protected activities and lack of hostility or animus towards protected activity by Colorado Lava. In reaching this conclusion I accord more weight to the direct testimony of Bjustrom and Kissner, having found their testimony credible based upon their demeanor, rather than inferences to be drawn regarding disparate treatment. I also note the lack of significant coincidence in time between the protected activities and the adverse action. For these reasons I find that the Secretary has failed to establish, by a preponderance of the evidence (see Robinette, *supra,* Pasula, *supra*), that the adverse taken by Colorado Lava was motivated in any part by Garcia's protected activities.

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[5]Avery Dennison, *supra*, involved alleged discrimination under Title VII and 42 U.S.C. § 1981. Its analysis of the burden required to establish a causal nexus between protected activity and adverse action is analogous to discrimination under Section 105 of the Mine Act.

[6]Subsequent to the Commission's decision 24 FMSHRC, supra, Garcia filed a statement in which he stated that he does not intend to present further testimony "... for the purpose of making out [his] prima facie case of discrimination ... ." The Secretary filed a statement that if it be found on remand that the Secretary did not establish a prima facie case then it may not call witnesses to rebut the Judges' finding. The Secretary reserved the right to call rebuttal or sur-rebuttal witnesses if the Judge, Commission, or reviewing court finds that the Secretary and Garcia made out a prima facie case.

For all the above reasons, I find that the Secretary has failed to establish that Garcia was discriminated against by Colorado Lava in violation of Section 105(c) of the Act, and that accordingly this case shall be **DISMISSED**.

Avram Weisberger
Administrative Law Judge

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