FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
601 New Jersey Avenue, NW, Suite 9500
Washington, DC 20001-2021

August 27, 2007

SHAWN JOHNSON,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEVA 2007-235-D
v.	:	HOPE CD 2006-04
	:	
HUFFMAN TRUCKING, INC.,	:	No. 10 A Mine
Respondent	:	Mine ID 46-08852 FVV

DECISION

Appearances: Mark L. French, Esq., Criswell and French, PLLC, Charleston, West Virginia, on behalf of the Complainant;
David Huffman, President, Huffman Trucking Inc., Mt. Nebo, West Virginia, on behalf of the Respondent.

Before: Judge Melick

This case is before me upon the Complaint by Mr. Shawn Johnson pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, the "Act," alleging, in effect, that he was laid off for several days after April 4, 2006, and was subsequently discharged by Huffman Trucking, Inc. (Huffman Trucking), on April 14, 2006, as a result of his activities protected under section 105(c)(1) of the Act. [1] In particular, Mr. Johnson states in his

[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 the 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 this Act.

complaint to the Department of Labor's Mine Safety and Health Administration (MSHA), filed April 28, 2006, that he was not being called back to work by the Respondent, Huffman Trucking, "because I have made complaints about conditions of my assigned truck to David Huffman... [and] I feel that I am not being called to work because MSHA shut down my truck during an inspection." At hearings, the allegations of protected activity were narrowed by the Complainant to three categories, i.e. complaints about (1) the brakes on his assigned truck (Truck No. 19), (2) about the third axle valve leak on his assigned truck, and (3) the odor in his truck cab caused by the valve leak (Tr. 56). Hearings were bifurcated so that the hearings held on April 25, 2007, were limited to the issue of liability.

This Commission has long held that a miner seeking to establish a *prima facie* case of discrimination under section 105(c) of the Act bears the burden of persuasion that he engaged in protected activity and that the adverse action complained of was motivated in any part by that 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 Castle 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 on the miner's unprotected activity alone. *Pasula, supra; Robinette, supra*. See also *Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639 (4th Cir. 1987); *Donovan v. Stafford Construction Co.*, 732 F.2d 194, 195-196 (6th Cir. 1983) (specifically approving the Commissions' 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.)

The record shows that Mr. Johnson was hired at Huffman Trucking on or about May 9, 2005, as a water truck driver and that sometime around July 2005 was assigned to drive the No. 19 haul truck. His complaints to Huffman Trucking regarding the brakes on the No. 19 truck are undisputed. Johnson apparently first complained about the brakes on August 11, 2005, when he noted a problem on the "Pre-Operational Inspection and Condition Report" (pre-op report or pre-op sheets) for the No. 19 truck (Tr. 57-58). Johnson explained that "if you press[ed] the brake pedal down, it would just start jumping. I mean, it was hard to hold steady pressure onto the brakes while it was going" (Tr. 59). "It was harder to get it stop because you couldn't hold steady pressure on the pedal" (Tr. 60).

According to Johnson, the problem was not corrected but he did not continue to report it on the pre-op reports because "we were told not to write the things down like that because he didn't want to see that kind of thing on the sheets. So for a long time, I didn't write anything on the pre-op sheets" (Tr. 63). According to Johnson, he was told by Virgil Bright not to mark on the pre-op

reports that there were problems with the truck (Tr. 66).[2] Nevertheless, on September 15th Johnson again checked off on his pre-op report that "brake accessories" were a problem. On November 7, 2005, he again checked off "brakes" and "brake accessories" on the pre-op report (Complainant's Exhibit 1-3; Tr. 67). According to Johnson, he was told that the brakes were "cammed over" and the truck needed new brake pads (Tr. 67). Johnson again reported a problem with the brakes on the pre-op report for December 22nd and testified that the problem that he had reported on November 7th had still not been corrected as of December 22nd . The record shows that on December 22nd, a citation was issued by MSHA for defective brakes on the No. 19 truck (Complainant's Exhibit No. 4; Tr. 69-70). According to Johnson "they [then] finally took it off the road to go ahead and put new brakes on it "(Tr. 68).

On February 24, 2006, Mr. Johnson again noted on his pre-op report a problem with his brakes, and testified that "the pedal was jumping again." (Tr. 75). On April 4, 2006, Johnson again checked off on his pre-op report "brake accessories" (Tr. 77) and later the same day, MSHA inspectors appeared at the mine to check the brakes on "all the trucks on the hill". Johnson testified that a few days before April 4th, he had called MSHA complaining about problems with several of the trucks. According to Johnson they had been unable to get these problems corrected (Tr. 81-82). On April 4th, MSHA issued citations for defective brakes on truck No. 19 as well as two other trucks and the trucks were then taken out of service for repairs (Complainant's Exhibit No. 5; Tr. 79-81).

In addition to Johnson's undisputed testimony regarding his reports of brake problems on the No. 19 truck noted above, the undisputed "Drivers Vehicle Inspection and Condition Reports" in evidence show problems noted for 'brakes' and/or "brake accessories" on the No. 19 truck on November 7, 2005, November 8, 2005, November 11, 2005, November 14, 2005, November 15, 2005, November 28, 2005, November 29, 2005, November 30, 2005, December 2, 2005, December 6, 2005, December 7, 2005, February 24, 2006, February 25, 2006, February 26, 2006, February 27, 2006, February 28, 2006, March 3, 2006, March 4, 2006, March 5, 2006, March 6, 2006, March 7, 2006, March 8, 2006, March 11, 2006, March 12, 2006, March 13, 2006, March 21, 2006, March 22, 2006, March 23, 2006, March 27, 2006, March 28, 2006, March 27, 2006, April 1, 2006, and April 4, 2006 (Complainant's Exhibit Nos. 1-3). It is undisputed that these reports were filed with Huffman Trucking and it may reasonably be inferred that company President David Huffman was aware of some, if not all, of these complaints. Mr. Johnson's testimony is also undisputed that he had also talked directly to Mr. Huffman on several occasions after February 24th about his problem with the brakes on the No. 19 truck (Tr. 85).

Mr. Johnson also noted defects in the third axle valve on his pre-op reports for February 10, 2006, February 26, 2006, February 27, 2006, February 28, 2006, March 3, 2006, March 4, 2006, March 5, 2006, March 6, 2006, March 7, 2006, March 8, 2006, March 11, 2006, March 12, 2006, March 13, 2006, March 21, 2006, March 22, 2006, and April 4, 2006 (Complainant's Exhs. 1-3). Since MSHA cited the leak in the third axle valve on April 4, 2006, as a violation of the mandatory

[2] Johnson did not know whether Bright was a mechanic, a shop foreman or "exactly what" his position was. (Tr. 66).

safety standard at 30 C.F.R. § 77.404(a) it is apparent that Johnson's complaints in this regard were also protected under the Act.[3] The record shows that Huffman was clearly aware of the later complaints concerning the third axle valve (Tr. 210-212, 216) and it may reasonably be inferred that he was aware of all of the above complaints.

Considering the above essentially undisputed evidence, it is clear that the Complainant engaged in a significant number of protected activities. As previously noted, the second element of a *prima facie* case of discrimination is a showing that the adverse action was motivated in any part by the protected activity. Since Huffman admitted at hearings that he let Johnson go because of Johnson's complaints in his pre-op report on April 14, 2006, about the third axle leak - - a problem MSHA had previously issued a violation for only ten days earlier, it is clear that this adverse action was motivated by such protected activity (Tr. 210-212, 216).

In addition to this direct evidence of discriminatory intent there is also abundant indirect evidence of Huffman's discriminatory intent. As this Commission observed in *Chacon v. Phelps Dodge Corp*., 3 FMSHRC 2508 (November 1981) "[d]irect evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." The Commission considered in that case the following circumstantial indicia of discriminatory intent: knowledge of protected activity ; hostility toward protected activity; coincidence of time between the protected activity and the adverse action; and disparate treatment. In examining these indicia the Commission noted that the operator's knowledge of the miner's protected activity is "probably the single most important aspect of the circumstantial case."

In the instant case there is no dispute that company President David Huffman had knowledge of Johnson's protected activity in filing numerous safety complaints in his pre-op reports for the brakes and the third axle valve leak on the No. 19 truck and was directly told of the brake defects by Johnson on several occasions (Tr.85). In addition, while there is no direct evidence that Huffman or any other agent of the Respondent was told of Johnson's complaints to MSHA preceding Johnson's layoff and subsequent termination, it may reasonably be inferred from the close proximity in time between Johnson's persistent complaints of brake and third axle valve defects in his pre-op reports and the MSHA inspection of Johnson's No. 19 truck and MSHA's issuance of citations for defective brakes and third axle leaks, that Huffman believed that Johnson had made such complaints to MSHA.

Hostility toward protected activity may also be inferred from Huffman's testimony that one of the reasons he did not retain Johnson was because "we couldn't get along with each other... [t]he problems he had with the truck none of the other drivers would have" (Tr. 209-210). In addition, when Huffman was asked at trial whether he would be calling Johnson back to work he responded that he would not, explaining that "this proceeding here would probably be the biggest reason for

[3] 30 C.F.R. § 77.404(a) provides that " [m]obile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately."

not calling him back" (Tr. 205).

Huffman's layoff of Johnson after Johnson's complaint on April 4th was also only shortly after the MSHA citation of Johnson's truck for defective brakes and the third axle leak on the same day and Johnson's final separation came only 10 days later. Thus there was clearly a coincidence in timing between the protected activities and the adverse action.

Finally, there is clear evidence of disparate treatment from the fact that two other drivers were retained and only Johnson was laid off after all of their trucks were shut down by MSHA on April 4th (Tr. 100-101). Johnson was not called back to work until April 12th. The record shows that the two other drivers continued working. Moreover the MSHA citation issued for the No. 19 truck was abated on April 8, 2006, and the pre-op reports for April 8th through April 11th, show that other drivers were driving Johnson's truck during this time (Complainant's Exhibit No. 6; Tr. 88-90). The implausible reasons cited by Huffman as the basis for Johnson's termination also reflect a lack of credibility and a transparent effort to cover-up the true reasons and motivation for Johnson's termination i.e. Johnson's protected activity (See discussion of this issue *infra*.). Under the circumstances, I find that the Complainant has clearly established a *prima facie* case of a discriminatory layoff and discharge under section 105(c) of the Act.

Huffman Trucking attempts to defend affirmatively by claiming that it would have taken the adverse action in any event on the basis of a business justification and Johnson's unprotected activities alone. This argument attempts to address the affirmative defense under the *Pasula* analysis. In *Chacon* the Commission explained the proper criteria for analyzing an operator's business justification for an adverse action:

> 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 a mere pretext seized upon to cloak discriminatory motive. But such inquires must be restrained.
>
> 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 Mine 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 on "good" business practice or on whether a particular adverse action was "just" or "wise." *Cf. NLRB v. Eastern Smelting & Refining Corp.*, 598 F.2 666, ((1st Cir. 19793). The proper focus, pursuant to *Pasula*, is on whether a credible justification figures into motivation and, if it did, whether it would have led to the adverse action apart from the miner's protected activities. If a proferred 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 practices. Rather, the narrow statutory question is whether the reason was enough to have legitimately moved that the operator to have disciplines the miner. *Cf*. R-W Service System Inc., 243 NLRB 1202, 1203-04(1979) (articulating an analogous standard).

In this regard, David Huffman cites a number of alleged unprotected reasons for Johnson's removal. At hearings Huffman proffered that he terminated Johnson (did not call him back to work) for the following non-protected reasons: "[l]ate for work and absenteeism, and the complaints from fellow workers about working, you know, with his profanity and attitude" (Tr. 153). The record shows that Johnson did have a number of unexcused absences (See Respondent's Exhibit No. 3) and that Huffman issued a "Final Warning" on January 26, 2006, for his absenteeism. According to Huffman, under their written policy "[t]he final warning is your last warning, and your unexcused absence next time will lead to discharge" (Tr. 218-219). However, only a few weeks later, on February 12, 2006, Johnson had another unexcused absence, without termination or any other disciplinary action (Respondent's Exh. No. 3; Tr. 220). He also had unexcused absences on March 20, 29 and 30. Indeed, Huffman admitted that his absenteeism policy was not enforced (Tr. 218-222) and it was only after Johnson continued to engage in persistent protected activity culminating in his complaints on April 4, 2006, and April 14, 2006, and the MSHA inspection and shut down of three of Huffman's trucks, that Huffman laid off Johnson and subsequently terminated him. Clearly, Johnson's absenteeism was not taken seriously enough to terminate him until after he engaged in significant protected activity.

The same can be said for Johnson's purported tardiness. According to Respondent's witness, Virgil Bright, Johnson's tardiness began as early as May 2005 yet there is not even a claim that disciplinary action based on such tardiness was taken until almost a year later, and only shortly after Johnson engaged in extensive protected activities and several MSHA inspections and citations were issued for safety violations on Johnson's truck.

Huffman's claims that Johnson's "attitude" was the basis for his discharge are also not credible because the so-called "attitude" problems (i.e. by not wearing a hard hat, wearing short pants and tennis shoes even when it was snowing) were events that apparently occurred in May 2005 almost a year before the adverse action and while Johnson was employed for another company (Tr. 118-130). In addition, Huffman Trucking witness Virgil Bright testified that he knew of no one having ever been terminated at the mine for using profanity (Tr. 167). Moreover, since no specific examples of "profanity" were cited it is not possible to evaluate the gravity of the allegation. Finally, drawing a "smiley face" on a disciplinary report cannot seriously be cited as a justifiable grounds for a suspension and discharge.

Huffman subsequently added another alleged reason for terminating Johnson which he described as follows at hearing:

> Yeah. Shawn and I had a clash, you know. It wasn't ever - - we couldn't get along with each other. We wasn't ever going get along with each other. The problems he had with the truck, none of the other drivers would have. The third axle valve was replaced, and

when Shawn come back to work, you know, he started to write the third axle valve down again. I went out and checked it. (Tr. 209-210).

According to Huffman there was no leak in the third axle valve but Johnson kept on reporting it.[4] When later asked why he could not simply have transferred Johnson to another truck after he continued to complain about defects in truck No. 19, Huffman gave contradictory responses, stating at one point that "we never switch drivers" (Tr. 213) and then later acknowledging that any number of other drivers in fact drove truck No. 19 (Tr. 213-217).

Under all the circumstances, I find that the proffered rationale for Johnson's discharge is not credible and was merely a pretext for terminating him because of his protected safety complaints. [5] Under the circumstances, I find that the Complainant herein has sustained his burden of proving that his layoff on April 4, 2006, and his subsequent termination were in violation of section 105 (c)(1) of the Act.

ORDER

Huffman Trucking, Inc., is hereby directed to immediately reinstate Shawn Johnson, the Complainant herein, to the job of truck driver at its No. 10 A mine or to a similar position at the mine with the same hours, rate of pay and benefits received prior to his termination. The parties hereto are directed to confer with respect to the possibility of reaching a settlement with respect to damages (including back pay) and attorney's fees and to report the results to the undersigned on or before September 14, 2007. Should the parties be unable to agree on all such issues further hearings will thereafter be scheduled.

Gary Melick
Administrative Law Judge
(202) 434-9977

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[4] While there is no requirement in the Act that the "alleged danger" or "safety or health violation" be proven to exist, I note that MSHA issued a citation on April 4, 2006, for a violation based on the third axle leak also reported by Johnson. I therefore find that Johnson's subsequent complaint on April 14, 2006, about third axle leaks was credible and based on a reasonable and good faith belief in the alleged danger and/or safety violation.

[5] It is also noted that Mr. Huffman testified at hearing that he would not now call Mr. Johnson back to work because of the instant discrimination case brought by Johnson (Tr. 205-206).

Distribution: (Certified Mail)

Mark L. French, Esq., Criswell & French, PLLC, 405 Capitol St., Suite 1007, Charleston, WV 25301

David Huffman, President, Huffman Trucking, Inc., 6005 Snow Hill Road, Mt. Nebo, WV 26679

Mark R. Malecki, Esq., Office of the Solicitor, U.S. Department of Labor, 1100 Wilson Blvd., 22nd Floor, Arlington, VA 22209

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