FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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February 22, 2002

MIKE FLETCHER,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEST 2001-150-DM
	:	WE MD 00-11
	:	
v.	:	
	:	Portable Crusher #1
MORRILL ASPHALT PAVING,	:	Mine I.D. 45-03357
Respondent	:	

DECISION

Appearances: Larry Larson, Esq., Lukins & Annis, Moses Lake, Washington, for Complainant;
Lewis L. Ellsworth, Esq., Gordon, Thomas, Honeywell, Malanca, Peterson & Daheim, Tacoma, Washington, for Respondent.

Before: Judge Manning

This case is before me on a complaint of discrimination brought by Mike Fletcher against Morrill Asphalt Paving ("Morrill") under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c)(3) (the "Mine Act"). Mr. Fletcher alleges that he was laid off from his employment with Morrill, at least in part, because he complained about safety conditions at the crusher. An evidentiary hearing was held in Wenatchee, Washington. The parties presented closing argument at the hearing in lieu of post-hearing briefs. For the reasons set forth below, I find that Mr. Fletcher established that he engaged in protected activity and that his layoff was motivated at least in part by that activity.

I. SUMMARY OF THE EVIDENCE

Morrill is in the sand and gravel business. Morrill operated a portable plant used to crush rock that was moved to several locations in Washington State between 1997 and 2000. This case arose as a result of events that occurred in July 1999 through early February 2000.

Mike Fletcher first starting working for Morrill in January 1997. Prior to that time he worked for several financial institutions and for Wenatchee Sand and Gravel. He was hired to operate a mobile rock crusher. He also spent a year in Hermiston, Oregon, operating an asphalt

plant for Morrill. In July 1999, the portable crusher was at a pit near Wenatchee. Because the crusher was being set up at that time, he ran the loader and fed the plant for about a week. (Tr. 15). While the crusher was at this pit, Fletcher complained about safety conditions to Roger Harting, crusher superintendent. He told Harting that the handrails on the cone screen had not been installed exposing employees to a 14-foot drop. (Tr. 16). Fletcher testified that the screens were being changed on a daily basis exposing him and others to a falling hazard. Fletcher also called Richard Thody, the corporate safety manager, to complain about the missing handrails. Fletcher testified that Thody went to the pit and told Warren Smethers, who was in charge of maintenance for the crushing plant, that the handrails needed to be installed. Handrails were installed shortly thereafter.

In August 1999, the portable crusher was moved to a different location. During this period, Fletcher was in contact with Thody on a regular basis to talk about safety issues. (Tr. 17). Fletcher testified that Thody asked him to keep a list of safety deficiencies so Thody would be better informed about safety issues. Fletcher provided that list in September 1999. (Ex. 4). In early October 1999, the crew was told to report to the office of Dean Gill, the General Manager. He called each individual into his office to discuss safety at the crusher. Mr. Smethers was terminated from his employment and the crusher was shut down until Thody made sure that all safety deficiencies had been corrected. (Tr. 19). Smethers was subsequently rehired by Morrill.

In October 1999, the crusher was moved to Maple Valley in Kent, Washington. After this move, Mr. Fletcher was assigned to the night shift to perform maintenance. The crusher was shut down during the night shift and only maintenance was performed. In January 2000, the crushing plant had to be repositioned at the Kent site because it was in a low area that tended to accumulate water. After this relocation, Fletcher was assigned to be the plant operator during the day shift. Fletcher made a number of complaints in January to Roger Harting. When no changes occurred, Fletcher made these same complaints to Mr. Thody. His complaints were that two employees at the crushing plant, Randy Syria and Don Drinkwater, were working with the smell of alcohol on their breath. (Tr. 23). Fletcher testified that Syria told him that he drank vodka at night until he passed out and started drinking again when he woke up the next morning. Fletcher also testified that Syria apologized for his behavior. Fletcher stated that he believes that the drinking issue is related to safety because there are many dangerous moving parts around a crusher. For example, Fletcher believed that Syria could kill or injure an employee if he operated the dozer while intoxicated. Fletcher felt that, as a shift boss, he had a duty to report this behavior. He stated that other employees came to him to complain about intoxication on the job. Fletcher stated that he was present when two other employees complained about this issue to Harting. (Tr. 26-27).

On February 8, 2000, Fletcher again complained to Harting that Mr. Syria smelled of alcohol, had a surly attitude, and had been arguing with another employee. Harting merely shrugged his shoulders. Later during that same shift, Mr. Harting told Fletcher that he was laid off. (Tr. 27). Fletcher testified that he asked Harting for a reason and Harting replied that there

was no reason. (Tr. 28). When Fletcher asked again, Harting replied that the company "didn't give Warren [Smethers] a reason when they laid him off." *Id.*

After Fletcher left the property in his truck, he called Dean Gill. Fletcher testified that Gill told him that he didn't know that he "had been laid off." *Id.* Gill told Fletcher to meet with him at his office the following morning. Fletcher also called Mr. Thody. Fletcher testified that Thody was furious when he heard that he had been laid off. Apparently, Thody wondered aloud during this conversation whether Fletcher had been discriminated against for raising safety issues. (Tr. 29). Thody asked Fletcher to meet with him after his meeting with Gill the following morning.

At the meeting with Gill on the morning of February 9, Fletcher asked Gill whether Harting had told him about Fletcher's complaints about safety and drinking on the job. Gill replied that Harting had not contacted him about any drinking issues. Fletcher testified that Gill did not tell him at this meeting that he was being laid off for economic reasons or for lack of work. *Id.*

Fletcher then met with Thody. Thody called Burt Touchberry, his boss, into his office and outlined the key events in Fletcher's employment history. According to Fletcher, both Thody and Touchberry indicated that he may have been discriminated against. (Tr. 30). Thody asked Fletcher to make a list of the safety deficiencies that Roger Harting had tolerated since Fletcher started working for Harting. (Tr. 30; Ex. 3).

Fletcher testified that Gill called him at his home on February 10, 2000, and said "you weren't laid off for any other reason than lack of work." (Tr. 32). Fletcher met with Thody several more times after that. Thody recommended that Fletcher file a discrimination complaint with the State of Washington under WISHA, the Washington Industrial Safety and Health Act. Fletcher filed a WISHA complaint. (Ex. 1). On or about February 24, Thody told Fletcher that he continued to believe that Fletcher got a "raw deal," but that he had been verbally reprimanded by his supervisor for making statements about discrimination to Fletcher.

Fletcher agrees that the crushing plant was overstaffed at the time of his layoff. (Tr. 46-47). He also does not dispute that Roger Harting was qualified and able to operate the plant. He also admits that when he raised safety issues at the pit near Wenatchee, the conditions were corrected. (Tr. 47). Except for the drinking issue raised at the Kent site, all of the safety issues were corrected. Indeed, Mr. Gill went to the site and instructed employees on safety issues. (Tr. 49). Morrill shut down the plant for several days in early October 1999 to correct the potential safety hazards that Fletcher brought up. Thody told Gill about the drinking problem at the crusher, but Harting never mentioned it. Fletcher believes that he was terminated because he went over Harting's head to talk to Thody and Gill about his safety concerns. Fletcher believes that both Gill and Thody wanted the crusher to be operated in a safe manner.

Fletcher believes that, once Morrill determined that it needed to eliminate an employee at the Kent site, he should have been bumped down to another position because he was capable of

performing all of the tasks at the crusher. Gill did not deny that Fletcher could have probably performed any job at the crusher. (Tr. 76-77). As it was, the two employees who came to work with alcohol on their breath kept their jobs while he was laid off. Both Syria and Drinkwater had less seniority than Fletcher. Drinkwater was hired by Morrill on January 10, 2000, and Syria was hired on August 23, 1999. Fletcher contends that he was laid off because he complained about safety over Harting's head.

Mr. Gill testified that he advised Fletcher on February 8 that he was being laid off because the company had to cut back. (Tr. 95). Gill testified that Fletcher was laid off because the company was losing money at the Kent site and, because they were operating only one shift, two plant operators were no longer needed. (Tr. 68). He stated that he had never terminated anyone on the basis of a lack of work until Fletcher was terminated. Gill stated that Fletcher was a good employee and admitted that he could have terminated Drinkwater or Syria instead of Fletcher.

Gill testified that he was the Morrill manager who determined that a layoff was necessary. He discussed who should be laid off with Harting. The crushing plant was operating one shift per day but there were two plant operators, Fletcher and Harting. Gill testified that he told Harting that the crusher did not need two plant operators. (Tr. 74). Harting called Gill back to tell him that Fletcher was the other plant operator. Gill testified that he responded "that's fine," meaning that Fletcher was chosen for the layoff. (Tr. 74-75). Gill testified that he did not take seniority into consideration when making this decision. (Tr. 79).

Although Gill told the Washington State Department of Labor and Industry during the WISHA investigation that Fletcher was the highest paid employee at the crushing plant, there were actually four or five employees making the same amount of money as Fletcher at the Kent project. Both Drinkwater and Syria were paid the same rate as Fletcher. When the crusher was working at projects that were not publically funded, Fletcher and Harting were paid more than the other employees. (Tr. 91). Gill testified that he chose Fletcher because Morrill did not need two plant operators at Kent. He believed that Thody was working with Syria and Drinkwater to correct any drinking problems. He was concerned about it, but believed that it no longer presented a safety hazard. Gill also testified that employees should raise safety issues and that he has never taken an adverse action against an employee who complained about safety. (Tr. 91-92). A meeting was held on the morning of February 8, 2000, to advise employees that they will be terminated if they test high for blood alcohol. (Ex. 6).

Richard Thody testified that he has a degree in loss control and started working for Morrill's parent company, Goodfellow Brothers, Inc., as the safety and health manager in March 1999. (Tr. 109). He stated that he and Fletcher had a good relationship and that Fletcher discussed safety issues with him in July 1999 and at other times after that date. Fletcher also complained to him about employees drinking on the job. (Tr. 114). Thody discussed the drinking problem with Gill. Thody apparently was not held in high regard by Harting because Harting referred to Richard Thody as the "Safety Dick" behind his back. (Tr. 116; Ex. 3 p.2).

When Thody heard that Fletcher had been laid off, he became upset. Thody testified that he told Fletcher that he may have been discriminated against. (Tr. 118). At the hearing, Thody testified that he does not believe that Fletcher was discriminated against for making safety complaints. (Tr. 118-19). Thody now believes that his initial belief that Fletcher may have been discriminated against was "a knee-jerk reaction." (Tr. 122). He was upset that Fletcher was laid off because they worked well together on safety issues and he considered Fletcher to be his friend. (Tr. 122 ,126). He was also upset because he also believed that Fletcher was very safety conscious. (Tr. 127). Thody testified that Gill would not take any retaliatory action against a employee for making safety complaints.

Gary Kneedler worked for Morrill from July 1994 to November 1999 as a crusher superintendent. (Tr. 130). Mr. Fletcher had worked under Kneedler as a plant operator. Kneedler testified that Fletcher knew how to operate the loader, the dozer, and the bobcat as well as perform all the other jobs at the crusher. Kneedler testified that Fletcher was a better employee than others because he was experienced at running all the equipment. He would have taken the experience and seniority of employees into consideration if a layoff had been required when he was the crusher superintendent. Kneedler testified that, in the crushing business, an employer will need two plant operators on some jobs but only one in others, depending on the number of operating shifts. He said that, as a general matter, "the more experienced key guys are the ones you want to keep around when you fluctuate crews back and forth." (Tr. 133). He admitted that Morrill was not required to lay off employees based on seniority, but that it was the "industry standard" to do so. (Tr. 135).

Shawn Simmons worked for Morrill from October 1998 to November 2000 as the area manager in Morrill's Hermiston, Oregon, office. He worked with Fletcher when Fletcher was the operator of the hot plant. Simmons testified that he was present at a safety meeting held in the Wenatchee Convention Center when he overheard a discussion of Mr. Fletcher's layoff. Simmons could not remember when this meeting took place but it was before Fletcher was laid off. (Tr. 143). Simmons heard Gill talk about the layoff. In Simmons' opinion, based on these conversations, the "primary reason [that Fletcher was laid off] seemed to be that he was stirring the pot, causing problems, going to the safety officer, things like that." (Tr. 140-41).

Mr. Gill testified that he has never made any derogatory remarks about Thody and that he did not say anything negative about Fletcher at the safety meeting at the convention center. (Tr. 151). Gill testified that Thody is a good safety officer because he is "real thorough." *Id.* Gill testified that Simmons may harbor animosity against Morrill because Simmons was accused by Morrill of stealing from the company. (Tr. 152). Morrill believes that he was selling crushed rock off the books and pocketing the money. (Tr. 152-53). Although Simmons quit his job in November 2000, Gill testified that Morrill was investigating Simmons' activities and that he would have been fired in any event for stealing from the company.

II. SUMMARY OF THE PARTIES' ARGUMENTS

A. Mr. Fletcher

Mr. Fletcher argues that the facts demonstrate that he was a good worker and a safety-conscious employee who had worked for the company since 1997. Starting in July 1999, Fletcher made safety complaints to his supervisor and to Mr. Thody. In January 2000, Fletcher complained about employees coming to work with alcohol on their breath. One of the individuals that Fletcher complained about, Mr. Drinkwater, was hired on January 10, 2000. After Fletcher made these complaints, Morrill decided that it needed to lay him off for economic reasons. Fletcher was laid off even though other employees had less seniority. The evidence shows that Fletcher had the experience to perform all the jobs at the plant.

Fletcher argues that the company's justification for his layoff is illogical and inconsistent. First, Morrill's position in the WISHA proceedings was that Fletcher was chosen because he was the highest paid employee at the Kent site. Later, when it was revealed that Fletcher made no more money than anyone else, the company argued that it did not need two plant operators. Fletcher contends that, because he had the ability and experience to perform all the jobs at the plant, the decision to lay him off as opposed to other less experienced employees does not make any sense. Mr. Gill testified that the company is safety conscious, yet the only person laid off was Mr. Fletcher who was making safety complaints. Mr. Thody was very upset by the layoff because the company let go the only person who was keeping him informed about safety problems. Thody continued to be concerned about Fletcher's termination when the State of Washington investigated the incident. Thody's testimony at the hearing should not be given any weight. Fletcher contends that the statements of management and Morrill's justification for choosing Fletcher for layoff do not "stack up in this case." (Tr. 161). Fletcher contends that he established that he was discriminated against when chosen for layoff.

B. Morrill Asphalt

Morrill argues that its decision to lay off Mr. Fletcher was not personal but economic only. The evidence establishes that Morrill had a strong commitment to safety. Fletcher does not deny that Thody and Gill were committed to safety. Fletcher did not feel threatened by bringing written safety complaints even though he knew that management would see it. Gill came to the plant in early October 1999 and shut it down for two days so that the safety problems that Fletcher brought up could be corrected. Every safety complaint that Fletcher raised was promptly attended to. Fletcher's real argument in this case is that he was singled out because he went over Harting's head when making safety complaints to Thody and Gill. There is no evidence in the record that he was discriminated against for this reason.

A mine operator cannot "negligently discriminate" against a miner. (Tr. 163). The discrimination must be an intentional act. Throughout this case and the investigation by the State of Washington, Fletcher maintained that Mr. Gill would not have taken any action against him as punishment for raising safety issues. Mr. Gill was the person who determined that there were too many people working at the Kent Plant and determined that two plant operators were not

necessary. There is no question that Morrill was losing money at the Kent Plant. Morrill does not have a collective bargaining agreement and it does not recognize seniority as a factor when laying off employees. There was nothing improper about Morrill selecting Fletcher for layoff.

Mr. Thody considered Fletcher to be his friend. Consequently, when Thody heard that Fletcher of laid off, he was naturally very upset. Thody raised the discrimination issue because he was upset, not because he believed that Fletcher had actually been discriminated against. Fletcher's reliance on Mr. Thody's statements following his layoff is nothing more than a "house of cards." (Tr. 166). The testimony of Simmons should be given no weight. This case should be dismissed because Fletcher did not meet his burden of proof.

III. DISCUSSION WITH FINDINGS OF FACT 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). "Whenever protected activity is in any manner a contributing factor to the retaliatory conduct, a finding of discrimination should be made." *Id.* at 624.

A miner alleging discrimination under the Mine Act establishes a *prima facie* case of prohibited discrimination by presenting evidence sufficient to support a conclusion that he engaged in protected activity and suffered adverse action 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); *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998). 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 Mike Fletcher engage in protected activity?

Mr. Fletcher engaged in protected activity when he complained about safety conditions at the plant from July 1999 until he was laid off. His complaints about alcohol use by his fellow employees was safety related because he feared that they could injure him as they operated heavy equipment.

B. Was Morrill's layoff of Mike Fletcher motivated in any part by his 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). In *Chacon*, the Commission listed some of the more common circumstantial indicia of discriminatory intent: (1) knowledge of the protected activity; (2) hostility or animus towards the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. *See also Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 530 (April 1991).

There can be no dispute that Morrill was aware of Fletcher's safety complaints. There was also a coincidence in time between Fletcher's complaints and his layoff. Fletcher started making safety complaints in July 1999 and his complaints continued until his layoff. Simmons testified that he overheard a conversation that led him to believe that Fletcher was laid off because he was "stirring the pot, causing problems, [and] going to the safety officer." (Tr. 140-41). I do not rely on Simmons' testimony. Circumstantial evidence shows that Harting did not welcome the safety activities of Thody and Fletcher. There is also evidence that Harting, not Gill, selected Fletcher for layoff. It appears that Morrill had never previously terminated anyone from employment under circumstances similar to the layoff of Fletcher.

I find that Fletcher established a *prima facie* case of discrimination. The circumstantial evidence establishes that the choice of Fletcher for lay off was motivated at least in part by his safety activities. Morrill's decision to lay off Fletcher does not make any sense from a business context. Fletcher was a well-trained and experienced plant operator who could perform any of the myriad tasks at the crusher. He had worked for Morrill for three years in a wide range of positions from a hot plant operator, maintenance worker, plant operator, and equipment operator. There is nothing in the record to indicate that Morrill had any problems with his work habits. When the plant was first moved to Kent, Fletcher worked the evening maintenance shift because there was only one operating shift. For reasons that are not clear, when the plant was repositioned at Kent to reduce flooding around the crusher, Fletcher became the plant operator even though Harting also worked that same shift and could operate it.

I credit the testimony of Gary Kneedler that it is the industry standard for a sand and gravel operator to retain the most senior and experienced employees when a layoff is necessary. It is logical to do so because, if and when the workload increases, the operator will be able to increase output more quickly. I recognize that Morrill was not restricted by a collective bargaining agreement to use seniority when determining whom to layoff, but it strains logic to assume that experience would not be considered when a reduction in workforce is necessary. In this case, Morrill retained two employees who had alcohol abuse problems at the plant, including one who had worked for Morrill for less than a month. Under these circumstances, the logic behind Morrill's decision to lay off Fletcher is difficult to understand. As discussed below, the evidence establishes that Harting played a major role in the decision to lay off Fletcher.

As the Commission has stated, motivation is subjective and direct evidence of motivation is rarely encountered. There is sufficient evidence in the record to establish that Morrill was motivated, at least in part, by Fletcher's safety work to establish a *prima facie* case of discrimination. Some of the evidence I relied upon in reaching this conclusion is discussed in more detail below.

C. <u>Did Morrill establish that its layoff of Mike Fletcher (1) was not motivated in any part by Fletcher's protected activity or (2) that it would have occurred even if Fletcher had not made any safety complaints to Harting, Thody, and Gill?</u>

Morrill contends that the layoff was totally based on economic considerations. Morrill established, and Fletcher does not dispute, that a layoff at the crusher was justified. Morrill did not make the decision that a layoff was necessary as a pretext to terminate Fletcher. The issue is whether the decision to choose Fletcher for layoff was motivated by his protected activities.

Morrill posited a number of different reasons for choosing Fletcher for layoff. When Fletcher challenged his layoff in the WISHA proceeding, Morrill contended that Fletcher was chosen because he was the highest paid employee at the crusher besides Mr. Harting. It is clear that Mr. Fletcher's wages were no greater than Drinkwater's and Syria's wages at the Kent project. In the present proceeding, Morrill argued that Fletcher was chosen because two plant operators were not required at Kent. Morrill did not establish that Fletcher was chosen for that reason alone.

Morrill also relies on the fact that Fletcher did not believe that Gill would lay him off because he complained about safety. Fletcher had high regard for Gill's commitment to safety because he had responded to his earlier complaints. Morrill argues that Fletcher's confidence in Gill is an admission that bars this action. It contends that because Gill made the final decision to lay off Fletcher, this case must be dismissed. I reject Morrill's argument. First, Fletcher's position is that Harting was the one who wanted to see him terminated from his employment and that it was Harting, not Gill, who first suggested that Fletcher be chosen for layoff. Fletcher believes that if he had not been making safety complaints, Harting would have not have suggested him for layoff and that Gill would have accepted Harting's recommendation. In addition, the

complaint in this case is against Morrill not Gill so the fact that Fletcher believes that Gill would not lay him off for making safety complaints does not bar this action or establish that Morrill was not motivated in some part by Fletcher's safety complaints.

Discrimination cases typically arise in the context of a termination for cause. In such instance, if a mine operator cannot establish that the protected activity played no part in its decision to terminate the complainant, it may nevertheless defend by proving that (1) it was also motivated by the miner's unprotected activities, and (2) that it would have taken the adverse action in any event for the unprotected activities alone. Because this case involves a layoff, the test is not a perfect fit. I must analyze whether Morrill would have laid Fletcher off even if he had not engaged in protected activity.

The Commission has cautioned its administrative law judges that the "Commission does not sit as a super grievance board to judge the industrial merits, fairness, reasonableness, or wisdom of an operator's employment policies except insofar as those policies may conflict with rights granted under section 105(c) of the Mine Act." *Delisio v. Mathies Coal Co.*, 12 FMSHRC 2535, 2544 (December 1990) (citations omitted). Nevertheless, the judge must carefully analyze the reasons given by the employer for the adverse action to determine whether such reasons are simply a pretext. In *Chacon*, the Commission explained the proper criteria for analyzing an operator's business justification 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 mere pretext seized upon to cloak the discriminatory motive.
>
> The Commission and its judges have neither the statutory charter not the specialized expertise to sit as a super grievance or arbitration board meting out industrial equity. 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 judgement our views on "good" business practice or on whether a particular adverse action was "just or "wise." The proper focus, pursuant to *Pasula*, is on whether a credible justification figured into the 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 a judge's or our sense of fairness or enlightened business practice. Rather the narrow statutory question is whether the

> reason was enough to have legitimately moved that operator to have disciplined the miner.

Chacon, at 3 FMSHRC 2516-17 (citations omitted). The Commission further explained its analysis as follows:

> [T]he reference in *Chacon* to a "limited" and "restrained" examination of an operator's business justification defense does not mean that such defenses should be examined superficially or be approved automatically once offered. Rather, we intended that a judge, in carefully analyzing such defenses, should not substitute his business judgement or a sense of "industrial justice" for that of the operator. As we recently explained, "Our function is not to pass the wisdom or fairness of such asserted business justifications, but rather only to determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed."

Haro v. Magma Copper Co., 4 FMSHRC 1935, 1938 (Nov. 1982) (citations omitted).

As stated above, Morrill's evidence that cutbacks were necessary is credible. It is also true that two plant operators were not necessary at the Kent site because the crusher was operating only one shift per day. The question is whether Morrill used the layoff as a cover to terminate Fletcher.

Morrill argues that a mine operator cannot "negligently discriminate" against a miner. I agree that the discrimination must be intentional. The following factors are in Fletcher's favor: (1) the proximity in time between his safety complaints and the adverse action; (2) Morrill's knowledge of his protected activity; (3) Morrill provided inconsistent reasons for choosing Fletcher for layoff at different times; (4) Morrill was aware that Fletcher had worked in many different positions for Morrill including on the maintenance shift at the Kent site; (5) Fletcher was paid the same hourly wage at the Kent site as other employees including Syria and Drinkwater; (6) Harting referred to Thody in disparaging terms, (7) Harting did not appear to welcome and was unresponsive to Fletcher's safety complaints, and (8) Fletcher had a good work record. Also favoring Fletcher is Mr. Thody's initial reaction to his layoff. Thody was well aware of Fletcher's work history and safety activities and he sincerely believed that he had been discriminated against. Fletcher was the only Morrill employee making safety complaints.

Of these factors, I find it highly significant that Mr. Gill offered different explanations for the layoff of Fletcher at different times. Because his reasons are inconsistent, I question the credibility of his testimony. Mr. Gill told the Washington State Department of Labor and Industry (DLI) investigator, on May 18, 2000, that Mr. Harting made the decision to lay off Fletcher. (Gill Interview at 5 attached to Fletcher's Response to Morrill's Motion for Summary Decision; Tr.

98-99). Gill told the DLI investigator that when he asked Harting how many people were working at the Kent crusher, Harting replied that eight people were working there. *Id.* Gill stated that he told Harting that only six people should be on that job. He further stated that Harting called him back and asked if it was "okay to lay off Mike." Gill told the DLI investigator that he responded to Harting as follows:

> [W]hoever you want to lay off is fine with me. I mean, that's, you're the guy that's running the crusher. As long as . . . it's not jeopardizing your production ability, you know, you make the choice.

Id. Gill also told the DLI investigator that Fletcher was the highest paid employee on the job except Roger Harting. *Id.* at 6.

During his deposition taken in this proceeding on July 17, 2001, Gill stated that, although Harting notified Fletcher that he was being laid off, "Roger and I" made the decision to choose Fletcher for layoff. (Gill Dep. at 28 attached to Fletcher's Response to Morrill's Motion for Summary Decision; Tr. 102). Gill further testified at the deposition, as follows:

> I remember telling [Harting]: We don't need two operators. What do we need two crusher operators for. We don't. Well, lets get rid of one of the crusher operators. These other guys are grunts that do specific things. Mike was basically the guy who just sat around and pushed buttons on a button house, get rid of Mike.

(Gill Dep. at 34). At the hearing, Gill testified that he told Harting to lay off the other crusher operator and, when he was told that it was Fletcher, he replied "that's fine." (Tr. 74-75). Harting did not testify at the hearing. Gill's testimony in the WISHA proceeding, taken only a few months after the layoff, was that Harting chose Fletcher for layoff. That testimony supports Fletcher's position in this case. I find that Fletcher's version of the events, as supported by Gill's DLI interview, is more credible.

Morrill did not rebut Fletcher's *prima facie* case. I find that the testimony of Fletcher is more credible than the testimony of Gill or Thody, for the reasons discussed above. Gill's testimony has been inconsistent and Thody's change of heart is not convincing. According to the declaration of DLI investigator Britt Scott, Thody told Scott during a telephone interview in March 2000, that Fletcher's layoff "would make [his] job more difficult because now other employees are going to be afraid to speak up or report any safety and health problems or concerns." (Ex. 11 at 2). The anti-discrimination provisions of the Mine Act were enacted specifically to prevent these types of fears. During the seven months prior to his layoff, Fletcher sought Thody's help in correcting safety deficiencies because Fletcher reasonably believed that Harting did not welcome and was unresponsive to his safety concerns. I conclude that the justifications presented by Morrill for choosing Fletcher for layoff are "so weak, so implausible, or

so out of line with normal practice that it was mere pretext seized upon to cloak the discriminatory motive." *Chacon*, at 3 FMSHRC 2516. Morrill used the necessity of the layoff to select Fletcher because he had been making safety complaints to Thody. In conclusion, I find that Fletcher established a *prima facie* case of discrimination and that Morrill did not rebut his case by showing that it did not lay off Fletcher for his protected activity or that it would have laid Fletcher off even if he had not engaged in protected activity.

It is my understanding that Fletcher is seeking (1) back pay from the date of his layoff through November 14, 2000; (2) retirement pay for the same period of time; and (3) health care benefits for this same period of time. (Tr. 33-46). He worked for other employers during part of this period. The crusher was shut down on November 14, 2000, and the crusher employees were laid off. Morrill disputes the award sought by Fletcher.

IV. ORDER

The parties are **ORDERED TO CONFER** before **March 15, 2002**, in an attempt to reach agreement on the specific relief to be awarded. An agreement as to the scope and amount of the relief will not preclude either party from appealing this decision. If an agreement is reached, it shall be submitted to me on or before **March 27, 2002**. The relief may be a lump sum payment.

If an agreement cannot be reached, the parties are **FURTHER ORDERED** to submit their respective positions on the disputed issues, with supporting arguments, case citations, and citations to the record, on or before **March 28, 2002.** Each party shall submit specific proposed dollar amounts for each category of relief.[1] If either party requests a hearing on remedial issues, such request shall identify the specific issue(s) on which a hearing is deemed necessary and provide a proffer of the evidence intended to be introduced. The other party shall submit a similar proffer within five days. If I determine that a hearing is necessary, it will be scheduled expeditiously. In accordance with 29 C.F.R. § 2700.44(b), I am submitting copies of this decision to the Secretary of Labor so that she may propose a civil penalty for the violation of section 105(c) of the Mine Act as set forth in that rule.

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[1] The proper method of calculating interest on back pay is set forth in *Secretary on behalf of Bailey v. Arkansas-Carbona Co.*, 5 FMSHRC 2042, 2052 (Dec. 1983), as modified by *Clinchfield Coal Co.*, 10 FMSHRC 1493, 1505-06 (Nov. 1988).

I retain jurisdiction over this case until I issue a specific award to Mr. Fletcher. Consequently, this decision will not become a final appealable decision until I issue an order awarding monetary damages.

Richard W. Manning
Administrative Law Judge

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