

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

**OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041**

January 30, 1996

CHRIS SCHULTZ, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. WEST 95-513-DM
: RM MD 95-14
STILLWATER MINING COMPANY, :
Respondent : Stillwater Mine
: Mine ID 24-01490

DECISION

Appearances: Scot Schermerhorn, Esq., Freeman & Schermerhorn,
P.C., Billings, Montana, for the Complainant;
Jeanne M. Bender, Beth Nedrow, Esqs., Holland &
Hart, Billings, Montana, for the Respondent.

Before: Judge Weisberger

Statement of the Case

This case is before me based upon a Complaint filed by Chris Schultz on August 30, 1995, alleging that Stillwater Mining Company (Stillwater) terminated him in violation of Section 105(c) of the Federal Mine Safety and Health Act of 1977 (the Act). An Answer was filed by Stillwater on September 25, 1995. Pursuant to notice, the case was heard in Billings, Montana, on October 31, 1995. Chris Schultz testified on his own behalf. Louis Meyers and Larry James Jaudon testified for Stillwater. Each of the parties filed a Brief and Proposed Findings of Fact on December 4, 1995. On December 8, 1995, Complainant filed a Response Brief. On December 13, 1995, Respondent filed a reply to this brief.

Findings of Fact

On July 11, 1994, Chris Schultz was hired by Stillwater to work as a laborer at its Stillwater Mine, an underground platinum group materials mining operation. Schultz underwent 40 hours newly employed inexperienced miner training. At that time, he received a copy of Stillwater's Employee Handbook and its Safety Rules and Practices. In the course of the training, there was no discussion regarding any possible disciplinary action that would be meted out to an employee for reporting an attack by another employee.

Prior to March 23, 1995, Schultz had been evaluated two times by his Supervisor, Tom Goldsmith, and was rated on his ability to get along with other employees. Schultz indicated

that there did not seem to be anything bad in the evaluations. Prior to March 23, 1995, Schultz never made any safety complaints.

In January 1995, Schultz was assigned to work in the east side of the mine, and to train another laborer, Larry Riddle, who had just been hired. Schultz continued to work with Riddle through March 23, 1995. Schultz indicated that he did not have any personality conflicts with Riddle, and was not aware of any hard feelings that Riddle had towards him. Riddle did not complain to mine management about any personality problems with Schultz. Schultz was never disciplined for any personality conflict with any other miner.

On March 23, 1995, Schultz did not work with Riddle. Schultz indicated that during the workday he borrowed a cigarette from Riddle, and engaged in small talk. According to Schultz, Riddle did not exhibit any hint of any hostile feelings.

At the end of the shift,¹ Schultz was in the process of descending a flight of stairs down to the parking lot. He saw Riddle at the bottom of the stairs. According to Schultz, Riddle said to him, "... well, do you have something smart to say now" (Tr. 21). Schultz said that he said, "what?" (Tr. 21), and then Riddle hit him. Schultz then dropped the clothes and lunch box that he had been carrying, and hit Riddle. According to Schultz, Riddle then hit him a few times and then he (Schultz) backed off. Schultz said that he then asked Riddle, "what's going on?" and Riddle said, "meet me at Carter's Camp in ten minutes" (Tr. 22).

Schultz then drove home and called Louis Myers, Stillwater's Superintendent, and told him that Riddle had attacked him in the parking lot. Myers then told Schultz to return to the mine to talk about the incident.

Schultz indicated that he initially reported the incident to Myers, because he was afraid that Riddle would have retaliated. Schultz indicated that he had been working with Riddle 40 to 50 percent of the time underground, mostly in isolated areas, and it would have been easy for Riddle to hurt or kill him.

Schultz returned to the mine and met with Myers, Allen Buell another superintendent, and Larry Jaudon, Stillwater's Safety

¹When Schultz left the mine at the end of the shift on March 23, 1995, he was not scheduled to work for 5 days, due to the normal rotation of his work shift.

Coordinator. Myers took Schultz's statement and told him that his job was in jeopardy as he thought it was a violation of federal law to fight on mine property. Myers told Schultz to go home, and that he would be in touch with him.

On March 27, Schultz called Myers, who asked him to return to the mine to talk to him. Schultz returned to the mine at approximately 1:00 p.m., and met with Myers and Ralph McKenzie, Stillwater's Safety Coordinator. Myers indicated that he had talked to Riddle, and informed him that Riddle had said that he and Schultz had a problem getting along. Myers asked Schultz if there were any problems, and Schultz said that there were not any that he was aware of. Myers told Schultz that he had to talk to John Thompson the mine manager. Myers recommended to Thompson that both Riddle and Schultz be terminated for fighting and unacceptable behavior, and Thompson agreed.

On March 28, Schultz called Myers, who told him to return to the mine to meet with him. Myers informed him that he had to terminate him, and that it was Thompson's decision. Schultz said that he asked why he was being terminated, and Myers did not give any response to the question, but said that it was Thompson's decision. Schultz then wrote to McKenzie 2 or 3 days later. On April 11, Schultz received a form entitled Record of Discussion With Employee which indicates that the action taken was "discharge" (Complainant's Exh. 2). This form, signed by Myers, dated April 10, further states as follows: "Termination for (1) disregard for the rights of fellow employees. (2) disregard or violation of accepted behavioral standards."

Thompson did not testify; however, he was deposed on October 24, 1995, and his deposition was admitted in evidence without objection. He was asked a series of questions regarding his role in various personnel actions, and then specifically about "discharge from employment." His answer, as pertinent, is as follows: "Generally speaking I would be the final say-so," (Complainant's Exh. 19, p. 5). Thompson indicated that he concurred in Myers' recommendation to discharge Schultz. He indicated specifically that the discharge had nothing to do with job performance and that the ultimate reason was "fighting on company property" (Complainant's Exh. 19, p. 11).

Riddle did not testify. Myers indicated that he spoke to Riddle, who indicated that he did throw the first punch, but that he had been provoked by Schultz who had been harassing him for some time. Myers indicated that he could not find anyone who had witnessed the fight, nor did anyone corroborate Riddle's allegation that he had been provoked and harassed by Schultz. Myers terminated Riddle for fighting, and also because he had not

yet completed his initial probationary period.

Stillwater's Safety Rules and Practices which was in effect when Schultz was hired (Complainant's Exh. 8) indicates that "scuffling and all forms of horseplay are prohibited." (Id., P. 8). The General Safety Rules, revised on September 19, 1994, and in effect at the date of the incident in issue, deleted the prohibition against scuffling and horseplay. Stillwater's Policies/Procedures/Benefits does not contain any prohibition against fighting.

Myers indicated that in terminating Schultz, he relied on the fact that fighting is not an acceptable behavior. However, he indicated on cross-examination that fighting does not include being attacked or defending yourself.

Discussion

The Commission, in Braithwaite v. Tri-Star Mining, 15 FMSHRC 2460 (December 1993), reiterated the legal standards to be applied in a case where a miner has alleged acts of discrimination. The Commission, Tri-Star, at 2463-2464, stated as follows:

The principles governing analysis of a discrimination case under the Mine Act are well settled. A miner establishes a prima facie case of prohibited discrimination by proving that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-800 (October 1980), rev'd on other grounds, sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). The 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 protected activity. Pasula, 2 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 also was motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. Pasula, 2 FMSHRC at 2800; Robinette, 3 FMSHRC at 817-18; see also Eastern Assoc. Coal Corporation, v. United Castle Coal Co., 813 F.2d 639, 642 (4th Cir. 1987).

In essence, it appears to be Schultz's position that he was fired as a result of his communicating to management the attack on him by Riddle. Schultz argues that this communication constitutes a safety complaint, as he was afraid that Riddle would have retaliated and injured him. He also asserts, in essence, that he was not fighting, as he hit Riddle back in order to protect himself after he had been hit by Riddle.

I find that hitting another miner, even where one was hit first, is not the type of activity that is protected under the Act. See, Bruno v. Cyprus Plato, Mining Corp., 10 FMSHRC 1649, 1651, (1988) (Judge Morris); Dickey v. United States Steel, 5 FMSHRC 519, 582 (1983) (Judge Koutras); Burgan v. Harlan Cumberland Coal Company, 15 FMSHRC, 889, 900 (1993) (Judge Feldman). I agree with the following statement of the law as set forth in Bryant v. Clinchfield Coal Company, 4 FMSHRC 1380, 1421 (1982) (Judge Kennedy): "Any claim of protected activity that is not grounded on an alleged violation of a health or safety standard or which does not result from some hazardous condition or practice existing in the mine environment for which the operator is responsible falls without the penumbra of the statute." (See also, Hastings v. Cotter Corporation, 5 FMSHRC 1047 (1983)(Judge Carlson)).

I further find that Stillwater's action in terminating Schultz was based solely upon his participation in the altercation of March 25. There was no disparate treatment of Schultz, since Riddle, who was involved in the altercation, was also fired for this incident. Any argument that the termination of Schultz was not proper as he was engaged in self defense, and that such activity is not precluded by any of Stillwater's rules or policies, is not for this forum to decide, as it is not the basis of any violation under the Act.

For all the above reasons, I conclude that Schultz has not established that Stillwater violated Section 105 of the Act. Therefore his Complaint is dismissed.

ORDER

IT IS ORDERED that this case be DISMISSED.

Avram Weisberger
Administrative Law Judge

Distribution:

Scot Schermerhorn, Esq., Freeman & Schermerhorn, P.C.,
401 No. 31st, Suite 710, Box 7176, Billings, MT 59103
(Certified Mail)

Jeanne M. Bender, Esq., Beth Nedrow, Esq, Holland & Hart,
401 North 31st St., Suite 1500, P.O. Box 639, Billings, MT 59103
(Certified Mail)

/ml