FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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July 24, 2001

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2000-31-D
ON BEHALF OF WILLIAM JENKINS	:	HOPE CD 99-10
AND MICHAEL MAHON,	:	
Complainants	:	Mine No. 1
v.	:	Mine ID 46-08102
	:	
DURBIN COAL, INC.,	:	
Respondent	:	

DECISION

Appearances: M. Yusuf M. Mohamed, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Complainants;
David J. Farber, Esq., Patton Boggs, LLP., Washington, D.C. and John Kirk, Esq., Inez, Kentucky, for Respondent

Before: Judge Zielinski

This matter is before me on a complaint of discrimination filed by the Secretary on behalf of William Jenkins and Michael Mahon pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (the "Act"). 30 U.S.C. § 815(c)(2). The complaint seeks an order declaring that Respondent, Durbin Coal, Inc., discriminated against Jenkins and Mahon and other relief including back pay and benefits, as well as a civil penalty in the proposed amount of $12,000.00. A hearing was held in Inez, Kentucky on December 5, 2000 and concluded on January 30, 2001, and the parties submitted briefs following receipt of the transcript. For the reasons set forth below, I find that Respondent did not discriminate against Jenkins and Mahon in violation of the Act.

Findings of Fact

Jenkins and Mahon worked the second shift at Durbin's underground coal mine until their employment ended on March 2, 1999. Whether they voluntarily left their jobs or were terminated by Respondent is hotly contested. Jenkins was a shuttle-car operator. He had worked at Durbin's mine twice in the past and over the last ten years had worked at various times for Universal Coal, a contractor that provided labor to a number of mines. Mahon operated a roof

bolting machine, or "pinner." He had worked at Durbin's mine approximately six months and had been employed for over three years before that at another mine that was co-owned by Carl Kirk, who was also a co-owner of Durbin. Jenkins and Mahon were related as "half brothers," born of the same mother, and both men were considered good employees who were capable of operating a variety of mining equipment and performing whatever tasks were needed.

In early 1999, Durbin was experiencing what it viewed as a high number of inspections by the Secretary's Mine Safety and Health Administration (MSHA) prompted by confidential, phoned-in complaints, commonly referred to as "code-a-phone" complaints. Miners were not raising safety issues with management and MSHA inspectors rarely found the conditions complained of. Kirk had visited the MSHA district office to discuss the complaints because their frequency was disrupting operations. He was advised by MSHA officials that the number and lack of merit of the complaints was a concern to them also because it resulted in a lot of "wasted time" on inspections. MSHA officials eventually went to the mine, met with the miners and encouraged them to raise safety issues with management in the first instance and to make code-a-phone complaints if management did not satisfactorily address the problem. This had little impact on the frequency and nature of the complaints.

On February 26, 1999, at about 2:00 p.m., Edward Paynter, an MSHA inspector, responded to Durbin's mine to conduct an inspection regarding a code-a-phone complaint that had been transcribed and forwarded by facsimile to his office the day before. The complaint was about "deep cuts and dust" and bore a date and time notation at the top left corner of "2/25/99 14:51." When he showed the brief complaint to Forest Newsome, Durbin's superintendent, he appeared somewhat angry and inquired if Paynter knew who made the complaint. When he received a negative response, he stated that he knew who it was, apparently basing his determination on the noted time of 14:51, or 2:51 p.m.[1] Paynter told him that the notation indicated when the copy of the complaint form had been transmitted by facsimile to their office, not necessarily the time of the call. Paynter met with the miners on the first and second shifts, and requested additional information in order to properly investigate the complaint. He told the men that if they wanted help from MSHA they would have to be willing to provide more information and that complaints should not be used as pranks or to vent frustrations. None of the miners present volunteered additional information. Paynter issued dust sampling pumps to the underground miners and went underground with them to conduct the inspection and monitor the dust sampling. He did not find evidence of deep cuts and the dust sampling results, returned the next day, were within acceptable limits.

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[1] The Secretary argues that Newsome's statement indicated that he suspected that Mahon had made the complaint because he was absent because of illness that day. However, it was not established that Mahon was the only second shift miner absent that day. Nor was it explained why a miner on another shift, and/or who may have been absent that day, could not have made the call.

Billy Williams, a second shift miner, testified that Newsome had told him that the complaint initiator was likely one of the "two Billy's" working the second shift because they were the only ones who had raised concerns about dust. However, Newsome denied that the other "Billy," William Jenkins, had complained about dust and Jenkins, himself, also denied making such complaints and stated only that he might have said something about ventilation or getting line curtain installed sometime in the past. Newsome had remarked, in the presence of a few miners, that he would give $1,000 to know who was making the code-a-phone complaints. However, there is no indication that anyone took this "offer" seriously. David Runyon, an electrician and mechanic, heard of the remark and jokingly said they could turn him in and split the $1,000 if they could find anyone to pay it. Jenkins too laughed it off when he heard about it.

On March 1, 1999, Mahon reported to work to find that someone had taped his pliers together and written the word "rat" on his belt. He took it as a joke, consistent with similar pranks that the miners perpetrated on each other, though after learning of the February 26 inspection, it occurred to him that the word "rat" may have been a reference to the person who had called in the complaint. Mahon told Newsome about it, and he also took it as an unremarkable prank. When Mahon later made a joking comment that he was a rat and would report his foreman's efforts to get the shift started a few minutes early, he perceived that Newsome, who was in an adjoining office, "slammed" the door.

At the time, Durbin was experiencing unexplained losses of equipment and supplies, which it was suspected were being stolen from the mine site, possibly by employees. Kirk monitored costs closely and had noticed an unusual increase in expenditures for bits for continuous mining and roof bolting machines, which he thought also might be related to the theft problem. He had instructed his mine superintendent, Newsome, and the person who handled supplies, Richard Mollette, to tighten up controls on supplies, including specifically pinner bits, and generally keep the supply room locked.

On March 2, 1999, Jenkins and Mahon arrived for work at the normal time, about 2:00 p.m.. Mahon rode to work in Jenkins' pickup truck, which had an open bed and a closed but unlocked toolbox immediately behind the cab. Mollette, who was in the supply room of the mine's office trailers, heard a noise like someone tossing something into the bed of a truck and looked out to see Jenkins returning from the area of the truck. He finished working with the supplies and told Newsome about it after the second shift men had gone underground. Newsome decided to investigate. He, Mollette and Jeffrey Farris, a mine foreman, went to Jenkins' truck and looked into the bed and through the windows into the cab. They did not see anything unusual. When Newsome lifted the top of the toolbox, however, he saw boxes containing roof bolter bits which were the same type of bits used by Durbin, some of which were wired together in the same manner that Mollette prepared them for Durbin's roof bolter operators. They counted 135 bits in the boxes. Newsome and Mollette felt that the bits belonged to Durbin.

Growing concerned about whether their search of the truck was legal, Farris called the West Virginia State Police post and was advised that the search was likely illegal and that the

matter should be handled administratively. Newsome called Kirk and told him what he had found. Kirk happened to be en route to the mine site to deliver some supplies to replace items that had been "lost" from the mine. He advised that he would be at the mine site in about fifteen minutes at which time they would discuss what to do. When he arrived, he and Newsome discussed the issues and Kirk advised Newsome to talk to Jenkins and Mahon, advise them what had been found and see what they had to say about it. He cautioned that they should not be accused of anything, just questioned, and told Newsome to have witnesses present for the conversation. Newsome wanted to do it before he left work, rather than wait until the end of the second shift, and Kirk stated that he could call the men out during the shift and talk to them. Kirk then left the mine site.

Newsome called down into the mine and spoke with David Runyon and told him that Jenkins and Mahon were needed on the surface. David Runyon told Frank Runyon, the foreman, that Jenkins and Mahon were needed on the surface and that he would give them a ride out of the mine in a mantrip. Although Newsome did not say anything about an emergency at home, it was unusual for miners to be called out of the mine during a shift and the calling out of these related miners raised the possibility of an emergency at home, possibly involving their mother. Frank Runyon likely included a comment to the effect — "I don't know whether there's an emergency at home, or what" — when he told Jenkins and Mahon to report to the surface. The trip to the surface took approximately 30 minutes, during which Jenkins and Mahon were very concerned about a possible emergency involving their families.

When they got to the surface, Jenkins dropped his gear into his truck and proceeded to change clothes. Mahon went to use the phone in the office to call home. Newsome interrupted him, saying: "There is nothing wrong. I just want to talk to you." He told Mahon that pinner bits were found in the truck and he asked where they came from. Mahon became angry and responded that if there were bits in the truck they belonged to his brother, Kip Mahon. He protested that Durbin had no business searching his brother's truck and that Jenkins would be angry about it. Jenkins came into the room and Mahon told him there was nothing wrong at home and that Newsome had found pinner bits in his truck and wanted to know where they came from. Jenkins became very upset and cursed Newsome for searching his truck. He also stated that if there were bits in the truck that they belonged to their brother Kip Mahon. Both men indicated that their brother, Kip, had asked them to try and sell some pinner bits a week or two before and speculated that Kip may have placed the bits in the truck over the weekend, without their knowledge. They had previously, however, indicated to another miner, Billy Williams, that they believed that Kip had obtained the bits illegally and were aware that the bits were in the truck. I find that Jenkins and Mahon knew, on March 2, 1999, that the bits were in the truck and that they believed that their brother Kip had stolen the bits.

There was a very heated exchange between Jenkins and Mahon and Newsome, including much cursing, primarily by Jenkins and Mahon. Jenkins was more angry than Mahon. Jenkins asked if they were fired, and Newsome responded that he had not fired anybody. Mahon went out to the truck to see if the bits were still there. Upon returning, he encountered Jenkins leaving

the office trailer and was told by him that Kirk didn't need them anymore. Both men got into the truck and left the mine. A few minutes later they returned to get their belongings. Jenkins stated that he believed that the incident was not about bits but was because of safety complaints that Durbin suspected he had made. Newsome denied that the incident had anything to do with safety complaints. Mahon requested that Newsome provide him with a "fired slip," documentation of the termination of their employment, and Newsome indicated that he would have one for them the next day. However, no such documentation was supplied.

The following day, Jewell Mahon, Michael's wife, called Newsome inquiring about final pay checks for the two men, noting that when men are fired they should be paid the next day. Newsome responded that the men were not fired, they had quit. She responded that if they weren't fired, then they could report for their regular shift, to which Newsome responded that he didn't want them back on mine property. When Paynter returned with the negative dust sample analysis on March 3, 1999, Newsome remarked that he thought that he had gotten rid of his problem. Paynter did not know wether that was a reference to the thefts or the complaints. Records maintained by Durbin, which appear to have been filled out and executed on March 2, 1999, by Newsome and Farris, note that both Complainants "got mad and quit" and that they would not be hired back. A personnel record maintained by Mahon Enterprises[2] reflects that Mahon "walked off the job when the person he rode with was asked about some items in the back of his truck" and notes the reasons for the action as "Dissatisfied" and "Personal reasons."[3] Mahon claimed unemployment benefits and a statement he gave on March 9, 1999, was essentially consistent with his allegations. However, at a subsequent "predetermination hearing" he apparently stated that Newsome responded "I don't know" when Mahon asked if he was being fired.[4] Newsome told several people after the fact, that Jenkins and Mahon had quit. Although, he also told Paynter that they had been fired.

In October of 1999, Kirk's then superintendent James Fain, indicated that he wanted to hire Mahon and inquired whether Kirk had any objection. Kirk responded that Fain was in charge and he could hire whoever he wanted to, that he had no objection to hiring Mahon. Kirk also testified that he felt that the incident had gotten out of control, reached an unfortunate result, and that he likely would not have objected to Jenkins being rehired. Mahon voluntarily left employment at Durbin's mine in February of 2000. Aside from Mahon's brief period of re-employment, neither Jenkins nor Mahon has since worked at a mine in which Kirk had an ownership interest.

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[2] Complainants' actual employer was Mahon Enterprises, a contractor that provided labor for Durbin's mine. Durbin has stipulated that it is an operator subject to the Act and is responsible for any discrimination against Jenkins and Mahon.

[3] These documents were exhibits to Carl Kirk's deposition, which was admitted into evidence as Complainants' Ex. 32.

[4] See, exhibit 3 to the Kirk deposition and Respondent's Ex. 1.

Conclusions of Law - Further Factual Findings

A complainant alleging discrimination under the Act typically establishes a prima facie case 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. *See Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981). The operator my rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no way motivated by protected activity. *See Robinette*, 3 FMSHRC at 818 n. 20. 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 817-18; *Pasula*, 2 FMSHRC at 2799-800; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642-43 (4th Cir. 1987) (applying *Pasula-Robinette* test).

Complainants here do not allege that they engaged in protected activity.[5] Rather, they contend that they were fired, or constructively discharged, because Respondent believed, or suspected, that they had engaged in protected activity, i.e., making code-a-phone complaints to MSHA. Their allegations state a viable claim of discrimination under the Act. *Sec'y on behalf of Moses v. Whitley Development Corp.*, 4 FMSHRC 1475 (1982), *pet. for rev. den., Whitley Development Corp. v. FMSHRC*, 770 F.2d 168 (6th Cir. 1985) (table). In *Moses*, the Commission held that "discrimination based upon a suspicion or belief that a miner has engaged in protected activity, even though, in fact, he has not, is proscribed by section 105(c)(1)." *Id.* at 1480. Complainants further allege that they were falsely accused of stealing company property as a pretext for Respondent's discriminatory action.

While there is evidence that Durbin may have suspected that Jenkins and/or Mahon had made code-a-phone complaints, I find that they left their employment in a fit of anger after being questioned about the pinner bits found in Jenkins' truck. They suffered no adverse action, i.e., their employment was not terminated, either actually or constructively, by Durbin. The Commission has made clear that adverse action is an essential element of a discrimination claimant's case, and in the absence of adverse action no finding of discrimination can be made. *Dolan v. F & E Erection Co.*, 22 FMSHRC 171, 175 (Feb. 2000). In addition, I find that the incident that led to their departure from Durbin was not precipitated, in any part, by suspicion that they had engaged in protected activity.

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[5] While Complainant Jenkins had refused to operate a shuttle car on which monitors had been bridged out, his actions had not produced any adverse reaction by his foreman, Frank Runyon, who appears supportive of both men. Complainants have also made clear that their theory of liability is that they were terminated because of an erroneous belief or suspicion that each of them had engaged in the protected activity of making code-a-phone complaints.

Complainants have devoted considerable attention to the "home emergency" issue, arguing that they are entitled to some leeway for impulsive behavior prompted by Durbin's "wrongful provocation," at least implying that Durbin deliberately decided to use a home emergency as a ruse to get them out of the mine. However, there would have been no need for Durbin to resort to a ruse. Complainants were subject to directives by their supervisors and presumably would have responded to an instruction to report to the surface. While unusual, men are occasionally called out of a mine, sometimes for unremarkable reasons, such as a need to move a vehicle. That said, those involved in responding to Newsome's request to bring the men out speculated that there might be something wrong at home. Frank Runyon and David Runyon admitted that the subject crossed their minds. The concern was verbalized, at least to the extent of an innocent comment by Frank Runyon to the effect: "I don't know if it's an emergency at home, or what." It would also have been reasonable for Jenkins and Mahon to conclude that they were likely being called out because of a home emergency. I find that both Jenkins and Mahon believed that the reason they were being called to the surface was some emergency at home, possibly related to their mother's health.[6] However, their belief was not the result of any statements by Durbin that there was, in fact, such an emergency. Nor did any Durbin official intend to, or, take any actions to mislead or provoke Complainants in the manner in which they were called out of the mine.

The real significance of the "home emergency" issue is its impact on the ensuing events. Complainants' feeling that they had been led, or allowed, to believe during the lengthy ride out of the mine that there was an emergency involving their families primed their reaction to being questioned about the pinner bits discovered in the truck. Their outrage at the search of the vehicle and implicit accusation of stealing company property resulted in an extremely hostile reaction to Newsome's inquiries. There was a very heated discussion, in which Complainants loudly cursed Newsome. Newsome, no doubt, reacted emotionally to Complainants' verbal assault. He noted that the Complainants would not be hired back on Durbin's records and gruffly told Mrs. Mahon the following day that he did not want them back on mine property. However, I credit his testimony and that of other witnesses to the discussion that he remained considerably more in control than the Complainants and was surprised by their reaction to his inquiry. I credit Newsome's testimony that he did not fire the Complainants, which would have been inconsistent with Kirk's instructions to him and find that the Complainants quit their jobs in a fit of anger in reaction to the search of the truck and the inquiry about the pinner bits.

The Secretary argues that a March 16, 1999, letter to Mahon relative to continuation of his health benefits and citing a "Qualifying Event Date of 02/28/99" evidences an intent by Durbin to terminate his employment that preceded the March 2, 1999 incident. The Secretary contends, in essence, that Durbin had determined to discharge Complainants on or prior to February 28, 1999, and that the events of March 2, 1999, were carefully scripted to result in the

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[6] Their mother had been in a serious automobile accident previously. Although it appears that she had largely recovered from her injuries by that time, her health apparently was a concern and was an issue that would have affected both men.

termination of their employment. This is far too great a leap to make from such a precarious platform. There was no evidence establishing where Black Mineral, the entity that wrote the letter, got the information it used to prepare the letter, what that information was, or whether it had any connection to Durbin.

The Secretary also questions the legitimacy of Durbin's concerns about pinner bit expenditures and suspicion that bits were being stolen. While it is correct that per-ton costs of continuous miner bits were, at least in one report, grouped with pinner bit costs and miner bit costs would be significantly higher, there is virtually no dispute that Durbin had been experiencing losses, or thefts, of equipment and supplies, such as pinner bits. Even Mahon was aware that there had been problems with thefts of supplies. I credit that testimony and the testimony of Durbin officials and Mollette that they were concerned about thefts and pinner bit expenditures and had taken steps to more closely control and monitor bit usage.

Constructive Discharge

Complainants alternatively argue that they suffered adverse action in that they were constructively discharged. As explained in *Dolan*, *supra*, 22 FMSHRC at 176-77:

> 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. *See, e.g., Simpson v. FMSHRC*, 842 F.2d 453, 461-63 (D.C.Cir. 1988). * * * It is the operator's failure to reasonably remedy such conditions that converts the resignation into an adverse action. *See Secretary of Labor on behalf of Nantz v. Nally & Hamilton Enters., Inc.*, 16 FMSHRC 2208, 2210-13 (Nov. 1994) (affirming conclusion of constructive discharge in the absence of finding that operator deliberately created intolerable conditions to provoke miner's resignation). The question whether conditions are intolerable is "viewed from the perspective of a reasonable employee alleging such conditions." *Secretary of Labor on behalf of Bowling v. Mountain Top Trucking Co.,* 21 FMSHRC 265, 276 (Mar. 1999), [*aff'd,* 230 F.3d 1358 (6th Cir. 2000) (table)]. * * * *
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> In cases involving claims of constructive discharge, the Commission has first examined whether the miner engaged in a protected work refusal, and then whether the conditions faced by the miner constituted intolerable conditions. *See Bowling*, 21 FMSHRC at 272-81; *Nantz*, 16 FMSHRC at 2210-13. * * * * In order to be protected, work refusals must be based upon the miner's "good faith, reasonable belief in a hazardous condition." *Robinette*, 3 FMSHRC at 812; *accord Gilbert v. FMSHRC*, 866 F.2d 1433, 1439 (D.C.Cir. 1989). A good faith belief "simply means honest belief that a hazard exists." *Robinette*, 3 FMSHRC at 810. Consistent with the requirement that the complainant establish a good faith, reasonable belief in a hazard, "a miner refusing work should ordinarily

communicate, or at least attempt to communicate, to some representative of the operator his belief in the safety or health hazard at issue." *Sec'y of Labor on behalf of Dunmire v. Northern Coal Co.*, 4 FMSHRC 126, 133 (Feb. 1982).

Once it is determined that a miner has expressed a good faith, reasonable concern about safety, the analysis shifts to an evaluation of whether the operator addressed the miner's concern "in a way that his fears reasonably should have been quelled." *Gilbert*, 866 F.2d at 1441; *see also Secretary of Labor on behalf of Bush v. Union Carbide Co.*, 5 FMSHRC 993, 998-99 (June 1983); *Thurman v. Queen Anne Coal Co.*, 10 FMSHRC 131, 135 (Feb. 1988), *aff'd mem.*, 866 F.2d 431 (6th Cir. 1989). A miner's continuing refusal to work may be deemed unreasonable after an operator has taken reasonable steps to dissipate fears or ensure the safety of the challenged task or condition. *See Bush*, 5 FMSHRC at 998-99.

Complainants' constructive discharge argument does not conform to this analytical framework, either legally or factually. The Secretary does not argue that the Complainants engaged in a protected work refusal, perhaps because none of the incidents prior to March 2, 1999, either individually or collectively, posed any safety or health hazard. The Complainants did not feel that they were subjected to a safety or health hazard and did not even perceive any significant objectionable condition in their employment. Obviously, they did not communicate any such concern to Durbin. The incident that precipitated their departure from Durbin, the questioning about pinner bits, likewise cannot be characterized as a safety or health hazard that would have justified a work refusal.

The Secretary argues that the totality of the conditions amounted to intolerable conditions such that Complainants "could not return to their jobs with any dignity."[7] The totality of conditions includes; as to Mahon, the incident of his pliers being taped, the word "rat" written on his belt and the incident where Newsome supposedly slammed a door after hearing him joke about being a rat; as to Jenkins, the comment that one of the "two Billy's" was making the complaints; and, as to both, the inquiry about the pinner bits. The Secretary contends that all of these conditions were the product of a suspicion that Complainants' had engaged in protected activity.

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[7] Secretary's Post Hearing Brief, at p. 20.

As noted above, none of the "conditions" that preceded the March 2, 1999 incident were viewed as intolerable, or even objectionable, by Complainants and they would not have been so viewed by a reasonable employee. Nor could the events of March 2, 1999, be viewed as intolerable working conditions by a reasonable employee, either standing alone or in combination with prior events. Durbin was rightly concerned about missing and stolen property and had a reasonable basis to call Complainants out of the mine and question them. Whether they could have remained at their jobs "with dignity" is not the test. They were not unreasonably subjected to a safety or health hazard. Nor were they subjected to conditions so intolerable that a reasonable miner would have felt compelled to resign. Moreover, as with the discharge allegation, I find that the conditions that Complainants allege prompted them to leave their employment were not, in any part, the result of unlawful motivation by Durbin, i.e., they were not the result of any suspicion or knowledge that either Complainant had engaged in protected activity.

Complaints of discrimination under *Moses* alleging constructive discharge do not fit nicely into the analytical framework described in *Dolan*. It is possible that the Commission would sustain a discrimination allegation where an operator, motivated by a suspicion that a miner had engaged in protected activity, created objectively intolerable working conditions that did not involve subjecting him to a safety or health hazard. This is clearly not such a case.

The Bounty or Reward Statement

The Secretary additionally contends that Newsome's statement that he would give $1,000 to know who was making the code-a-phone complaints was, in itself, discrimination in violation of the Act. The Secretary posits two theories for this contention; 1) that the statement amounted to a policy of Durbin's that was "facially discriminatory," relying on *Swift v. Consolidation Coal, Co.*, 16 FMSHRC 201 (Feb. 1994); and, 2) that the statement was discriminatory under the traditional *Pasula-Robinette* test. I find that the *Swift* analysis is inapplicable here in that Newsome's statement was not a policy or program of Durbin's. More significantly, there was no adverse action attributable to the statement.

Under *Swift*, in order to establish that a business policy is discriminatory on its face, "a complainant must show that the explicit terms of the policy, apart from motivation or any particular application, plainly interfere with Mine Act rights or discriminate against a protected class." *Swift*, 16 FMSHRC at 206. If a miner can establish that he suffered adverse action because of a facially discriminatory policy, he will prevail in a discrimination action under the Act, because "an operator may not raise as a defense lack of discriminatory motivation or valid business purpose in instituting the policy." *Id*.

Swift and similar "facially discriminatory" cases[8] deal with formal policies or programs implemented by an operator that did not directly target protected activity. Whether that precedent applies to an isolated verbal statement like that at issue here is questionable. If such a statement was construed as a serious attempt to learn the identity of a miner making confidential complaints of safety or health violations, an operator responsible for it could hardly contest the unlawfulness of the motivation or advance a valid business purpose for it. There would appear to be no need to extend the "facially discriminatory" theory of liability, with its elimination of defenses, to situations that do not involve formal employment policies. The traditional *Pasula-Robinette* analysis, which the Secretary advances here, should provide an adequate remedy for a discrimination claimant who has suffered adverse action in such circumstances.

The Secretary argues that because Newsome was superintendent of the mine, that his statement should be construed as a Durbin policy and since it is facially discriminatory that Newsome's "intention is irrelevant," that "such a statement is inherently designed to chill" the exercise of Mine Act rights and that the "result of making such a statement is predictable and foreseeable."[9] This argument fails for several reasons.

Assuming that Newsome could make policy for Durbin, he had no such intention when he made the "off-the-cuff" remark and there is no direct evidence that anyone who heard the comment, or heard about it, took it seriously or viewed it in the remotest sense as a policy of Durbin's. Newsome's intention is relevant to the analysis. While lack of discriminatory motive is not a defense to an action premised upon a facially discriminatory policy, Newsome's intent in making the statement, as well as the manner and circumstances under which the statement was made, are relevant to determining whether it constituted a facially discriminatory policy and whether it resulted in any adverse action. Newsome testified that, if he did make such a statement, it was not serious and was made as an off-the-cuff remark. No other witness to the statement testified. The Secretary's argument concerning the statement is relegated to assessment of the demeanor of one individual, who also did not testify, who told other witnesses about the statement.[10] As noted above, there is no evidence that the comment was made other than in jest or that it was pursued or even widely circulated. I find that the comment, while

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[8] See *Sec'y on behalf of Price v. Jim Walter Resources, Inc.*, 12 FMSHRC 1521 (Aug. 1990); *UMWA v. Consolidation Coal Co.*, 1 FMSHRC 338 (May 1979).

[9] Secretary's Post Hearing Brief, at 37-38.

[10] Billy Williams testified that Stephen Ellis told him about the statement and that Ellis, in the opinion of Williams, appeared to take the statement seriously, although it was related in an unemotional, conversational manner. Williams expressed surprise and stated that he didn't believe that Durbin was so desperate to pay money to find out who was making the complaints. Jenkins testified that Ellis told him about a $500 offer and that he appeared to have taken the statement seriously. Jenkins, himself "laughed it off." In a statement given to MSHA, Ellis denied any knowledge of a reward or bounty from the company to find out who called MSHA.

made, was no more than an off-hand remark prompted by frustration with what was perceived as a persistent pattern of groundless complaints resulting in disruptive inspections. It was not an employment policy of Durbin's.

The Secretary's adverse action assertions related to the statement are somewhat confusing. Her facially discriminatory argument does not directly allege adverse action, suggesting that she can prevail even in the absence of adverse action. Her *Pasula-Robinette* argument is based upon adverse action suffered by a protected class of miners, i.e., the presumed chilling effect on their right to make safety and health complaints. Her focus is on the two Complainants here. The First Amended Complaint, as amended by Order dated March 8, 2001, prays for a civil penalty "in the amount of $3,000.00 per occurrence, per victim of discrimination, for a total of $12,000.00," i.e., $3,000.00 for the discrimination suffered by Jenkins and Mahon related to their alleged discharge and $3,000.00 as to Jenkins and Mahon related to the "reward" offer. However, there is no evidence that Jenkins or Mahon, or any other miner, suffered adverse action or felt that his rights under the Act were interfered with because of the statement.[11] Jenkins did not take the statement seriously when he was told about it. Mahon did not testify about the statement and apparently never heard about it. In the absence of adverse action, an essential element of a discrimination claimant's case, Complainants cannot prevail. *Dolan, supra.*

ORDER

Complainants suffered no adverse action. They were not discharged either affirmatively or constructively. They suffered no adverse action as a result of Newsome's off-the-cuff comment. The complaint of discrimination cannot be sustained. Accordingly, the complaint is hereby **DISMISSED**.

Michael E. Zielinski
Administrative Law Judge

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[11] Such comments are not to be condoned, because they could result in a chilling of miners' rights to make legitimate safety complaints if made in a manner and under circumstances suggesting a serious intent to discover the identity of miners making legitimate confidential complaints. There is also a danger that, even if obviously made in jest, such a comment could be taken seriously by a miner hearing about it second or third hand. Here, Newsome's comment was not intended to, and did not, have a chilling effect on the rights of miners.

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