

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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FALLS CHURCH, VIRGINIA 22041

April 26, 1996

CLYDE PERRY, : DISCRIMINATION PROCEEDING  
Complainant :  
v. : Docket No. WEST 96-64-DM  
: MSHA Case No. RM MD 95-18  
:  
PHELPS DODGE MORENCI, INC., : Morenci Branch Mine  
Respondent : Mine I.D. 02-00024

**ORDER DISMISSING COMPLAINT FOR FAILURE TO STATE  
A CLAIM UPON WHICH RELIEF MAY BE GRANTED**

Before: Judge Amchan

In September 1995, Complainant, Clyde Perry, filed a complaint with the Mine Safety and Health Administration (MSHA) alleging that he had been discharged by Respondent, Phelps Dodge, on February 3, 1995, in violation of section 105(c) of the Federal Mine Safety and Health Act. Material attached to the complaint indicates that Mr. Perry was fired either for refusing to provide a urine sample for a drug test, or for testing positive.

Complainant Perry apparently injured his right foot at work on February 16, 1993. After a month off work, Mr. Perry claims that Respondent required him to return on light duty.

In October, 1993, Complainant states that he was taken off light duty and required to work as a truck driver. Perry states further that he requested that his foreman give him another assignment because driving a truck caused him to have pain in his right foot, knee and back. Respondent apparently declined to provide Mr. Perry with any other type of work.

On January 28, 1995, Complainant was asked to provide a urine specimen for a drug and alcohol test. Documents provided by Complainant indicate an accident occurred in the vicinity in which he was working that evening, although Mr. Perry was not involved in the accident. Complainant contends that Respondent's demand for a urine specimen was unfair and contrary to Respondent's policies and normal practices. He was fired either for failing to cooperate with the test or for testing positive.

On November 6, 1995, MSHA informed Complainant that it had

determined that his discharge did not violate section 105(c) of the Act. Thereupon, Complainant initiated this action on his own behalf pursuant to section 105(c)(3) of the Act. In February, 1996, Respondent filed an Answer to the Complaint and a Motion for a More Definite Statement.

On February 29, 1996, I issued an Order to Show Cause to Complainant and an Order to Provide a More Definite Statement of his claim for relief. In that order, I expressed my opinion that Mr. Perry's complaint did not appear to allege any activity protected by the Federal Mine Safety and Health Act.

Complainant responded to my Order three weeks later. In response to my direction to specify his protected activities, Mr. Perry replied:

When I was forced to go back to work almost a month I had been off of work, still on crutches and medication.

I felt it was unsafe to go back to work with doctors orders, and if I did not go back to work I would be discharged. When I was task training other employees on buses while I was on medication I also complained to the Respondent that it was unsafe. I was also kept in a lower paying job, harassed for being off of work for almost the whole month of May for medical reasons and was told that I was terminated, because I told the Respondent that I was unable to perform my duties as a truck driver I felt it was unsafe because of medication and medical reasons. I explained to Respondent that I could not perform my duties with doctors orders to retrain with different type of work.

Mr Perry stated further that, A[t]he basis for my belief [that he was the victim of retaliation] is I complained about my injury and I could not perform my job. I felt I was unsafe for myself and co-workers to operate heavy equipment under my condition. I gave the Respondent a lost time accident@.

Having reviewed Complainant's response to my Show Cause Order I hereby dismiss his complaint alleging that his discharge violated section 105(c) of the Act. Assuming that I were to find all the facts alleged by Mr. Perry to be true, I conclude that they fail to state a claim upon which relief may be granted under the Act.

Section 105(c)(1) of the Federal Mine Safety and Health Act provides that:

No person shall discharge or in any manner

discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any ... miner because such miner ... has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent ... of an alleged danger or safety or health violation ... or because such miner ... has instituted or caused to be instituted any proceeding under or related to this Act ... or because of the exercise by such miner ... of any statutory right afforded by this Act.

The Federal Mine Safety and Health Review Commission has enunciated the general principles for analyzing discrimination cases under the Mine Act in Sec. ex rel. 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), and Sec. ex rel. Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981). In these cases, the Commission held that a complainant establishes a prima facie case of discrimination by showing (1) that he engaged in protected activity and (2) that an adverse action was motivated in part by the protected activity.

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 the protected activity. If the operator cannot thus rebut the prima facie case, it may still

defend itself by proving that it was motivated in part by the miner's unprotected activities, and that it would have taken the adverse action for the unprotected activities alone.

Complainant herein has not alleged that he engaged in activities protected by the Act. Being injured on the job is not an activity protected by section 105(c). Inability to perform one's tasks, even if due to a work-related injury, is similarly not within the scope of this provision. Refusal to take a drug test or testing positive is not protected activity either -- even if the employer's demand for such a test is unfair, unwarranted and contrary to the employer's normal practice<sup>1</sup>.

Finally, I conclude that it is not a section 105(c) violation to decline to provide alternative employment to a person who alleges that their physical condition poses a threat to their safety and the safety of others. An employee, who in good faith, believes his condition threatens others would cease performing such work activities. Although it may be a violation to retaliate against an employee who in good faith asserts that the continued employment of a co-worker poses a safety hazard, it is not a violation of the Act for an employer to take the position that an employee must either be able to perform his current tasks or seek employment elsewhere.

In short, I dismiss Mr. Perry's complaint because even if he were to establish that he was treated unfairly, or in a discriminatory manner, he would fail to establish a section 105(c) violation. The Act does not prohibit all discriminatory or retaliatory conduct. It prohibits only such conduct taken with regard to activities protected by the Act. Since

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<sup>1</sup>However, a demand for a urine specimen might constitute a section 105(c) violation if it was made in retaliation for other protected activities, such as making legitimate safety complaints, assisting MSHA in conducting an inspection, etc.

Complainant has not alleged any such activities, he has failed to state a claim upon which relief may be granted. His discrimination complaint is therefore **DISMISSED**.

Arthur J. Amchan  
Administrative Law Judge

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