

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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March 22, 2001

GLENN MAYHUGH,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	
	:	Docket No. WEVA 2001-8-D
v.	:	MORG CD 2000-06
	:	
CONSOLIDATION COAL COMPANY,	:	Robinson Run No. 95 Mine
Respondent	:	Mine ID 46-01318

ORDER DENYING MOTION FOR SUMMARY DECISION **and** **NOTICE OF HEARING SITE**

On March 12, 2001, Respondent Consolidation Coal Company (Consol) filed a motion for a summary decision in this Discrimination Proceeding on the grounds that the Complaint pursuant to Section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, (1994) the “Act,” does not, in essence, allege that it engaged in discriminatory or retaliatory acts against the Complainant Glenn Mayhugh.¹

Under Commission Rule 67(b), 29 C.F.R. § 2700.67(b) “[a] motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to

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 or 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 miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding 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 of miners or applicant for employment on behalf of himself or others of any statutory right afforded by the Act.

interrogatories, admissions and affidavits, shows: 1) that there is no genuine issue as to any material facts; and 2) that the moving party is entitled to summary decision as a matter of law.”

Consol accepts that the facts alleged by Mr. Mayhugh, in his complaint to the Department of Labor’s Mine Safety and Health Administration on April 10, 2000, and in his statement of April 17, 2000, as true for purposes of its motion. Consol’s summary of the Complaint and statement is not disputed and is as follows:

In short, Mayhugh complained to his foreman, Mr. Roberts, (“Roberts”) about working in dusty conditions due to rock dusting taking place while they were changing out a pump. Mayhugh and Roberts both worked through the shift changing the pump under the same conditions. Mayhugh complained after the shift to the mine foreman, Mr. Tonkovich, who told Mayhugh he didn’t have to work inby the rockdusters. The next day, while Roberts and Mayhugh were getting ready to start the shift with the rest of the crew, one miner asked Roberts if it was straightened out about working inby the rockdusters. Roberts said it was taken care of and for the men to not kick up dust and get it on Mayhugh. Mayhugh told Roberts that he felt that comment was harassment and that he didn’t have to take it. The foreman said, “Yes, you’ll take it and you’ll like it you pussy lip son of a bitch.” Mayhugh said he wouldn’t take it and the foreman said, “Yes, you will.” Mayhugh felt ill and took his clothes off. Roberts came into the change room and tried to settle Mayhugh down and tried to talk to him, but Mayhugh told him to leave him alone and called Roberts “one of the most self-centered pompous people (he) had ever been around.” Roberts asked Mayhugh to get dressed and said they would work this out. Mayhugh said he was sick and wanted to go home. Roberts told Mayhugh he could go home if he wanted and would be excused.

Consol argues that the noted events did not constitute discriminatory action within the meaning of Section 105(c) because the term “discriminated against” is limited to retaliatory acts such as suspension without pay, onerous work assignments, and letters of reprimand placed in personnel files. Consol argues that Roberts never threatened Mayhugh, never discharged him, never assigned him to an undesirable job or took any other action recognized as discriminatory in nature.

However, subjecting an employee to humiliation and ridicule by management for engaging in activities protected by the Act and encouraging co-workers to also ridicule the employee for such protected activities may indeed constitute adverse action and discrimination within the meaning of Section 105(c)(1). In addition, if a causal connection can be medically established between such intentional ridicule and humiliation and subsequent physical illness resulting in lost work time, appropriate damages may be recoverable under Section 105(c).

As the Complainant correctly observes, whether the words spoken, and the manner and

context in which they were spoken, by Foreman Roberts to the Complainant were inoffensive “kidding” or constituted actionable discrimination is a factual issue to be resolved at evidentiary hearings.

Under the circumstances Consol’s Motion for Summary Decision must be, and is, denied. The hearings will accordingly proceed as scheduled at **9:00 a.m., on Thursday, March 29, 2001, at the Federal Correctional Institution, Training Center, Route 857, Greenbag Road, Morgantown, West Virginia.**

Gary Melick
Administrative Law Judge
703-756-6261

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