FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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November 3, 1999

ANTHONY WILLIAMS,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEVA 99-71-D
v.	:	MSHA Case No. HOPE-CD-99-03
	:	
OASIS CONTRACTING, INC.,	:	
Respondent	:	

DECISION

Appearances: Andrew J. Katz, Esq., The Katz Working Families' Law Firm, L.C., Charleston, West Virginia, for Complainant;
Ricklin Brown, Esq., Bowles Rice McDavid Graff & Love, PLLC, Charleston, West Virginia, for Respondent.

Before: Judge Hodgdon

This case is before me on a Complaint of Discrimination filed by Anthony E. Williams against Oasis Contracting, Inc., under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). A hearing was held in Charleston, West Virginia. For the reasons set forth below, I find that the Complainant was not discharged by Oasis because he engaged in activities protected under the Act.

Williams filed a discrimination complaint with the Secretary of Labor's Mine Safety and Health Administration (MSHA), pursuant to section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2), on December 8, 1998.[1] On March 4, 1999, MSHA informed him that, on the basis of its investigation, it had determined that "a violation of Section 105(c) of the Act has not occurred." Williams then instituted this proceeding with the Commission on April 2, 1999, under section 105(c)(3), 30 U.S.C. § 815(c)(3).[2]

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[1] Section 105(c)(2) provides, in pertinent part, that: "Any miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination."

[2] Section 105(c)(3) provides, in pertinent part, that: "If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission . . . ."

Background

Oasis Contracting, Inc., provides temporary contract labor for various coal companies in the southern coal fields of West Virginia. Anthony Williams began working for Oasis on September 12, 1997. Since he had never worked as a miner before, Oasis provided him with new miner training. He was then assigned to work as a general laborer at the Upper Big Branch underground coal mine operated by Performance Coal Company.

Williams worked both above ground and underground for Performance, operating scoops and "supply motors," taking care of belt lines and working as a supply man, inloader operator and welder. All of this work was considered "outby work," that is, it was not directly involved with the production of coal at the face. On August 26, 1998, Williams received his miner's certification.

Williams was laid-off by Performance on September 16, 1998. On December 7, 1998, he went to Oasis' office to find out if there was any work available for him. After being advised that there was none, he left the office only to return a few minutes later to request his "bonus." The "bonus" was in reality a yearly clothing allowance provided for Oasis employees working as miners. On being informed that he was not entitled to the allowance since he was not working, he began talking in a loud voice and using profanities to the woman in the office concerning the lack of work and allowance. He had to be asked to leave by a male employee. As a result of this incident, Oasis terminated his employment.

Williams filed a discrimination complaint with MSHA the next day. In his complaint, Williams alleged:

> I believe I was laid off after Oasis management was pressured by Performance Coal Company. The coal company was afraid that I had knowledge that would get them in trouble. I had received a telephone call from the Johnson family lawyer informing me that I would be subpoenaed to testify in court about a fatal accident that occurred at the Upper Big Branch mine.

(Comp. Ex. 3.) At the hearing, Williams also implied that he was laid-off from Performance because he complained about having to work alone as an inexperienced miner.

Findings of Fact and Conclusions of Law

In order to establish a *prima facie* case of discrimination under Section 105(c) of the Act, a complaining miner bears the burden of establishing (1) that he engaged in protected activity and (2) 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 (October 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981);

Secretary on behalf of Jenkins v. Hecla-Day Mines Corp., 6 FMSHRC 1842 (August 1984); *Secretary on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508 (1981), *rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983). 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. *Pasula*, 2 FMSHRC at 2799-800.

I find that the Complainant has demonstrated that he engaged in protected activity, but that he has not established that he was discriminated against as a result of that activity. I further find that the Complainant was not a believable witness. Finally, I find that the Respondent has shown that the Complainant was terminated for reasons other than his having engaged in protected activity.

Protected Activity

Williams alleges that the protected activity that he engaged in was being a potential witness in a wrongful death action being brought by the family of Danny Johnson,[3] and complaining about working alone as a "red hat."[4] Both claims are supported only by the Complainant's less than precise testimony. However, giving him the benefit of the doubt, I find that he did engage in protected activity.

The Respondent questions whether being a potential witness in a civil case can be protected activity. I agree with the Complainant that it can be.

Section 105(c)(1) of the Act, 30 U.S.C. § 815(c)(1), states that a miner has engaged in protected activity when he has acted as follows: (1) he "has filed or made a complaint under or related to this Act, including a complaint . . . of an alleged danger or safety or health violation;" (2) he "is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101;" (3) he "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, (4) he has exercised "on behalf of himself or others . . . any statutory right afforded by this Act." (Emphasis added.)

While there does not appear to be any law on this point, I find that a wrongful death case based on an alleged safety violation at a mine is a proceeding related to the Act. It follows that a person about to testify in such a proceeding is engaging in protected activity.

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[3] It was never stated at the hearing against whom the wrongful death action was being brought; I am assuming it was Performance Coal Company.

[4] Until a new miner has been certified, he is distinguished in the mine as a new miner by wearing a red hard hat. *See* 30 C.F.R. § 75.1720-1.

The Complainant's claim that he engaged in protected activity by complaining about working alone as a "red hat" is more tenuous. In the first place, the Complainant has not cited, and I have not been able to find, any prohibition in the regulations against new miners being assigned to work alone. In the second place, while there are prohibitions against any miner being "assigned, or allowed, or . . . required to perform work alone in any area where hazardous conditions exist that would endanger his safety unless he can communicate with others, can be heard, or can be seen," at surface metal and non-metal mines, the surfaces of underground metal and non-metal mines and surface coal mines, 30 C.F.R. § § 56.18020, 57.18020 and 77.1700, and a prohibition against any miner being "assigned, or allowed, or . . . required to perform work alone in any area where hazardous conditions exist that would endanger his safety unless his cries for help can be heard or he can be seen" in underground metal and non-metal mines, 30 C.F.R. § 57.18025, there does not appear to be a similar requirement for underground coal mines.

Thus, since he did not allege that he was working in "hazardous conditions," Williams' protest about working alone does not appear to be grounded in any violation of the safety regulations. In fact, he was building stoppings in an area removed from the working face. Nor did he claim that he was out of sight or sound of others. Nonetheless, for the purposes of this decision, I will assume that his complaint of having to work alone involved protected activity.

Motivation for Discharge

The Complainant has failed to establish that he was discharged because he was a potential witness in the wrongful death case or because he complained about working alone. To prevail in this matter, Williams must show not only that he was laid-off by Performance because of his protected activity, but also that he was terminated by Oasis for the same reasons. Other than make the charges by his own testimony and showing that he was laid-off and terminated, respectively, he has presented no evidence, circumstantial or otherwise, to connect the activity with the adverse action.

As alleged in his complaint, Williams testified that he was called sometime in June or July by an investigator working for the Johnson family and told that he could be *subpoenaed* to testify at a trial. He claimed, however, that the only mine people he told about the call were "[j]ust co-workers." (Tr. 179.) Despite this claim, it is apparent that Performance was aware that its employees, including Williams, were being questioned by someone representing the Johnson's[5]. This knowledge on the part of Performance, however, is not enough to lead to the conclusion that is why Williams was laid-off.

Williams did not show that the company knew that he was going to be a witness at the trial. In fact, there is no way the company could have known this since Williams himself did not

[5] Gary Frampton, the Performance superintendent, testified that Williams came to him and told him that "somebody from Mrs Johnson's law firm had tried to contact" him and Williams wanted to know if he should talk to the person. (Tr. 218.)

know it. At the time of this hearing, there had been no trial in the Johnson case and Williams had not even been deposed. Further, the Complainant did not show that Performance believed that he would testify adversely to their interests. Williams gave a statement to the MSHA and state investigators when the Johnson accident was being investigated. At that time, he told the investigators that the overcast structure which later collapsed "looked sound to me when I left that night." (Resp. Ex. 4 at 2.) In addition, Williams testified that he refused to talk to the investigator, so even the Johnson family did not know what his testimony would be. Consequently, if anyone at Performance considered it at all, the assumption would have been that he would support their case.

Lastly, Williams did not show why laying him off would have benefitted the company. If they suspected that he was a hostile witness, certainly laying him off would make him more hostile and likely to testify against them. Therefore, it seems unlikely that this would have motivated them to lay him off.

Turning to the complaint of working alone, the sum total of Williams' testimony concerning his complaining about it to management was: "I started on that job on a Monday and then Thursday night I finally, you know, met Danny Gerald[6] outside, and I told him that I shouldn't be working by myself as a red hat and besides I need help to get this caught up, I can't keep up." (Tr. 73.) If this was a complaint about safety rather than a complaint about not being able to keep up, I will assume that management had notice of it since Danny Jarrell was a foreman. However, the Complainant has not shown that Gary Frampton, the person who made the decision to lay him off, knew about it. He has also not shown any connection between the complaint and the layoff. According to Williams testimony, he was neither a "red hat" nor working alone when he was notified that he was being laid-off. Thus, there is no coincidence in time between the two actions.

Finally, not only has Williams not demonstrated that he was laid-off by Performance because of the protected activity he engaged in, he has also failed to show that Oasis was even aware of the protected activity at the time he was terminated. Both Philip Farley, the owner of Oasis, and Stephanie Buchanan, the Oasis employee who received the telephone call from Performance asking that Williams be laid-off, denied knowing anything about the protected activity in which Williams claimed he engaged. Frampton denied telling Oasis that the Complainant had engaged in protected activity.

While it might be expected that if Williams had, in fact, been laid-off and then terminated for engaging in protected activity, these witnesses would not admit to it, Williams has nothing other than his speculation to support his claim. There is no direct evidence, or evidence of any type, that would tend to indicate that Performance and Oasis were acting in concert. None of the circumstantial indicia of discriminatory intent recognized by the Commission in *Chacon*, 3 FMSHRC at 2510, are present with respect to Oasis. There is nothing to indicate that Oasis had

[6] His name is actually spelled "Jarrell."

knowledge of the Complainant's protected activities. There is no evidence that Oasis had ever demonstrated hostility towards protected activity There is no coincidence in time between the protected activity and Williams' termination. Lastly, there is no evidence of disparate treatment of Williams.

Williams case depends totally on his credibility. As discussed above, he has failed to prove that his layoff and termination were the result of his protected activity even assuming that everything that he testified to were true. In fact, however, he was not a credible witness.

The Complainant testified that he observed Danny Jarrell weld a "rusty screwdriver" into the overcast which later collapsed causing the death of Johnson. (Tr. 91-92.) The implication in this testimony was that this was the adverse information that Performance did not want Williams to reveal at a trial. However, he did not mention this to the state and federal investigators, instead telling them that everything on the overcast looked sound.[7] Thus, he either misled the investigators, or he was not forthcoming at the hearing.

Assuming that he gave a false statement during the investigation because, as he said, he did not want to lose his job, this does not explain why he did not mention the screwdriver in his discrimination complaint. By this time he had lost his job. Yet he made no mention of what he allegedly knew either in his formal complaint, (Comp. Ex. 1), or the detailed statement he made to MSHA the next day in support of his complaint, (Resp. Ex. 1). He also did not bring up the fact that he had complained about having to work alone in either statement.

In addition to these two major inconsistencies, Williams testimony was also vague, contradictory and replete with claims of inability to recall when his assertions were questioned. His demeanor and manner while testifying also evidenced a lack of forthrightness. As already noted, his testimony is completely uncorroborated. Therefore, I accord little probative value to this testimony.

Not only did the Complainant's case fail in its burden of establishing that his layoff and discharge were motivated by his protected activity and lack credibility, but Oasis demonstrated that the adverse action taken against Williams was for reasons other than his engaging in protected activity. Frampton testified that Williams was laid-off because his work was not satisfactory. He stated that he had talked with the Complainant several months before about the layoff after receiving complaints from several of Williams' supervisors. Williams denied that he

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[7] Both the West Virginia Office of Miners' Health, Safety and Training investigation report and the MSHA investigation report concluded that out of the 18 "H" beams making up the ceiling of the overcast, only one had been welded and that this weld was insufficient to support the weight placed on the ceiling of the overcast. (Resp. Exs. 5 and 6.) The reports also concluded that "[i]nferior and insufficient bracing was used to support the sidewalls and ceiling." (Resp. Ex. 6 at 6.) Neither report mentions a "rusty screwdriver" and neither the state nor the federal agency issued any citations or orders to Performance as a result of the accident.

had ever been told his work was satisfactory. However, Farley confirmed that Frampton had called him about Williams' work performance. Farley and Buchanan both testified that when Williams was laid off they were told by Frampton that it was because of unsatisfactory work.

Moreover, even if Performance's reason for laying Williams off was a pretext for laying him off because of his protected activity, there is nothing to indicate that Oasis was aware of the pretext. Indeed, Oasis told Williams that if work was available with another company, which he could perform, they would give it to him. It was not until he became abusive at the Oasis office that he was terminated.

Order

Accordingly, since the Complainant has failed to show that he was laid off and then terminated for engaging in activity protected under the Act, it is **ORDERED** that the complaint of Anthony Williams against Oasis Contracting, Inc., under section 105(c) of the Act, is **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge

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