

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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November 5, 2002

RODNEY WOODRUFF,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEST 2002-163-D
	:	DENV CD 2001-21
	:	
v.	:	
	:	Trans Alta Coal Mine
HOLLINGER CONSTRUCTION, INC.,	:	
Respondent	:	

DECISION

Appearances: Rodney Woodruff, Chehalis, Washington, pro se;
Larry Slaughter, Hollinger Construction, Inc., Longview, Washington,
for Respondent.

Before: Judge Manning

This case is before me on a complaint of discrimination brought by Rodney Woodruff against Hollinger Construction, Inc., (“Hollinger”) 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. Woodruff alleges that he was forced to quit his job at Hollinger because he was not given a respirator to wear when he was using a torch to cut metal at the mine. An evidentiary hearing was held in Kelso, Washington. For the reasons set forth below, I find that Mr. Woodruff did not establish that Hollinger took any adverse action against him or that he was constructively discharged by Hollinger.

I. SUMMARY OF THE EVIDENCE AND FINDINGS OF FACT

Hollinger is a contractor that was hired by Trans Alta Centralia Mining to expand its heavy media plant (the “plant”) at its surface coal mine in Lewis County, Washington. This expansion was a major project that involved about 220 Hollinger employees at its peak. Coal enters the heavy media plant after it has been mined and crushed for sorting and washing. Pipes carry water and reagents used in this process. Hollinger was hired to expand the plant and add new equipment. A major component of the job was to install new piping for the plant.

Hollinger hired pipefitters from the pipefitters union hall to install the new piping. There were about 25 pipefitters working on this project at its peak. The heavy media project

began in about April 2001 and was completed by the end of that year. Mr. Woodruff was hired on May 29, 2001 as a pipefitter through the union hall.

On or about June 12, 2001, Woodruff was assigned to remove nuts and bolts off flanges under a tank, remove the flanges, and weld on new flanges. The top had been removed from the tank, which was about 40 feet above the surface level. To perform this task, Woodruff and his partner, Mark Lyons, were required to work under the tank to remove the nuts, bolts, and flanges and inside the tank to weld on new flanges. They first installed scaffolding under the tank and set up their equipment. Their immediate supervisor was Willy Fick.

Mr. Woodruff decided that the best way to remove the old, rusty nuts and bolts was to cut them with his welding equipment. To do this he would use his welding equipment as a torch while wearing his welder's mask. Woodruff decided that he wanted to wear a respirator while performing this task because he feared that the fumes could be hazardous to his health. He went to a trailer on the site that functioned as Hollinger's tool room. Woodruff testified that he did not want some "high-tech monstrosity" that had to be fit-tested, but just something to "break the fumes." (Tr. 18). He described what he wanted as a "button respirator." Apparently, this type of device consists of a cloth particle mask that has a button on the front through which air is expelled. (Tr. 61). Woodruff was told by a Hollinger employee that the company did not have any respirators in the tool room but that particle masks were available.

Mr. Woodruff went to Mr. Fick to find out how he could get a respirator. According to Woodruff, Fick agreed that the bolts and flanges needed to be cut with a torch but Fick commented that nobody else was using a respirator at the plant. Woodruff responded by saying that maybe everyone else was wrong. Woodruff also testified that at some point in his discussions with Fick, Fick offered to let him perform other unspecified tasks at the project, but that he rejected the offer because he would need a respirator in any event. Woodruff testified that he was upset that Hollinger did not have respirators available for use.

Woodruff testified that when he did not hear back from Fick, he talked to John Lake, Hollinger's safety manager for the heavy media project. Woodruff testified that he left early that day, about 2:30 p.m., and he did not hear back from anyone about obtaining a respirator. Woodruff acknowledged that he had a conversation with Lake about respirators on June 12, but he could not remember the substance of this conversation. (Tr. 30-31, 41-42).

Woodruff arrived at work late on June 13, 2001, at about 9 am, rather than at the 7 am starting time. A meeting was underway concerning how the welding and pipefitting work was to be performed at the project. Woodruff talked to Ken Patrick, a union steward, about respirators soon after he arrived. According to Woodruff, Patrick told him that there were no respirators at the project but that he understood why he wanted one. (Tr. 32). Woodruff replied that if there are no respirators available at the plant, then he is leaving. Woodruff went to Fick, told him he was quitting, and filled out the paperwork to resign from his position.

There is no dispute that Woodruff quit and that he was not involuntarily terminated by Hollinger.

Woodruff testified that he quit because, after his conversation with Patrick, he was convinced that Hollinger was not going to provide him with a respirator. He said that Patrick was usually on top of things and that Patrick told him that Hollinger had a “big meeting” about it and that his safety concerns were not taken seriously by the company. (Tr. 35). Woodruff denied that anyone from Hollinger told him that he could be fit-tested for a respirator if he shaved off his beard. (Tr. 26, 28-29; Ex. C-6).

John Lake, Hollinger’s safety manager for the heavy media project, does not dispute that Woodruff asked for a respirator on June 12. Lake testified that he told Fick that Hollinger will provide a respirator to any employee who asks for one but that the employee must be fit-tested first. Lake testified he told Woodruff on the afternoon of June 12 that if he returned to the project the next day with his beard shaved off, he would be fit-tested for a respirator. (Tr. 59-60). Lake stated that an employee with a beard cannot be fit-tested for a respirator.

Lake also testified that Hollinger must comply with safety and health regulations of the State of Washington. Most of the work that Hollinger performs is not regulated by the Department of Labor’s Mine Safety and Health Administration (“MSHA”) but is subject to the Washington Industrial Safety and Health Act. Lake testified that the company, in accordance with Washington regulations, requires an employee who will be wearing a respirator to first complete a medical evaluation form that is faxed to the medical clinic used by Hollinger to make sure that the employee does not suffer from any medical conditions that would prohibit the use of a respirator. Once the clinic has reviewed the form, the employee is fit-tested for a respirator. Lake testified that Hollinger does not “just pass out” respirators to employees but requires that they be fit-tested. He also testified that Hollinger’s employees were advised of this policy during new employee orientation. (Tr. 64). Consequently, employees can pick up particle masks in the tool room, but not respirators.

Lake further testified that the fit-testing kit was at Hollinger’s offices, that he retrieved this kit after work on June 12, and that he brought it to the plant on the June 13 so that Woodruff could be fit-tested if he still wanted to wear a respirator. (Tr. 64). Woodruff arrived at the plant with a beard on June 13. Lake stated that when he asked Fick about Woodruff on June 13, Fick told him that Woodruff had quit. Woodruff admits that he did not discuss the respirator issue with Lake on June 13. (Tr. 41).

Larry Slaughter also testified on behalf of Hollinger. He was Hollinger’s project manager at the plant. He did not take this position until September 2001, after Woodruff had quit his job. He testified about Hollinger’s general safety program. He testified that no respirator was actually needed because the nuts and bolts should have been removed using a wrench, not a torch, and that the area was well ventilated in any event. After Woodruff quit,

the nuts and bolts were removed by other employees using a wrench. The installation of new flanges, however, required welding. There is no evidence as to when this welding occurred.

Woodruff filed for unemployment compensation, which Hollinger did not contest. Because Woodruff quit his job, he had to demonstrate “good cause” for quitting in order to collect unemployment compensation. The administrative law judge for the State of Washington entered findings that Hollinger refused to provide a respirator for Woodruff. (Ex. C-1 ¶ 5). Slaughter testified that Hollinger did not appear at the unemployment compensation hearing or introduce any evidence in that case because of scheduling conflicts and because it did not see any reason to deny Woodruff unemployment compensation.

II. DISCUSSION WITH FURTHER 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. *Pasula* at 2800; *Robinette*, 3 FMSHRC at 817-18; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

In this case, Mr. Woodruff does not deny that he quit his job, but asserts that he had no choice but to quit when the company refused to provide him with a respirator. Complaining about respiratory protection or asking for a respirator is activity that is protected under section 105(c) of the Mine Act. Thus, Hollinger was prohibited from terminating or otherwise

disciplining him when he asked for a respirator. There is no dispute, however, that Woodruff was not terminated or disciplined. A finding that an employer took adverse action against a miner engaged in protected activity is a necessary element of a complainant's case. Thus, unless Woodruff was constructively discharged, there was no adverse action and there can be no finding of discrimination. *Bryce Dolan v. F & E Erection Company*, 22 FMSHRC 171, 175 (Feb. 2000).

The Commission has determined that a "constructive discharge is proven when a miner engaged in protected activity shows that an operator created or maintained conditions so intolerable that a reasonable miner would have felt compelled to resign." *Id.* at 176. The "key inquiry" in a constructive discharge case is whether "intolerable conditions existed such that a reasonable miner would have felt compelled to resign." *Id.* "It is the operator's failure to reasonably remedy such conditions that converts the resignation into an adverse action." *Id.*

I find that Woodruff failed to establish that Hollinger created or maintained conditions that were so intolerable that a reasonable miner would have felt compelled to resign. I reach this conclusion for a number of reasons. First, although Woodruff communicated his desire to wear a respirator while using the welder as a cutting torch on June 12, he did not follow through on June 13. When he arrived at the plant at 9 a.m. on June 13, he asked the union steward about a respirator. When the union steward told Woodruff that he would not be issued a respirator, Woodruff quit. He admits that he did not ask Lake about the respirator and he could not remember what was said in his conversation with Fick. (Tr. 41, 43). He simply assumed that he would not be granted the right to wear a respirator, so he quit and left the plant.

I find John Lake's testimony in this case to be especially credible. Lake testified that he advised Woodruff on June 12 that the company did not just hand out respirators because each employee had to be fit-tested for a respirator. It is possible that Woodruff did not hear or comprehend all that was said in this conversation, but he did not take the opportunity to discuss the respirator issue with Lake on June 13 before he quit. Hollinger did not anticipate that anyone would be needing a respirator that early in the project, so the fit-testing equipment was at the company's office. I credit Lake's testimony that he went to the office after work on June 12, picked up the fit-testing equipment, and brought it to the plant on June 13.

Woodruff denied that anyone told him that he could be fit-tested for a respirator. He did acknowledge, however, that before he left work on June 12, Lake and Fick discussed his situation and that he may not have heard everything that was said. He testified that he could not "remember what our exchange of words [were] at that point." (Tr. 27). Woodruff testified, however, that nobody told him "face-to-face" that he could have a respirator. (Tr. 26). Assuming that to be the case, a reasonable miner would have asked Lake for a respirator on June 13 before he resigned from his job. Because Woodruff left work early on June 12 and arrived late on June 13, it was particularly unreasonable for him to rely solely on the statements

of a union steward that respirators were not available, without discussing it with someone from management.

Lake credibly testified that, although there had been a meeting on the morning of June 13 to discuss the welding project, the respirator issue was not discussed and, more importantly, Ken Patrick was not at the meeting. (Tr. 91-93). Woodruff's testimony on this issue was somewhat inconsistent. At first he stated that the meeting was not about respirators. (Tr. 31). Then Woodruff testified that Ken Patrick told him that, at a "big meeting" about welding, Hollinger management said that respirators would not be made available to employees. (Tr. 32-35). Although Woodruff believed that Patrick was "on top of" the respirator issue, Lake testified that John Mitchell, not Ken Patrick, was the safety and health representative for the pipefitters. (Tr. 35, 92).

Woodruff admits that when he initially raised the respirator issue, his supervisor offered him the opportunity to perform other tasks. Woodruff refused this offer because he assumed that he would need a respirator sooner or later. There is no doubt that Hollinger did not have respirators available at the plant at the time Woodruff first requested one, but a reasonable employee would have performed other work until respirators were provided. It is clear that he could have performed work that did not require the use of a respirator for at least a day or so until a respirator was provided. Indeed, after Woodruff quit, other Hollinger employees removed the same nuts and bolts that Woodruff was going to cut off with his welder by using wrenches. A respirator was not necessary for such work.

Slaughter and Lake credibly testified that Hollinger does not keep respirators lying around because a respirator is not as effective if it is not fit-tested. (Tr. 67, 84-85). This fact is especially true with an employee who has a beard, as Woodruff did on June 12 and 13 as well as at the hearing. I credit Lake's testimony that Hollinger requires an employee to obtain medical clearance and to be fit-tested before he can wear a respirator. It is quite clear from the evidence in this case that Hollinger would have allowed Woodruff to perform other work until these requirements were met.

Hollinger did not believe that a respirator was necessary to perform the work that Woodruff was assigned. Hollinger management concluded that most of the work could be performed using wrenches rather than a welder and, more importantly, that the area was well ventilated. Woodruff stated that the investigator for MSHA agreed with Hollinger in this regard. (Tr. 68). Contrary to Woodruff's belief, the company's position that respirators were not required is consistent with its position that it would have fit-tested him for a respirator. Hollinger allows employees to be fitted for respirators in circumstances where its managers believe that respirators are not necessary. (Tr. 93). Later in the year, after Woodruff quit, the welders were fit-tested with respirators in preparation for the installation of the piping system. (Tr. 11, 37).

I hold that Mr. Woodruff failed to establish that Hollinger created or maintained conditions so intolerable that a reasonable miner (employee) would have felt compelled to resign. It is the employer's failure to reasonably remedy a safety or health hazard that converts an employee's resignation into an adverse action. Woodruff did not give Hollinger sufficient opportunity to provide a remedy. Woodruff relied exclusively on the statements of the union steward that respirators would not be provided when he decided to quit. As supported by the testimony presented by Hollinger, the proper and reasonable procedure would have been for Woodruff to discuss the issue with Lake on the morning of June 13 rather than simply quitting. The facts make clear that Hollinger would have provided a respirator once fit-testing requirements were met. Thus, there was no showing that Hollinger took adverse action against Woodruff.

At the hearing, Woodruff relied on the decision of the administrative law judge in the unemployment compensation proceeding before the Washington Employment Security Department to support his case. I admitted that decision as an exhibit in this case and accepted the findings therein as Woodruff's testimony. (Ex. C-1). I am not bound by the findings and conclusions in that decision, however, because standard of proof was different in the unemployment compensation case and because Hollinger did not contest the claim or present any evidence in that case.

III. ORDER

For the reasons set forth above, the discrimination complaint filed by Rodney Woodruff against Hollinger Construction, Inc., under section 105(c) of the Mine Act is **DISMISSED**.

Richard W. Manning
Administrative Law Judge

Distribution:

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