FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Ave., N.W., Suite 9500
Washington, D.C. 20001

January 28, 2004

DAVID MULLENS,	:	DISCRIMINATION PROCEEDING
Complainant,	:	
	:	Docket No. WEVA 2003-155-D
v.	:	HOPE CD 2002-9
	:	
U.S. STEEL MINING COMPANY, LLC,	:	50 Mine
Respondent	:	Mine ID 46-01816

DECISION

Appearances: David Mullens, Pineville, West Virginia, *pro se*,
Michael P. Duff, Esq., U.S. Steel Corporation, Pittsburgh, Pennsylvania,
for Respondent.

Before: Judge Zielinski

This case is before me on a complaint of discrimination filed by David Mullens pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 ("the Act"), 30 U.S.C. § 815(c)(3).[1] Mullens alleges that U.S. Steel Mining Company, LLC, ("U.S. Steel") discriminated against him by suspending him for disciplinary reasons on June 6, 2002, as a result of his complaints about safety. A hearing was held in Beckley, West Virginia. For the reasons set forth below, I find that Respondent did not discriminate against Mullens, and dismiss the complaint.

Findings of Fact

Mullens is employed as a mechanic by U.S. Steel at its Gary No. 50 Mine, an underground coal mine located in Pineville, West Virginia. He is assigned to the longwall operation, and works the second shift. One of his primary duties is inspecting, calibrating and maintaining carbon monoxide ("CO") monitors. As of May 2002, he had been engaged in what he described as a "long battle . . . for not months but years, trying to get the . . . CO monitoring system in compliance with law." Tr. 16. One issue involved a CO monitor near the tailpiece of the longwall, which is required to be located in the top third of the distance between the floor and

[1] Pursuant to section 105(c)(2) of the Act, a miner may submit a complaint of discrimination to the Secretary of Labor, who must conduct an investigation and file a complaint with the Commission if she determines that the Act has been violated. Section 105(c)(3) provides that, if the Secretary determines that the Act has not been violated, the miner may file an action before the Commission on his own behalf. 30 U.S.C. § 815(c)(2) and (3).

roof of the mine and within a specified distance of the face. Because the height of the coal seam varies and the longwall moves forward rapidly, maintaining the monitor in the proper location can prove difficult.[2]

In early May 2002, Mullens reported to Marvin Cochran, the area manager of the longwall operation, that the location of the monitor was not in compliance with regulations and that he had been noting that fact in the "permissibility book." After some prompting from Mullens, Cochran stated that he would "take care of it." Tr. 16-17. On June 5, 2002, Mullens was preparing to work his normal evening shift, which began at 4:00 p.m., and noticed that the monitor was hanging from the longwall equipment, about 15 inches from the floor, in coal that was about six and one-half feet thick. About 3:45 p.m., as he was passing through a locker room area, he noticed Cochran and "confronted" him about the problem. The longwall had not operated that day and was not expected to operate on the evening shift. Cochran was involved in a discussion with other managers who were trying to address the problems that had interfered with production. Mullens told Cochran that "the [CO] monitor was still out of compliance and that he had not taken care of it" as he had promised to do. Tr. 18.

Cochran responded by instructing Mullens to call down to the day-shift personnel, who were still in the mine, and tell them to fix the problem. Mullens responded that the day-shift men would not listen to him, and that Cochran needed to give the instruction. Cochran replied that it would be better if Mullens just fixed the problem himself. Mullens replied that his immediate supervisor, White Mullins, had already assigned him duties for the day and that Cochran should "run it by" Mullins. Cochran said he didn't have to run it by anybody – that he was telling Mullens what to do and that he was to do it. Mullens stated that he had no problem fixing the monitors, but had to tell his foreman what he was going to do. Cochran told him that he didn't have to tell anyone. Mullens reiterated that he needed to tell his foreman and Cochran repeated that he was Mullens' boss – Mullens countered that his foreman was his boss.[3] The increasingly emotional nature of this exchange resulted in raised voices by both parties.

In the course of the argument, Mullens attempted to move past Cochran toward the door to an adjacent office where his foreman was located. Cochran moved to block his path, and repeatedly did so as Mullens tried to get around him. In the course of insisting that Mullens was

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[2] It is not clear why positioning of the monitor was a long-standing problem. Mullens explained that the preferred solution was to fabricate a bracket to hold the monitor and weld it to the "stage loader." Tr. 36-38. Cochran testified that the problem could have been remedied in a few minutes by hanging the monitor from a roof bolt. Because the longwall face advanced rapidly, it would have to be "moved pretty regular," but it would be in compliance. Tr. 77. Mullens agreed that there were temporary measures that could have been taken, but rejected the roof bolt solution. Tr. 43.

[3] White Mullins was foreman of a crew working on the longwall, and reported to Cochran, the area manager.

to do what he told him to do, Cochran pointed at Mullens with his index finger and twice made contact with Mullens' chest. At the first contact, Mullens backed away and told Cochran not to touch him. After the second contact, Mullens stated, "Marvin, I've done told you once, I'm not telling you no more, you touch me again, I'm going to put you on your ass." Tr. 20.

Cochran then told Mullens to come with him upstairs. Mullens thought that Cochran intended to bring the matter to the attention of the mine superintendent. Cochran, however, told Mullens to sit in his office because he wanted to settle the matter himself. Tr. 20-21, 79. Essentially the same exchange took place – Cochran insisted that Mullens do what he was told and Mullens repeated the warning of what he would do if Cochran touched him again. They then proceeded to the office of Russell Combs, the mine superintendent, where, in the presence of union officials, they related their versions of the controversy. Cochran stated what had happened, followed by Mullens. When Mullens was finished, he asked Cochran if what he had stated was correct, and Cochran replied "That's basically it." Tr. 23. David Tilley, one of the union officials present because of the potential for disciplinary action, corroborated the respective descriptions of events. Tr. 54-60, 109-11. There were few differences in their statements.

There were, however, differences in recollections of one aspect of the confrontation and how the participants reported it during the meeting. Mullens testified that he told Cochran that he would fix the monitor.[4] Cochran recalled that Mullens had stated that it was not his job to fix the monitor. Tr. 19, 28, 73-74. However, Cochran later testified that he wasn't sure if Mullens had said that it wasn't his job. Tr. 87. In his mind, Mullens' insubordination was insisting on going to his foreman's office rather than proceeding to fix the monitor. Cochran explained, "I was instructing him what I wanted him to do . . . . He was refusing a direct order." Tr. 89. Combs' recollection also varied, but he arrived at the same conclusion that Cochran did. He initially thought that Mullens had said that he told Cochran that he wouldn't fix the monitor. However, he later testified that he didn't think Mullens made such a statement – that that was a conclusion he reached. "[W]hat I heard was Mr. Mullens refusing to do the work and he wasn't going to do it with Mr. Cochran telling him, the only way was if his boss came and told him." Tr. 106. I find that Mullens told Cochran that he would fix the monitor. However, he tacitly refused to begin working on it immediately, and insisted on proceeding to his foreman's office.

Because of the emotional state of the two participants, Combs decided that they shouldn't work further that day. He also wanted to consult with company human resources staff on potential courses of action, and to review Mullens' work record. Tr. 98. Cochran had worked the day shift and was departing. Mullens was sent home. The following day, Mullens was given a notice of disciplinary action advising him that he was being suspended for five days. It read, in part:

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[4] Tilley also testified that during the meeting Mullens related that he had told Cochran that he had no problem doing the work. Tr. 54, 109.

> On Wednesday, 06/05/02, you were involved in an incident involving Marvin Cochran, area manager-longwall, in which Mr. Cochran gave you an order to perform certain work, and you refused. You also used abusive and threatening language towards Mr. Cochran. These actions constitute a violation of Mine and Shop Conduct Rule #4 "Insubordination (refusal or failure to perform work assigned or to comply with supervisory direction) or use of profane, obscene, abusive, or threatening language or conduct towards subordinates, fellow employees, or officials of the Company.

Ex. R-2.

On June 10, 2002, Mullens filed a complaint of discrimination with the Secretary's Mine Safety and Health Administration ("MSHA"), alleging that he had been discriminated against when he was suspended on June 6, 2002.[5] He identified Marvin Cochran as the person responsible for the discriminatory action. By letter dated January 16, 2003, MSHA advised that its investigation had been completed and that it had concluded, on behalf of the Secretary, that no discrimination had occurred. Mullens then filed the instant complaint of discrimination with the Commission, pursuant to section 105(c)(3) of the Act.

Conclusions of Law - Further Findings of Fact

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 may 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).

While the operator must bear the burden of persuasion on its affirmative defense, the ultimate burden of persuasion remains with the complainant. *Pasula*, 2 FMSHRC at 2800; *Schulte v. Lizza*, 6 FMSHRC 8, 16 (Jan. 1984).

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[5] Mullens also filed a grievance through his union, protesting the suspension. That matter went to arbitration and was decided in U.S. Steel's favor. In addition, Mullens initiated a criminal action against Cochran who, after a trial, was acquitted of a charge of battery.

Prima Facie Case

Section 105(c)(1) of the Act prohibits discrimination against any miner who complains to an operator or its agent about "an alleged danger or safety or health violation." 30 U.S.C. § 815(c)(1). Mullens' June 5th complaint about the CO monitor, as well as his prior reports of problems with the CO monitoring system, was activity protected under the Act. Mullens suffered adverse action, a five-day suspension.

The principle issue as to Mullens' *prima facie* case is whether the adverse action was motivated in any part by his protected activity. For the reasons set forth below, I find that the adverse action was not motivated by his protected activity.

Both Cochran and Combs testified credibly that Mullens' protected activity played no part in the decision to discipline him. Tr. 80, 103. The decision to take disciplinary action was made by Combs, who was not involved in, and did not witness the confrontation. He listened to the parties' descriptions of the events and, after consulting with human resources staff and reviewing Mullens' work record, decided to impose a five-day suspension. While Mullens believed that the five-day suspension was an "awful rough penalty," as noted below, there is no evidence that he was treated disparately under U.S. Steel's disciplinary system.

Mullens had engaged in protected activity on numerous prior occasions, none of which resulted in adverse action. His duties included calibration and maintenance of safety equipment, and he had periodically brought issues to management's attention for years. Consequently, he was engaged in protected activity on an ongoing basis. Despite the friction he described, he had never been disciplined for such actions. Tr. 32-33. Mullens brought problems with the CO monitors directly to MSHA's attention "probably six times" prior to June of 2002. Tr. 35. None of those complaints led to any adverse action. Similarly, Mullens' encounter with Cochran in May of 2002, which he described as a "confrontation," did not result in discipline. Tr. 16, 30.

While the confrontation began with Mullens' protected activity, that issue quickly became moot. Cochran directed Mullens to remedy the problem, a task within his duties and responsibilities. Tr. 19, 86, 103. The dispute that followed concerned whether Mullens would immediately address the problem, as Cochran wanted him to do, or go to his foreman's office first. The interaction quickly escalated to a heated exchange, with both participants stepping over the line of reasonable conduct.

Evidence of disparate treatment can be highly probative of unlawful motive, just as evidence of consistent treatment can indicate the lack thereof. *Sec'y of Labor on behalf of Bernardyn v. Reading Anthracite Co.*, 23 FMSHRC 924, 929 (Sept. 2001). Here, Mullens introduced no evidence that there were other similarly situated miners that were treated more favorably in the disciplinary process. Respondent presented limited evidence on that issue. Combs testified that he had disciplined "several" miners for violations of Rule #4, suggesting that Mullens' discipline was consistent with established disciplinary practices. Tr. 104.

Even though there is no direct evidence of unlawful motivation, the Commission has recognized that such evidence seldom exists and that discrimination often must be proven through circumstantial evidence. *Sec'y of Labor on behalf of Garcia v. Colorado Lava, Inc.*, 24 FMSHRC 350, 354 (April 2002), *citing Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C.Cir. 1983). Circumstantial evidence of unlawful motivation may include an operator's knowledge of the protected activity, hostility toward the protected activity, coincidence in time between the protected activity and the adverse action, and disparate treatment of the complainant. *Id*.

Here, Cochran was well aware of Mullens' protected activity, and the discipline immediately followed the June 5th complaint. Cochran reacted with hostility toward Mullens, and there had been some friction between the two in the past. Such evidence could justify an inference that the adverse action was motivated in part by protected activity. I decline to draw such an inference here. The significance of the timing of the disciplinary action and Mullens' protected activity of June 5th is largely offset by the fact that Mullens' pattern of protected activity had never resulted in adverse action. Moreover, I find that Cochran's hostility was not directed toward Mullens' protected activity, but was a consequence of their respective personalities.

There had been long-simmering friction between Mullens and Cochran. Tr. 63. Mullens was described by a co-worker as a very thorough person who strived to make sure that operations that were his responsibility were properly and timely performed. Tr. 45-46. He impressed me as a person who approached his job duties with considerable intensity, and who would readily confront supervisors that he viewed as unresponsive to work-related issues. On June 5th, Mullens approached Cochran in a confrontational manner, and he described his encounter a month earlier as a confrontation. Tr. 16, 18, 71. Cochran had a somewhat authoritarian manner of supervising. Tr. 76. Dennis Elswick, a former U.S. Steel employee who witnessed the June 5th incident but did not hear what was said, testified that "the tension between the two was really heated . . . and that's when I thought to myself, this is not going to be good because [Cochran] has a history of not being able to talk to people real well. If they don't do exactly what he says immediately, then, you know, it winds up in a confrontation, but most of the time it don't go this far." Tr. 47. The conflict between Mullens' intensity and confrontational manner and Cochran's intolerance of anything short of complete deference to his instructions produced a predictable result, one that bore no relationship to the subject matter of the interaction.

Mullens' argument on causation is, in essence, that he acted reasonably and with justification, and that his protected activity had to be the reason he was disciplined. As he explained it, "the argument we [were] having was over [protected activity] and at the time I didn't feel that I had done [anything] wrong to deserve the treatment that I received." Tr. 27-28. The disciplinary letter referred to two grounds for the suspension: insubordination and abusive language. Mullens was surprised by the inclusion of insubordination, because he had told Cochran that he would fix the monitor. Tr. 28. As noted above, however, he refused to immediately go and work on the monitor. Cochran and Combs conceded, at least in retrospect,

that it would have been reasonable for Mullens to notify his foreman of his new duties for the shift. Tr. 89, 107. The dispute that precipitated the disciplinary action was actually over when and how that notification would be accomplished. Mullens insisted on going to his foreman's office before he started the work, while Cochran insisted that he immediately depart to do the work. Mullens, somewhat reluctantly, conceded that there was an alternative means of notifying his foreman that would have avoided the conflict with Cochran, i.e., calling from a phone in the mine as he proceeded to the work site. Tr. 118-20. However, he firmly believed that the "best way" to accomplish the notification was to physically proceed to his foreman's office. Tr. 119. Mullens' preferred method of notifying his foreman may well have been quite reasonable. However, his insistence on pursuing that avenue, rather than proceeding toward the work site, required that he ignore Cochran's directive and subject himself to disciplinary action for insubordination.

It is difficult to fault Mullens for reacting as he did to Cochran's touching. Cochran's actions clearly provoked Mullens' threats. Charles E. Ashley, who witnessed the encounter, testified that "if he was doing it to me, I would have poked him in the nose." Tr. 65. The Commission has held that an operator may not rely on wrongfully provoked conduct as a business justification for otherwise discriminatory action. *See Sec'y of Labor on behalf of Bernardyn v. Reading Anthracite Co.*, 23 FMSHRC 924, 936-38 (Sept. 2001), *citing Moses v. Whitley Dev. Corp.,* 4 FMSHRC 1475, 1482 (Aug. 1982). However, the "wrongful" provocation that the Commission has found to afford a miner broad leeway in responding has been conduct wrongful under the Act. The complainant in *Moses* reacted to the operator's "unlawful and provocative" attempts to determine if he had reported an accident to MSHA inspectors. *Id*. Similarly, Bernardyn reacted to being ordered to drive faster under highly unsafe driving conditions and his removal from the haulage run for not doing so.

Cochran did not berate Mullens or direct him to ignore the safety problem. Rather, he ordered Mullens to immediately remedy it. Cochran's provocative touching was prompted by Mullens' tacit refusal to immediately embark on the task, and was not motivated by his protected activity. Cochran's conduct may have been unjustified from a personal relation standpoint, but was not unlawful under the Act.

I find that U.S. Steel made the decision to discipline Mullens solely as a consequence of his unprotected activity, i.e., his tacit refusal to do what Cochran had instructed him to do and his use of abusive and threatening language. Accordingly, I find that Complainant has failed to prove a *prima facie* case of discrimination.

Respondent's Affirmative Defense

While I have rejected Mullens' argument on causation, there is no question that his interaction with Cochran, at least initially, involved protected activity. It is also clear that hostility had developed between Cochran and Mullens. I have found that that hostility was a result of a personalty conflict, rather than the subject matter of their interactions. Nevertheless,

the line between Mullens' protected and unprotected activity is very thin. Assuming, for purposes of argument, that Mullens' discipline was in some part the result of his protected activity, it would be necessary to examine Respondent's affirmative defense.

In *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2516-17 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983), the Commission explained the proper criteria for analyzing an operator's business justification affirmative defense:

> Commission judges must often analyze the merits of an operator's alleged business justification for the challenged adverse action. In appropriate cases, they may conclude that the justification is so weak, so implausible, or so out of line with normal practice that it was mere pretext seized upon to cloak discriminatory motive.
>
> 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. 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 operators's business judgment our views on "good" business practice or on whether a particular adverse action was "just" or "wise." The proper focus, pursuant to *Pasula*, is on whether a credible justification figured into motivation and, if it did, whether it would have led to the adverse action apart from the miner's protected activities. If a proffered justification survives pretext analysis . . . , then a *limited* examination of its substantiality becomes appropriate. The question, however, is not whether such a justification comports with a judge's or our sense of fairness or enlightened business practice. Rather, the narrow statutory question is whether the reason was enough to have legitimately moved that operator to have disciplined the miner. (citations omitted).

The Commission further explained its analysis in *Haro v. Magma Copper Co*, 4 FMSHRC 1935, 1938 (Nov. 1982):

> [T]he reference in *Chacon* to a "limited" and "restrained" examination of an operator's business justification defense does *not* mean that such defenses should be examined superficially or be approved automatically once offered. Rather, we intended that a judge, in carefully analyzing such defenses, should not substitute his business judgment or sense of "industrial justice" for that of the operator. As we recently explained, "Our function is not to pass on the wisdom or fairness of such asserted business justifications, *but rather only to determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed.*" (citations omitted).

Respondent, through the testimony of Combs, advanced a credible business justification for suspending Mullens. He was presented with a dispute between a miner and a mid-level manager that continued to be highly emotional at the time of the meeting. Tr. 97-99. He concluded, in essence, that Mullens had refused to commence the work Cochran had directed him to do until he could talk to his foreman. Tr. 103. Mullens freely admitted threatening Cochran. Combs reviewed Mullens' work record, consulted with company human resources personnel, and decided to impose a five-day suspension. The only evidence on the issue suggests that the discipline was consistent with other disciplinary actions taken by Respondent for violations of the subject rule. Mullens had never been disciplined for any of his previous protected activity.

I find that Respondent would have taken the disciplinary action for Mullens' threatening language and tacit insubordination, even if there had been no protected activity involved at the beginning of the confrontation. Respondent, therefore, established an affirmative defense to the charge of discrimination.

While I have found that Mullens' complaint is not viable under the Act, his argument on liability has considerable appeal. He agreed that he would correct the problem with the CO monitor, as Cochran had instructed him to do. His determination to proceed a short distance to his foreman's office to tell him about the change in his job duties may well have been the "best way" to accomplish that task, and his threats were clearly provoked by Cochran's actions. On the whole, he acted no more unreasonably than Cochran did. Nevertheless, the consequences of that unfortunate encounter fell entirely on him, and a five-day suspension does, indeed, seem like an "awfully rough penalty," considering all of the circumstances.

As noted above, however, the Commission's jurisdiction is limited. Commission Administrative Law Judges are not free to impose their views on whether discipline was "just" or "wise." My sole responsibility is to determine whether Respondent violated the Act, and I am convinced that it did not.

ORDER

For the reasons stated above, I find that U.S. Steel's decision to discipline Mullens was not motivated in any part by Mullens' protected activity. Rather, it was based solely upon legitimate business considerations. In the alternative, I find that U.S. Steel would have taken the disciplinary action as a result of Mullens' unprotected activities alone. Accordingly, the Discrimination Complaint is hereby **DISMISSED**.

Michael E. Zielinski
Administrative Law Judge

Distribution (Certified Mail):

David Mullens, P.O. Box 464, Pineville, WV 24874

Michael P. Duff, Esq., U.S. Steel Corp., 600 Grant Street, 15th Floor, Pittsburgh, PA 15219-2800

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