

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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September 30, 1998

PAMELA BRIDGE PERO, : DISCRIMINATION PROCEEDING
Complainant :
 :
 : Docket No. WEST 97-154-D
v. : DENV CD 96-20
 :
 :
CYPRUS PLATEAU MINING CORP., : Star Point No. 2
Respondent : Mine ID 42-00171

DECISION

Appearances: L. Zane Gill, Esq., Salt Lake City, Utah,
for Complainant;
Matthew McNulty, Esq., Mara Brown, Esq.,
Salt Lake City, Utah,
for Respondent.

Before: Judge Cetti

This proceeding was initiated by a complaint filed by Pamela Bridge Pero (hereinafter APero) under the provisions of Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 802 *et seq.*, the Act,¹

¹ Section 105(c)(1) of the Act provides as follows:

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, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment, has filed or made a complaint under the related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine or

because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such representative of miners or applicant for employment has instituted or caused to be instituted any proceedings under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative or miners or applicant for employment on behalf of himself or of any statutory right afforded by this Act.

Pero initially filed her complaint with the Mine Safety and Health Administration (MSHA) at its Price, Utah, field office on September 12, 1996. In this first complaint Pero stated she was employed as a Human Resource Assistant and she listed the person responsible for the discriminatory action as Louis Grako, Human Relations Manager, and Keith Seiber, a previous vice-president and general manager of Cyprus Plateau Mining Corp. Pero's allegation of the discriminatory action in her complaint filed with MSHA reads as follows:

My employment was terminated on September 11, 1996. I feel this was done because over the course of the past 2-3 months, I have expressed to mine management personnel, the fact that dishonest acts have been executed by Mr. Grako (under the direction of Mr. Seiber for the past 1 2 years.) I feel this was retaliation for Awhistle blowing.@

MSHA conducted an investigation of Ms. Pero's complaint and by letter dated March 18, 1997, advised her that on the basis of the information gathered during the course of its investigation, a violation of Section 105(c) of the Act had not occurred. The letter in pertinent part reads as follows:

Re: Results of Discrimination Investigation
Case Number DENV-CD-96-21

Dear Ms. Pero:

Your complaint of discrimination under Section 105(c) of the Federal Mine Safety and Health Act of 1977 has been investigated by a special investigator of the Mine Safety and Health Administration (MSHA).

A review of the information gathered during the investigation has been made. On the basis of that review, MSHA has determined that a violation of Section 105(c) of the Act has not occurred.

If you should disagree with MSHA's determination, you have the right to pursue your action and file a complaint on your own behalf with the Federal Mine Safety and Health Review Commission.

Ms. Pero disagreed with MSHA's determination and on May 30, 1997, filed a complaint on her own behalf with the Commission under ' 105(c)(3) of the Act..

I

Stipulations

I accept the following stipulations that the parties entered into the record.

1. Cyprus owns and operates the underground coal mine known as Star Point No. 2
2. Ms. Pero was an employee of Cyprus at the time she was terminated.
3. Ms. Pero was terminated effective September 11, 1996.
4. Ms. Pero's rate of compensation at the time she was terminated are not in dispute.

II

Applicable Law

It is well settled law that a miner seeking to establish a *prima facie* case of discrimination under Section 105(c) of the Act bears the burden of proof that he engaged in protected activity and that the adverse action complained of was motivated in any part by that protected activity. *Secretary on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-2800 (October 1980) *rev'd* on grounds, sub nom. *Consolidation Coal Co., v. Marshall*, 663 F.2d 1211 (3rd Cir.1981); and *Secretary on behalf of Robinette v. United 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 the protected activity. If an operator cannot rebut the *prima facie* case in this manner, it may nevertheless defend affirmatively by proving that it would have taken the adverse action in any event on the basis of the miner's unprotected activity alone. *Pasula, supra*; *Robinette, supra*. See also *Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987); *Donovan v. Stafford Construction 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). *Cf. NLRB v. Transportation Management Corp.*, 462 U.S. 393, 397-413 (1983) (approving nearly identical test under National Labor Relations Act).

III

Ms. Pero was employed by Plateau Mining Corporation in the Human Resources Department during all relevant times. She started as a receptionist and then started working half a day in Human Resources Department (H.R.) and later commenced working there full-time with typing and other secretarial and clerical duties.

The Human Resources Department consisted of four people. Pero testified that the people in the Human Relations Department took over some of the clerical side of safety. They also did typing for the engineers and ran the switchboard. Pero in addition to running the

switchboard helped with the filing and typing of forms for on the job injuries and workers compensation claims. Pero states all the forms had to be sent to the state of Utah and only a few had to be sent to MSHA. Pero testified her clerical duties included typing workers compensation forms and typing of some of the MSHA 7000-1 forms. She states that her immediate supervisor, Louis Grako, instructed her to contact employees injured on the job to see if it was possible to get the miner to come back to work without loss time so as to avoid having to report a lost time injury. The miners got a bond each month if they had no loss time injuries during that month. Ms. Pero testified that as she talked to her brother who was the safety director at a rival or competing mine and talked to other safety people, she started to get a feel that some of the things that had been past practice weren't right. She stated she didn't feel comfortable with the practice of permitting or encouraging injured employees to take a doctors day off because there were medical facilities for them to go to. On further reading on the matter and talking to her brother who was the safety director at a competing mine, she determined that the employees injured on the job should not be taking a doctors day off.

From the time she was hired until she was terminated (11 years) Pero received only satisfactory or better performance reviews and never received any form of discipline prior to May 1996. However, she did receive a demotion from Human Resources Assistant II to Human Resources Assistant I. Pero attributes that demotion to the fact that she filed a sexual harassment complaint against her supervisor, Keith Seiber, who was Respondents vice-president and general manager (VPGM) at the time. Her sexual harassment lawsuit was dismissed by the Federal District Court in early 1995. It is claimant's contention that management's attitude towards her turned negative as a result of her unsuccessful harassment complaint. (Tr. 79, 83, 84, Complainant's Brief p. 5). This was also the perception of her co-worker Ms. Tucker who testified to the same effect. Asked by her counsel on direct examination to give some specifics, Pero testified as follows:

If (Keith Seiber) wanted me to do something, he told someone else to have me do it. He directed, I feel, Mr. Grako, to put me back on the switchboard, take my work away and not give me raises. That all came into it there. Any little thing I did, Lou was writing it down. He was making a big deal out of it, and I felt that came from Keith.

Q. What was your mind between Mr. Grako and Mr. Seiber?

A. They were bed partners from the beginning. I felt Mr. Seiber hired Mr. Grako to go in and clean house or do whatever with anybody he wanted to get rid of. Everyone around the mine felt like he was the hatchet man. That's my perception; that's really strongly what I felt.

Q. So you perceived what you believed to have what actions taken against you to try to take away your job responsibilities?

A. Yes.

Q. To freeze your salary?

A. Yes.

Q. Did you understand why that was happening?

A. No. I just felt like C you had to be part of their team up there. There were people that were and people that weren't, and I wasn't.

Q. Okay. When did you first start becoming concerned about safety issues, things that were being done that you thought were either illegal or against regulations? When did you first start becoming concerned about that?

A. I think it took me a while. I didn't have any training on the job. I didn't have anybody tell me what was legal and what wasn't legal. I was told to go in and look at the forms, see how Gayle had done them, and do them the same way. And I think it took me months to realize and start researching everything that I needed to know before I felt comfortable with what people had marked on the claims on the workers=accident reports. But as I talked to the safety people and as I called Rhys Llewelyn who wrote the book and as I talked to my brother, I started to get a feel that some of the things we were doing that had been past practice weren't right. (Tr. 84-85).

Pero discussed her views about the proper way to fill out the worker's compensation claims, related forms and reports for on the job injuries with her supervisor, Mr. Grako. She testified that sometimes Mr. Grako agreed with her and sometimes he did not. At other times he told her he would have to check further with others and then get back to her. (Tr. 91). Pero also attempted to convey her concerns about these and other matters with Mr. Grako's boss, Allen Childs, who was the Respondent's new vice-president and general manager at the time. Mr. Childs testified that Pero talked about alleged illegal reporting but never mentioned MSHA's 7000-1 form or 7000-1 reporting. (Tr. 472-479).

Asked as to the scope of her complaints on direct examination by her counsel Pero testified as follows:

Q. What was the scope of the things that you were complaining about?

A. The lack of trust in the department, the way we were treated by Mr. Grako. If we did the least little thing wrong, that was blown into a big, major thing. We were reprimanded for things that we didn't think we had even done. All of us were feeling that way.

There were sexual harassment problems, there was a big list of things.

Q. Did you at some point sense that you were getting in trouble for your complaints?

A. Yes, I did.

Q. When did you first sense that?

A. I think it started happening in April, and I think what happened was, when we talked to C well, can I give you an example of one?

Q. Certainly.

A. One problem I had was with the way we hired our summer students. I had been approached by all the people, saying, "This is no longer a program for everybody's kids. It's just the salaried employees' kids."

So, in passing one day, I mentioned it to Mr. Childs. So, he asked me to come into his office and we discussed it. And, I said, "It has become the salary students' program. We don't have any hourly people's children working."

He said, "Would you please get me some numbers?"

I got the numbers together, and it was like four to one. And, I said, "You know, to be fair to all of our employees, we need to make this 50/50."

He said, "I agree." And he talked to Mr. Grako.

I think when he started talking to Mr. Grako about my complaints, Lou (Grako) knew we were talking. Then,

he talked about Kim's complaints, and he would go talk to Lou. He (Grako) knew C he started knowing that we were going above him to the VPMG with our problems. That's when I felt him change. He got quiet with me; he got very secretive.

All of us girls noticed him listening outside the door, and he would stand and stare at us if we talked when he thought we were talking about something. We got really scared; we all got really scared.

So, what happened was, we all quit talking because we could see that he was going to come back on us for what we said.

And that continued for a month or two period until I left for my surgery. But I told Alan repeatedly that I was scared.

Q. So your first contact with Alan Childs about your concerns was probably early April of 1996?

A. Yes. He quit involving me in all of the discussions about Workers' Comp. (Tr. 135-137).

IV

Respondent's Three-Step Disciplinary Procedure

It was undisputed that Cyprus at all relevant times had in place a progressive employee disciplinary policy. This procedure is set forth in their employees handbook given to every employee. Under this policy there is a well established three-step disciplinary procedure. (Tr. 139). The evidence presented established that Pero was disciplined and eventually discharged when she exhausted the Cyprus progressive three-step disciplinary procedure.

Step 1 discipline resulted when Pero signed (forged) the name of her supervisor Louis Grako on two dinner certificates, one for herself and one for her husband. The one for herself may have been given to her but not the one for her husband. This written Step one reminder given to Pero in May 1996 states in part:

At the conclusion of our meeting, I advised you that you were to take the next day off with pay, April 30th, and come back the next day with a written action plan and commitment of how you can build trust and credibility with me and within our department. This is essential in any human resources organization.

Regardless of the possibility that I may have given you one dinner certificate, the other certificate was unauthorized and you signed my name to both certificates without authorization. I'm requesting that you bring in all the certificates you have for my review and approval. Dishonesty, including falsifying of my name and theft of Company property is a serious violation of our Guidelines for Appropriate Conduct.

As we discussed in our meeting, because of your serious misconduct I'm giving you this documented Verbal Reminder, Step 1 and placing it in your personnel file.

Pam, you must take immediate measures to improve your attitude and trust toward the Company and myself. The Company will not tolerate this type of behavior on your part or on the part of any employee. The Action Plan you provided me did not address the trust issue but totally evaded the real issue, I'm directing you to revise your commitment. I would like your commitment by Monday, May 6, 1996.

This letter should make it abundantly clear to you that if you fail to live up to your commitment and abide by company rules, you will subject yourself to further disciplinary action up to and including termination ...

On July 25, 1996, Pero was given a Step 2 written reminder which in pertinent part states:

On May 6, 1996, you were issued a Verbal Reminder following a conversation concerning dishonesty, which involved using my name without authority. At that time you had assured me that you would stop distrustful behavior and be a team player.

Unfortunately, we had another recent incident where you failed to properly inform me that you were going to have surgery and possibly be away from work for an extended period of time. In our telephone conversation on June 12th I had to make assumptions to figure out that you were going to be gone from work. I asked you in that same telephone conversation why you did not let me know ahead of time that you would be away from work. Your response was that you wrote me a note and you thought I would not be back from Denver until Friday, June 14th. In our meeting on June 14th you told me that the reason you wrote me a letter, dated June 10,

1996 is that I was not available for you to talk to. I stressed my dissatisfaction with the way you handled the whole process.

On June 26th, after you returned to work we had another discussion concerning the above mentioned incident and your failure to use the interview rating sheets, as I instructed you to do so in the past. Further, we discussed other work performance problems such as your failure to change the short-term (sic) disability forms, etc. You explained that you had let Allen know that you were going to have surgery two months ago and as far as the interview sheets and short-term disability forms were concerned you said you did not have time to complete the interview sheets or make changes in the STD forms. I explained that I was available all during the week of June 3rd and was at work all day Friday, June 7th and I am available to you on a regular basis. At the conclusion of our meeting, I advised you that because of the seriousness of your behavior in failing to give proper notice of your absence from work and your recent unacceptable work performance I am giving you this Written Reminder, Step 2 of our Corrective Action Policy. Pam, I want to make it abundantly clear that I will not tolerate this type of behavior by you or any other employee. Further, as I explained to you Human Resources employees are held to a high standard of honesty and integrity. You must take immediate measures to significantly improve your work performance and your attitude toward me, because I am responsible for your performance and conduct. If you are going to be away from work for any period of time which includes qualified Short-Term or Long-Term Disability you need to follow those policy guidelines, which include informing me on a regular basis of your progress. This includes periodic medical reports from your doctor. This is something you have not done in the past. Should you fail to immediately improve your conduct and performance, you will subject yourself to further disciplinary action up to and including termination. I will no longer accept your excuses. Also, it's unfortunate you can not make a commitment to change. I encourage you to make a change and I am here to help.

The third and final disciplinary step which resulted in termination On September 11, 1996, was a letter signed by Allen P. Childs, Vice-President, General Manager as follows:

RE: Notice of termination of Employment

Dear Mrs. Pero,

As you are aware your employment with Cyprus Plateau Mining Company (ACyprus@) was terminated effective September 11, 1996. Further, since May 1996 you have been disciplined for violation of company rules, and have been given both verbal and written warnings regarding those violations. Copies of the written warnings were earlier provided to you. However, as you requested on September 11, 1996, copies of the warnings are enclosed with this letter.

The decision to move you to the final step of the disciplinary process and terminate your employment at Cyprus is based upon several factors, including, without limitation, the following:

1. In May 1996 you were sent to Denver to be trained in the new Health and Safety Reporting System (AHSRS@). You were given very specific instructions regarding implementation of this program at Cyprus, and you were instructed to inform Jack Trackemas about how the system should operate. You were trained for several days at significant expense to Cyprus in airfare, meals, lodging and incidentals.

Unfortunately, you failed to carry out your instructions to assist in program implementation. In early July, Mr. Michael R. Peelish determined that you had not done any work on the HSRS, nor had you followed up with Mr. Trackemas. Consequently, the Cyprus program was delayed for approximately seven weeks. This type of neglect did not occur at any other facility.

2. Cyprus has also recently learned of unsatisfactory work performance by you in connection with the completion of I9 immigration forms. On or about September 4, 1996, during an OFCCP site audit, the auditor reviewed the I9 file maintained by you. The auditor discovered that a very significant percentage of the I9s were filled out incompletely and/or improperly. This could result in substantial fines to Cyprus, and has already required work time to remedy these numerous mistakes.

As an experienced human resources representative, you should be totally familiar with the I9 form, which is relatively simple to fill out. It was part of your responsibility in new employee orientation to insure that these forms were completely and accurately filled out. You were specifically informed by Mr. Grako prior to the OFCCP audit to review the I9 forms and insure they were in proper order. Prior to taking leave you evidently enlisted the aid of a co-employee in order to secure information necessary to complete certain of these forms. It appears, however, that these forms were in such disorder that they could not be corrected prior to the OFCCP audit. You were directly responsible for this matter.

3. Cyprus has recently learned that you have made verbal representations to various individuals, both employees and non-employees of Cyprus, that your

supervisor, Lou Grako and Cyprus have committed illegal acts in the handling of the workers compensation claims of Clifford Snow and Alvin Rogers. You did not, however, make a written report to this effect nor did you report such acts to your supervisors. Nevertheless, an investigation was undertaken both internally and outside the company. Cyprus interviewed outside personnel involved in the administration of its workers compensation claims, including the claims adjuster and branch manager of Scott Wetzel Services and outside legal counsel responsible for handling workers compensation matters. Cyprus has determined that the claims process employed in the above-referenced claims was not only consistent with Utah Law, but in fact one of the claims was approved by an Administrative Law Judge of the Utah Industrial Commission.

Since your duties at Cyprus include claims processing, your apparent misunderstanding of processing and your wrongful accusation of mishandling of claims is particularly troublesome. More importantly, Cyprus confirmed during this investigatory process that you made disparaging remarks about Lou Grako's handling of workers compensation claims to co-workers and directly to non-employees of Cyprus, including Scott Wetzel's branch manager. Your baseless and wrongful accusations of misconduct on the part of Mr. Grako appear to be personally motivated, and your defamatory remarks to non-employees was completely inappropriate. Further, your baseless accusations resulted in a costly, time consuming and totally unnecessary investigation.

It is also clear that you are unable and/or unwilling to work harmoniously with your supervisor, Mr. Lou Grako. You do not communicate effectively with Mr. Grako, you have made a concerted effort to undermine his authority with co-workers and other employees of Cyprus, and you are desirous of having Mr. Grako terminated or transferred. While you are certainly free to register complaints about your supervisor directly to him or, pursuant to company policy, to the mine manager or others, you evidently have not been content with the response to complaints and have continued to disrupt the effective operations of the human resources department.

In an effort to preserve your employment, Cyprus attempted approximately two months ago to find another position for you within the company. That effort was unsuccessful, due largely to the unwillingness of other supervisors to accept you as an employee in their departments. Since that time, Cyprus has received further information that compels this decision to terminate rather than transfer your employment.

You are hereby advised that pursuant to company policy, you have the right to arbitrate this decision. A copy of the relevant portions of Cyprus' policy manual are attached hereto for your review.

Moreover, under the open door policy of Cyprus, you may respond to these allegations by contacting me or as otherwise indicated by company policy. I have also attached hereto a copy of the open door policy as it relates to this situation.

A separate notice will be provided to you regarding the treatment of benefits upon termination of employment. If you have any other questions or concerns, please contact me at your convenience.

Very truly yours,

/s/

Allen P. Childs

Vice President, General Manager

cc: Mr. Lou Grako
Mr. Don Eckstein
enclosures

Mr. Childs testified the termination notice was prepared in the corporate office in Denver. Mr. Childs agreed with it and signed it. The notice was prepared by Mr. Baron who heads the Human Relations department in the corporate office and Mr. Eckstein who went to the mine in question to do an evaluation and investigation of the allegations. (Tr. 457). On the basis of the evidence before me I find that none of Pero's complaints in anyway involved her own safety. Certainly in her original complaint filed with MSHA there is no mention of any safety concerns for herself or anyone else. It only suggests a strong desire to blow the whistle on her supervisor, Lou Grako, whom she disliked and described in her testimony as a hatchet man who made her and all the employees fear for their jobs. At the hearing Pero did make a self serving statement of her concern for the safety of men injured on the job coming to work to take advantage of the benefit of the so called doctors day-off practice and continuing to receive full pay for less than a full days of light or restricted work. On the record before me I am unable to credit the sincerity or reasonableness of her safety concerns. Nevertheless, I am assuming arguendo that Pero engaged in protected activity. I find that the preponderance of the evidence established that Pero was discharged for her unprotected activity alone. The reasons for her discharge stated in the Notice of Termination of Employment are not a pretext and are supported by the record.

In *Secretary on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2516-2519 (November 1981), rev's on other grounds sub nom. the Commission stated:

The Commission and its judges have neither the statutory charter nor the specialized expertise to sit as a super grievance or arbitration board meting out industrial equity. *Cf. Youngstown Mines Corp.*, 1 FMSHRC 990, 994 (1979). 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 judgment our views of good business practice or on whether a particular adverse action was just or wise. Cf. *NLRB v. Eastern Smelting & Refining Corp.*, 598 F.2d 666, (1st Cir. 1979). The question, however, is not whether such a justification comports with justice or our sense of fairness or enlightened business practices. Rather, the narrow statutory question is whether the reason was enough to have legitimately moved the operator to have disciplined the miner. Cf. *R-W Service System Inc.* 243 NLRB 1202, 1203-04 (1979) (articulating an analogous standard).

DISCUSSION AND CONCLUSION

The issue in this case is not whether the adverse action was just or wise or comported with my sense of fairness or enlightened business practice.

The record clearly demonstrates that the reasons given by the employer for the adverse action were not plainly incredible or implausible. I conclude and find that the stated reasons for the adverse action taken by Cyprus were not pretextual.

While it is assumed for purposes of this decision that Pero engaged in protected activity, I find that Cyprus in terminating Pero's employment was motivated by Pero's unprotected activity and would have taken the adverse action in any event on the basis of Pero's unprotected activity alone. I therefore find that discharge of Pero was not in violation of Section 105(c) of the Act.

The record, as a whole, satisfactorily demonstrates a business justification for Ms. Pero's discharge.

CONCLUSION OF LAW

1. Cyprus did not violate Section 105(c) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 815(c) in discharging Pero in September 1996.
2. Any protected activity that Ms. Pero engaged in did not in any part motivate her discharge.
3. Even if the discharge of Ms. Pero were motivated in any part by the fact that she engaged in protected activity, she would have been discharged for unprotected activity alone.

ORDER

This case is **DISMISSED**.

August F. Cetti
Administrative Law Judge

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