

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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March 20, 2002

DANIEL HERNANDEZ, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. WEST 2001-308-DM
: RM MD 01-03
ASARCO INCORPORATED, : Mission Complex
Respondent :
: Mine ID 02-00855

DECISION

Appearances: Daniel Hernandez, Complainant, Perris, California, pro se;
Willa B. Perlmutter, Esq., Patton Boggs LLP, Washington, DC, for Respondent.

Before: Judge Bulluck

This proceeding is before me on a Complaint of Discrimination filed by Daniel Hernandez against ASARCO, Incorporated ("ASARCO"), under section 105(c) of the Federal Mine Safety and Health Act of 1977("the Act"), 30 U.S.C. § 815(c). The complaint alleges unlawful discharge from employment in retaliation for having made safety complaints to ASARCO.

Hernandez filed his discrimination complaint with the Mine Safety and Health Administration ("MSHA") pursuant to section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2), on October 31, 2000 (Ex. R-8).¹ On March 1, 2001, MSHA notified Hernandez that, based on its investigation of the allegations, it had concluded that a violation of section 105(c) had not occurred (Ex. R-11). Hernandez, pro se, initiated this proceeding before the Commission on March 30, 2001, under section 105(c)(3) of the Act, 30 U.S.C. § 815(c)(3).²

¹Section 105(c)(2) provides, in pertinent part, that "Any miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination."

²Section 105(c)(3) provides, in pertinent part, that "If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission"

A hearing was held in Tucson, Arizona. The parties presented testimony and documentary evidence, and filed post-hearing briefs. For the reasons set forth below, I conclude that Hernandez failed to prove that he engaged in activity protected by the Act and that, assuming, *arguendo*, that he had, ASARCO discharged him for reasons that are unrelated to any protected activity.

I. Stipulations

The parties stipulated to the following facts:

1. On August 15, 1995, the Complainant was hired to work at ASARCO Mission underground mine.
2. On February 26, 1997, the Complainant voluntarily left his job at ASARCO mission underground mine for personal reasons.
3. On September 2, 2000, the Complainant was rehired by ASARCO Mission underground mine.
4. The Complainant was fired from his job on October 18, 2000.
5. When the Complainant was fired from his job at ASARCO Mission underground mine, he was still in the probationary period.

II. Factual Background

ASARCO's Mission Complex is an underground copper mine. Daniel Hernandez worked at the Mission mine as a driller from August 15, 1995, until February 26, 1997, when he quit his job for personal reasons (Tr. 6). Hernandez sought employment with ASARCO a second time, was rehired as a jumbo (underground drill) operator at the Mission mine, and worked in a probationary status from September 2, 2000, until October 18, 2000, when he was discharged, according to ASARCO, for "improper workplace inspection and unacceptable drilling pattern" (Tr. 354; Ex. R-26).

Hernandez last worked during the swing shift of October 17, 2000, under the charge of shifter (underground shift supervisor) Roger Sparby, who made routine rounds to his crew's individual headings every hour or so, to ensure that work was progressing smoothly and to assist his workers where necessary (Tr. 11-16, 313-15). Hernandez started the shift working in one heading, then later drilled in the 197 East/18 West heading with Sparby (Tr. 321, 335-36). While in the process of drilling, a misfire was found behind the heading, approximately 100 feet from Hernandez's location on the jumbo, which was blasted later at the end of the shift when blasting is

typically performed (Tr. 321-25, 336-37). Two hours before the end of the shift, Sparby last checked Hernandez's heading where, because Hernandez was in the process of rattling down prior to drilling, there was "a lot of loose," and Sparby summoned a mechanic to assist Hernandez with problems he was having with the jumbo's hydraulic system (Tr. 327-29, 335, 338, 341-43). When the following crew reported at midnight, graveyard shift supervisor Louis Marrujo dangered-off Hernandez's heading, prohibiting further entry pending investigation by senior underground supervisor Gary Torres during the day shift (Tr. 295, 370-72). Based on Marrujo's report and accompanying diagram of unsafe conditions and improper drill pattern, Torres and day shifter Dennis Dippel inspected the physical condition of the dangered-off heading (Tr. 285, 287-92, 373-75, 387-88; Ex. R-25). Consequently, in close proximity to the on-coming swing shift at 4:00 p.m. on October 18th, Torres submitted his notes and photographs of the heading to mine manager Pete Graham (Tr. 388; Ex. R-26, R-27). When Hernandez reported for duty on the swing shift, Torres summoned him to the office, showed him the photographs of his work area, and discussed its unsafe condition (Tr. 55, 388). Hernandez denied having left his heading as depicted in the photographs and alleged that Marrujo's graveyard crew had "set him up" by sabotaging his heading (Tr. 17-19, 92-93, 389-90). According to Torres, it was then that he decided to fire Hernandez (Tr. 390).

III. Findings of Fact and Conclusions of Law

In order to establish a *prima facie* case of discrimination under section 105(c) of the Act,³ a complaining miner bears the burden of establishing that 1) he engaged in protected activity and 2) the adverse action of which he complained was motivated in any part by the protected activity. *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (October 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981); *Secretary of Labor on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842 (August 1984); *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508 (November 1981), *rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983).

The operator may rebut the *prima facie* case by showing that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Pasula*, 2

³Section 105(c)(1) of the Act provides that a miner cannot be discharged, discriminated against or interfered with in the exercise of his statutory rights because: (1) he "has filed or made a complaint under or related to this Act, including a complaint . . . of an alleged danger or safety or health violation;" (2) he "is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101;" (3) he "has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding;" or (4) he has exercised "on behalf of himself or others . . . any statutory rights afforded by this Act."

FMSHRC at 2799-800. If the operator cannot rebut the *prima facie* case in this manner, it, nevertheless, may defend affirmatively 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.* at 2800; *Robinette*, 3 FMSHRC at 817-18; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987); *Donovan v. Stafford Const. Co.*, 732 F.2d 954, 958-59 (D.C. Cir. 1984); *Boich v. FMSHRC*, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's *Pasula-Robinette* test).

Hernandez has failed to meet the first step in establishing a *prima facie* case of discrimination. He has not established that he engaged in protected activity, despite alleging at different stages in this proceeding that he had made safety complaints to management concerning working around misfires, rattling (checking ground) and scaling (bringing down loose ground) with the jumbo drill, moving heavy hoses underground, and drug usage by miners underground.

Looking first to Hernandez's discrimination complaint of October 31, 2000, he described having drilled "across the drift from a misfire half the night" on the swing shift of October 17th, but admits that he "never got the chance to express [himself]" because on October 18th, Gary Torres confronted him with evidence that he had left his heading in an unsafe condition and failed to drill the burn⁴ properly, then fired him (Ex. R-8). In essence, Hernandez alleged that the graveyard crew had sabotaged his heading "to make it look like [he] had left bad ground for the next shift" (Ex. R-8). It was not until well after his termination, when forwarding his Complaint to the Commission pursuant to section 105(c)(3), that Hernandez alleged in his cover letter of March 26, 2001, that he had been required to "bar down" (scale) with the jumbo, despite complaints to his supervisor that that method of ground control endangered his safety. Later still, during his deposition, Hernandez raised for the first time the complaint of having been required to carry heavy hoses underground (Tr. 99-103).

At hearing, Hernandez testified that he had first complained about working around misfires to day shifter Dennis Dippel and alleviated the problem himself rather than refusing to drill in that environment, but was unable to specify when this incident occurred and admitted that he had failed to document it (Tr. 7-11, 20-21; *see* 85-86). Dennis Dippel testified that he did not remember Hernandez ever working under his supervision during Hernandez's second stint at Mission underground, that Hernandez had never made any safety complaints to him, and that he had no involvement in the decision to terminate Hernandez (Tr. 275, 293, 298-301). Respecting Hernandez's last shift on October 17th, Gary Torres testified that, when confronted with having left a dangerous heading, Hernandez accused other miners of deliberately making it unsafe, and that Hernandez never complained about a misfire or any other safety issue (Tr. 389-92, 403). Hernandez, himself, conceded in testimony that he had never spoken to Torres about misfires

⁴The "burn," a series of holes in a drill pattern, is where the explosives start to "pull" or break out the center rock, causing surrounding rock to break into the center, so that the face breaks down in an orderly fashion (Tr. 180-84).

(Tr. 51-56). Swing shift supervisor Roger Sparby, on duty October 17th, testified that the misfire never posed a danger because it was discovered a safe distance of 100 feet away from where Hernandez was drilling and no one else was working in the area, and that the misfire was blasted at the end of the shift to avoid exposing the crew to dust and smoke in the middle of the shift (Tr. 321-325). Sparby further testified that Hernandez had not made any safety complaints to him (Tr. 326). Hernandez produced no evidence that would substantiate a misfire incident involving Dippel, and he failed to prove that his involvement in discovering and detonating the misfire on Sparby's watch amounted to a complaint of unsafe working conditions. Moreover, in light of the fact that Hernandez never refused to work under the alleged unsafe conditions, never documented the conditions in personal notes or on time cards,⁵ nor complained to Torres when the shift ended or any reasonable time thereafter, his testimony falls substantially short of rebutting the credible cumulative testimony of ASARCO's witnesses, including the union steward, safety engineer and human resource manager, that Hernandez never complained about misfires or any other safety issues while he was working in the probationary status.

Hernandez, save his bare allegation in responses to ASARCO's discovery requests, has failed to establish that he made safety complaints about rattling and scaling with the jumbo drill prior to his termination (Tr. 70-82). Furthermore, he conceded, through deposition and hearing testimony, that he had never complained to management about being required to haul heavy hoses around the mine (Tr. 100-03). Similarly, Hernandez has failed to establish that he raised a safety complaint respecting drug usage underground, prior to his termination. The evidence indicates that he faxed a complaint to the Arizona State Mine Inspector on October 19, 2000, implicating, among others, Marrujo's crew in illegal sales and on-the-job cocaine and methamphetamine usage, but he admitted in testimony that he had not become aware of this activity until after he was fired (Tr. 104-06).

ASARCO has consistently maintained that Hernandez never engaged in protected activity, and has sought to cast his character in a negative light and his claims as after-the-fact fabrications of a system-savvy litigant, designed to construct a cause of action. One glaring instance of Hernandez's lack of truthfulness and manipulation of the system is illustrated by the Order of February 29, 1996, wherein Commission Judge Richard Manning granted a continuance in the discrimination proceeding Hernandez had brought against American Girl Mine, based upon Hernandez's representation to the judge that his mother's recent death had prevented him from "turning his attention to his case" (Ex. R-1). It is clear from the instant record, including Hernandez's own testimony, that his mother is "alive and kicking" (Tr. 27-28). Moreover, Hernandez's discrimination complaint against American Girl, also regarding termination, makes it evident that he is knowledgeable as to his rights and protections under the Act and how to proceed with a claim (Tr. 57-60, 86-89). Judge Manning clearly explained miners' rights under the Act in his dismissal of Hernandez's discrimination claim for, in part, his failure to allege that

⁵Hernandez's explanation for his failure to document the alleged safety complaints--that he was on probation and feared that "stirring up" things would get him fired--is totally implausible, since, according to him, fear of termination did not prevent him from rocking the boat by verbally complaining (see Tr. 85-86, 90-91).

he had engaged in protected activity (Ex. R-7). 18 FMSHRC 1182 (July 1996) (ALJ). While Hernandez's credibility has been seriously undermined by inconsistencies in his testimony and statements so far askew a plausible sequence of events as to be unworthy of credence, it is unnecessary to focus on his character because, other than the evolution of his bare assertions subsequent to MSHA's investigation of his Complaint, he has failed to produce any evidence supportive of his claim that he engaged in protected activity.

Assuming, *arguendo*, that Hernandez had established a *prima facie* case, ASARCO has rebutted his case by proving that Hernandez was discharged for legitimate, business-related reasons, entirely unrelated to any alleged protected activity. Credible evidence, unrebutted by Hernandez, clearly establishes that Hernandez had problems maintaining his heading in a safe condition and following ASARCO's required drill pattern during his first period of employment, which persisted without improvement after he was rehired. Union Steward Fred Ambrose testified that Hernandez had been known to leave his heading in need of scaling--unsafe for Ambrose to drill on the subsequent shift, and that other miners had complained that Hernandez's holes were drilled crooked and out of line ((Tr. 171, 176-78, 185, 189). Dennis Dippel testified that among his crew, Hernandez had a reputation of leaving his headings unsafe, and that Hernandez's drill pattern was "really bad" (Tr. 276-84). Roger Sparby testified that Hernandez left bad ground conditions in his headings, not conducive to safe drilling, and that Hernandez would not drill the right pattern (Tr. 315-17). Furthermore, Sparby testified that, in his opinion, Hernandez was trying to get too much done without taking care of his surroundings, and that while he had spoken to Hernandez on several occasions about workplace inspections and following the company's standard drill pattern, he had seen no improvement (Tr. 318-20, 330-31). Gary Torres testified that Hernandez was rehired under the condition that he would adhere to standard operating procedures by performing adequate workplace inspections and drilling according to the mandated pattern, but that he personally observed Hernandez's non-compliance in both areas (Tr. 350-52, 356-69, 373-75; see 122-27; Ex. R-21). Torres noted that Hernandez persisted in drilling the rounds "his way," despite the fact that Torres had drawn him a diagram of the company's standard drill pattern which Hernandez carried around in his pocket (Tr. 370; see 108-117; Ex. R-25). Safety engineer George Zugel testified that engineering support and management input are involved in planning the specific drill pattern for a particular mine, and that there is no deviation from the standard drill pattern at Mission underground (Tr. 232-33). Zugel also attested to personally observing unsatisfactory performance by Hernandez, including failure to take down loose rock (Tr. 237-43; Ex. R-25).

By his own testimony, Hernandez admitted some responsibility for ground conditions in his heading on October 17th, by suggesting that appropriate discipline would have been time off, but concluded that "being that [he] was on probation, they didn't care--they were happy to see [him] leave" (Tr. 97). It is clear, based on the record in its entirety, that Hernandez's persistent non-conformance with standard operating procedures was the sole motivation for ASARCO's decision to terminate his employment, and that he would have been terminated for performance deficiencies irrespective of any protected activity.

ORDER

Accordingly, inasmuch as Hernandez has failed to establish, by a preponderance of the evidence, that he was discharged for engaging in activity protected under the Act, it is **ORDERED** that the Complaint of Discrimination of Daniel Hernandez against ASARCO, Incorporated, under section 105(c) of the Act, is **DISMISSED**.

Jacqueline R. Bulluck
Administrative Law Judge

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