

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
2 SKYLINE, Suite 1000  
5203 LEESBURG PIKE  
FALLS CHURCH, VIRGINIA 22041

December 10, 1998

|                        |   |                           |
|------------------------|---|---------------------------|
| JOHN D. LEHOUX,        | : | DISCRIMINATION PROCEEDING |
| Complainant            | : |                           |
| v.                     | : | Docket No. YORK 98-36-DM  |
|                        | : | NE MD 98-03               |
| PLOURDE SAND & GRAVEL, | : |                           |
| Respondent             | : | Mine ID No. 27-00094      |
|                        | : | Plourde Sand & Gravel     |

## DECISION

Appearances: Susanna G. Robinson, Esq., Douglas, Robinson, Leonard & Garvey, P.C.  
Concord, New Hampshire for Complainant;  
Frank P. Spinella, Jr., Esq., Hall, Morse, Anderson, Miller, & Spinella, P.C.  
Concord, New Hampshire for Respondent.

Before: Judge Bulluck

This discrimination proceeding is before me on a Complaint of Discrimination brought by John D. Lehoux against Plourde Sand and Gravel (APlourde@), under Section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 815(c). The complaint alleges unlawful discharge in retaliation for safety complaints raised with the Secretary's Mine Safety and Health Administration (AMSHA@) during a fatality investigation.

John Lehoux filed his discrimination complaint with MSHA pursuant to Section 105(c)(2) on February 6, 1998 (Ex. C-5).<sup>1</sup> On April 28, 1998, MSHA notified Lehoux that, based on its investigation of the allegations, it had concluded that a violation of Section 105(c) had not occurred. Lehoux, through counsel, instituted this proceeding before the Commission on May 18, 1998, under Section 105(c)(3), 30 U.S.C. ' 815(c)(3).<sup>2</sup>

A hearing was held in Concord, New Hampshire. The parties presented testimony and

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<sup>1</sup>Section 105(c)(2) provides, in pertinent part, that AAny 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.@

<sup>2</sup>Section 105(c)(3) provides, in pertinent part, that AIf 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....@

documentary evidence, and filed post-hearing briefs. For the reasons set forth below, I conclude that while Lehoux engaged in protected activity, he was not discharged by Plourde for engaging in that, or any other, protected activity.

## I. Stipulations

The parties stipulated to the following facts:

1. Lehoux was hired by Plourde on November 11, 1996, and fired by Plourde on December 12, 1997.
2. Lehoux was initially hired as a salesman, but served as plant superintendent and safety officer for Plourde from March to December 1997.
3. Brent Blackey died in a fatal accident at Plourde's Hooksett plant on December 3, 1997.
4. After the accident, Lehoux was interviewed by MSHA investigators.

## II. Factual Background

Plourde is owned and operated by the Plourde brothers; Oscar is the president of the company and Lawrence is the vice-president and treasurer (Tr. 19, 164; Vol. II: 50). Lawrence Plourde had functioned as manager of the Hooksett plant for approximately 30 years, until Lehoux became the first outsider@plant superintendent (Tr. 187; Vol. II: 51).

Lehoux applied for a position in aggregate sales with Plourde, was interviewed, and was hired as a salesman to replace Tom Woodley on November 11, 1996 (Ex. C-1; Tr. 14). Richard Weed, financial consultant to the Plourdes, assisted them in hiring Lehoux (Tr. 308-12). Lehoux also functioned as the company's safety coordinator during part of his tenure (Tr. 21). Dissatisfied with employment elsewhere, Tom Woodley sought reinstatement and was rehired as Plourde's salesman in March 1997, at which time Lehoux vacated that position and accepted reassignment to the position of plant superintendent (Tr. 12, 21, 166, 312-14).

As superintendent of the Hooksett plant, Lehoux supervised and worked alongside Larry Champhene, Brent Blackey and Kenny Publicover, who was terminated during Lehoux's tenure (Tr. 42, 277-79). Oscar Plourde was Lehoux's supervisor (Tr. 31). At some point in the Fall of 1997, Oscar Plourde, dissatisfied with Lehoux's job performance, requested that Tom Woodley discretely Aput the word out@in the industry that the Plourdes were looking for a replacement for Lehoux (Tr. 316; Vol. II: 12-13). As a result of those efforts, Don Davis was referred to Tom Woodley, was interviewed by Woodley and the Plourdes, and within two weeks of his application for the plant superintendent position, was offered the job in early to mid November 1997 (Tr. 198-200, 317-18; Vol. II: 14-16). Don Davis=report-to-duty date at Plourde was delayed a week

or so, in order for him to complete a project for his current employer before his departure; Davis reported to duty at Plourde on December 8, 1997 (Tr. 214, 234, 318; Vol. II: 17-18). In the meantime, on December 3, 1997, Brent Blackey was involved in a fatal accident at the Hooksett plant. Lehoux was not at work the day Blackey was killed (Tr. 47-48, 55). An MSHA accident investigation ensued, during which Lehoux, among other employees, was interviewed (Tr. 84-86). Upon conclusion of the MSHA investigation, on December 12, 1997, Lehoux was discharged by Plourde.

### III. Findings of Fact and Conclusions of Law

In order to establish a *prima facie* case of discrimination under Section 105(c) of the Act,<sup>3</sup> a complaining miner bears the burden of establishing that 1) he engaged in protected activity and 2) the adverse action of which he complained was motivated in any part by the protected activity. *Secretary of Labor 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 (3<sup>rd</sup> Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981); *Secretary of Labor on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842 (August 1984); *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508 (November 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 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. If the operator cannot rebut the *prima facie* case in this manner, it,

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<sup>3</sup> Section 105(c)1 of the Act provides that a miner cannot be discharged, discriminated against or interfered with in the exercise of his statutory rights because: (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.

nevertheless, may defend affirmatively by proving that it was also motivated by the miners' unprotected activity and would have taken the adverse action for the unprotected activity alone. *Id.* at 2800; *Robinette*, 3 FMSHRC at 817-18; *see also Eastern Assoc. Coal Corp. v. FMSHRC* 813 F.2d 639, 642 (4<sup>th</sup> Cir. 1987); *Donovan v. Stafford Const. Co.*, 732 F.2d 954, 958-59 (D.C. Cir. 1984); *Boich v. FMSHRC*, 719 F.2d 194, 195-96 (6<sup>th</sup> Cir. 1983) (specifically approving the Commission's *Pasula-Robinette* test).

Lehoux has met the first step in establishing a *prima facie* case of discrimination. The record establishes that Lehoux cooperated with MSHA during its investigation of Brent Blackey's death in early December 1997, and according to Lehoux's testimony, he started squawking like a pigeon because he was extremely upset about Brent Blackey's death (Tr. 50, 54-57). Lehoux further testified that he and Larry Champhene had led the MSHA investigators around the plant, pointing out safety concerns, and that he, himself, showed them an electrical box that did not have an emergency shut-off, which he believed had something to do with Blackey's death (Tr. 57-59). Indeed, Plourde concedes that Lehoux engaged in protected activity (Resp. Br. at 1-2).

Lehoux has ultimately failed to establish a *prima facie* case, however, because he has not met his burden of proving the second step--that Plourde's decision to discharge him was, in any part, motivated by his cooperation with MSHA. Lehoux attempted to establish a causal connection between his safety complaints in early December 1997, following Blackey's death, and his discharge shortly thereafter on December 12<sup>th</sup>, through circumstantial evidence of his satisfactory work performance and Oscar Plourde's animus toward MSHA. While bearing in mind that direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect, the evidence presented does not establish an intent to discriminate. *See Secretary of labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (November 1981), *rev'd on other grounds*, 709 F. 2d 86 (D.C. Cir. 1983).

Looking first to Lehoux's performance, Lehoux argues that absence of any disciplinary action in his personnel file establishes that he had been meeting the expectations of the Plourdes, or had otherwise been performing his duties satisfactorily (Ex. C-1). However, lack of documented performance deficiencies must be analyzed in the broader context of the manner in which the Plourde brothers have operated over the extensive life of the company. There is considerable testimony that the Plourdes do not follow the company's written safety program policy, deal with their employees orally, and otherwise run a very informal operation (Tr. 179-80; Vol. II: 59; Ex. C-2). For example, in response to questioning on cross-examination as to whether Lehoux had ever received a written reprimand, salesman Tom Woodley testified to his view of how Oscar Plourde ran the company:

A. Unfortunately, Plourde Sand and Gravel has never done it that way, and so there are no written records to show that. Since this has come about, they realize that we're going to have to, and we're now going ahead and doing written reprimands and that sort of thing. Unfortunately, Mr. Plourde has been in business since 1929 or whatever, never had to do that sort of thing. This is the first time it's

happened, and he's kind of described as old school. He's always--you understand where you stand with Mr. Plourde, if you know him. He's very vocal

(Tr. Vol. II: 40-41). Indeed, Lehoux expressed a similar view by testifying, on cross-examination, as follows:

Q. Would you agree that at Plourde Sand and Gravel many things are done informally?

A. Yes, I would.

Q. It's a seat-of-the pants operation in some respects, is it not?

A. Yes.

Q. Would that be a fair characterization?

A. Yes.

Q. And you'd agree that oftentimes Oscar Plourde and Larry Plourde will not create paperwork but rather speak to people, sometimes in Oscar's case, with some passion?

A. Uhm-hmm, yes.

Q. But would you agree it's more likely that someone would get a verbal warning than a written one at Plourde Sand and Gravel?

A. Yes, I would.

Q. And in fact, in your experience, they're fairly lax on the paperwork aspect of things?

A. Yeah, they are

(Tr. 90-1). Oscar Plourde referenced the way he and his brother conducted business in the following testimony:

Q. Did you ever think of putting it in writing, if it was a disciplinary action?

A. We never issued any writing, very, very--I don't remember issuing anybody a citation [reprimand] (Tr. 179).

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Q. And you didn't think, in those months between July and August of 1997, to when you were going to terminate him, to start showing in his personnel file, documenting, performance issues?

A. Never entered my mind.

Q. Never did that?

A. No, never did it to nobody (Tr. 208; see also 212).

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A. We're construction people, we're not paper people (Tr. 224).

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A. And his father [Lehoux's] ran a bigger operation than we have. We always worked together and hand in hand when we do that, we're of the 60's and the 70's and the 50's, we're not of the 90's. Paper is tough for us

(Tr. 229-30). This cumulative testimony, unrebutted, leads me to conclude that lack of written reprimands in Lehoux's personnel file is not dispositive of whether the Plourdes were satisfied with his job performance.

On the issue of Lehoux's performance, the evidence establishes that Lehoux had problems in both the sales and plant superintendent positions. It is clear from the record that, despite Lehoux's assertions to the Plourdes that he could handle the positions, Lehoux had very little experience in sales and management when they hired him, and received no formal training from them throughout his tenure with the company (Tr. 15, 17, 30-31, 168-71, 195-96, 253-58, 311-14, 339-41; Vol. II: 86-87, 96-98, 129; Ex. C-9). In fact, there was no job description for either position and Lehoux was told what to do on the job (Tr. 258-59, 341; Vol. II: 86). Lehoux, himself, corroborates the testimony of Oscar Plourde and Dick Weed that Lehoux was uncomfortable and performing poorly in sales (Tr. 30, 167, 313). Respecting the plant superintendent position, both Plourde brothers testified to Lehoux "slacking off" some time around May 1997, and to their increasing dissatisfaction with Lehoux's ability to effectively manage and distance himself from subordinate employees, repair and maintain equipment and produce material (Tr. 167, 174-75, 188-89, 191-92, 211-12, 241-42; Vol. II: 51-58, 60-63, 70-71). Tom Woodley testified to having observed the plant running below capacity under Lehoux, and to having personally spoken to Lehoux about preventing his subordinates from loafing (Tr. Vol. II: 28-32). Moreover, the Plourdes testified to having made constant verbal complaints to Lehoux about deficiencies in his work, including, but not limited to, his failure to have safety guards replaced on equipment immediately after repair (Tr. 178-83, 185-86, 238, 241-43; II: 57-

60, 85). Lehoux agrees, on cross-examination, that Oscar and Larry Plourde had been unhappy with the pace at which he addressed maintenance problems (Tr. 102, 109-10). Lehoux's witness, Larry Champhene, testified that Oscar was generally disagreeable, that he was constantly on the employees' backs, and that he routinely bitched out the employees, including Lehoux (Tr. 274-75). Despite numerous assertions that he had never been told by the Plourdes of dissatisfaction with his performance, Lehoux also agreed, on direct examination, that Oscar got aggravated often, had a bad temper, yelled and screamed, and pushed the employees pretty hard (Tr. 38). Furthermore, he conceded that the Plourdes were unhappy with his supervision of his subordinates:

Q. Was there ever an issue about you working side-by-side with the people you were supervising?

A. Yeah. I don't think they--they saw it as, like, I was trying to be buddy-buddy with everybody. But I'd always been taught, if you could, to work with your employees a little bit. It shows them that you're willing to help out, it's not just something that you're going to hand to someone because you don't want to do it. I shoveled right side-by-side with Lawrence Chemphene and Brent and Kenny all the time. I did most of the welding, cutting.

Q. And was that an issue; in other words, was that something that you were disciplined for doing?

A. I wasn't disciplined, but I knew they didn't--they frowned on it a little bit. Larry Plourde's son, Philip, we talked about a couple times, that I should back off a little bit, but it's hard with three men, which I considered doing a four, five-man job, to try and really keep that place up to par.

Q. Were you ever told that your job was in jeopardy if you didn't stop working side-by-side with--

A. No, never.

Q. Were you told that you were not allowed to work side-by-side with the men or that they just wanted you to stand back a little bit more?

A. No, nobody ever said that to me. I just could tell, the way things went, you know, the body language, the way we talked sometimes. I needed to be more of a supervisor than a plant helper, but what was I going to do? We needed it. It's either that or it doesn't run

(Tr. 42-43). Moreover, Lehoux testified to frustration with the job by May of 1997, based on frequent disagreements with Oscar Plourde because of pervasive unsafe work conditions, and

Oscar Plourde's tendency to drive the workers to produce at the expense of their safety (Tr. 32, 35-42, 48, 50-51, 108, 118-19, 121, 126-27, 154-55). His dissatisfaction escalated to a level that caused him to begin searching for employment elsewhere, he asserted, sometime around August/September 1997 (Tr. 105-07). Lehoux further testified that he "started feeling hostility from Oscar before, maybe, you know, in those weeks prior to the death [Brent Blackey's]" (Tr. 63). Consequently, based on the evidence, I conclude that throughout most of his tenure, Lehoux was not meeting the Plourde's expectations, of which he was made aware, especially through verbal confrontations with Oscar Plourde and that, by May of 1997, the dissatisfaction had become mutual.

The question raised by Lehoux, at this juncture, is whether Oscar Plourde initially intended to demote him, then changed his mind when Lehoux cooperated with MSHA's investigation of Brent Blackey's death. For the following reasons, I think not. As the president of the company, Oscar Plourde, without question, is the decision-maker. The evidence clearly establishes that Oscar Plourde complained to his management team during the Summer of 1997 about Lehoux's performance and requested that Tom Woodley "look around, keep an eye out" for a replacement superintendent in or around late September (Tr. 187, 197, 205, 240, 315-16; Vol. II: 12-13, 64-65). Lawrence Plourde testified credibly that, despite his earlier desire to give Lehoux another chance by demoting him to a loader operator or other lesser position, he had become convinced by September of 1997, that replacing Lehoux was necessary and he ultimately concurred in his brother's decision to fire him (Tr. Vol. II: 64-69, 73-75, 84).

The record also establishes that Don Davis' original report-to-duty date in November 1997, as the new plant superintendent, was delayed until December 8<sup>th</sup>, in order for Davis to accommodate his former employer (Tr. 214, 232, 318; Vol. II: 17-18, 100-01, 106-07). Oscar Plourde testified credibly that he had always intended to fire Lehoux as soon as he brought a replacement on board, but following the advice of his attorney, he had kept Lehoux on the job for the first week of Davis' tenure as the new plant superintendent, until MSHA had concluded its fatality investigation (Tr. 190, 197, 215, 217, 223, 227, 236). Lawrence Plourde, Richard Weed and Tom Woodley corroborated Oscar Plourde's testimony that the decision to fire Lehoux had been made prior to hiring Don Davis and Brent Blackey's death (Tr. 318-19, 325; Vol. II: 19-20, 68-71, 91). Furthermore, Richard Weed's testimony, that the office manager, Maria LaRocca, had been asked to process a final payroll check for Lehoux before Brent Blackey's death, was un rebutted (Tr. 318). Davis testified credibly that on his first day at Plourde, he and Lehoux were told that Davis would be the plant superintendent and that Lehoux would be a working foreman (Tr. Vol. II: 100). Tom Woodley testified likewise (Tr. Vol. II: 18-20). This evidence is consistent with Oscar Plourde's testimony that he never intended to give Lehoux advance warning of his termination, and leads me to conclude that what Lehoux and the other workers were told about the new work arrangement was merely a ruse to maintain Lehoux on board until his availability for MSHA was no longer necessary (Tr. 190, 227-29).

Lehoux's theory of discrimination focuses, as well, on Oscar Plourde's well-documented dislike of MSHA, and the proximity between Lehoux's cooperation with the fatality investigation



and his discharge (Tr. 71-75, 86, 89, 162, 175-78, 183-85, 276, 288, 296-97, 344-45; Vol. II: 42-45, 92). Lehoux cites an incident between Oscar Plourde and himself, around December 9<sup>th</sup> or 10<sup>th</sup>, in which Lehoux admitted that he had disclosed electrical safety violations to MSHA during the fatality investigation (Tr. 58-60). While Oscar Plourde's rendition of the incident differs as to whether it was he or Lehoux who had raised the subject with the other, they are in agreement that Plourde essentially walked off without arguing (Tr. 219-21, 244). To surmise that Oscar Plourde was angered by Lehoux's admission based on his dislike of MSHA, contrary to his displayed nonchalance, is speculative, at best. I credit Oscar Plourde's testimony as to his state of mind at the time:

Q. Did you walk away after he told you?

A. He told me he told æm. I says, ÅYeah. Then I went upstairs. He told them, I just walked off, that's all.

Q. You didn't try to argue with him?

A. No.

Q. Were you unhappy that he had disclosed this or anything to MSHA?

A. At this point, no, because the investigation was on. Whatever was, was. That's the way I look at it

(Tr. 144-45). Indeed, no evidence has been presented that Oscar Plourde's hostility toward MSHA was transferred to any of his employees, respecting their cooperation with MSHA, during the time period in question or any other time (see also Tr. Vol. II: 129-40, 142-44). The evidence establishes that the employees were advised by management of their right to cooperate fully with MSHA free of harassment, that they were made available to MSHA without interference, and that management was unaware of the content of the employees' discussions with the investigators (Tr. 74-75, 87-90, 230, 244-46, 281-88, 321-22, 324; Vol. II: 91-92, 122).

If anything, the Plourdes were consistent throughout Lehoux's tenure with the company: the same lack of prudent management skills that afforded him the benefit of employment and was utilized in his supervision, became the very weapon that struck him down. My function is to determine whether Lehoux's discharge was discriminatory, not whether he was treated unfairly, although I am moved to comment that he was. It appears likely that Lehoux was Ågiven a chance to work in positions for which his skills were sorely lacking because, in part, his father had been well-liked and respected in the industry by the Plourdes and because of other reasons, not necessarily job related, that Richard Weed put aptly:

A. I knew him personally. He grew up in our neighborhood. He grew up with my kids, same neighborhood, same school; had knowledge of his mother and father.

And as a result of sort of understanding where he had been in life, Marine Corps, I had been in the Marine Corps, so we had a lot in common, a lot to talk about. And that sort of blended into the process

(Tr. 310; see also 229-30). For perhaps the best of intentions, Lehoux was programmed to fail from the start, insufficiently trained to master his duties with the resources made available to him, and denied formal, progressive discipline, that would have put him on notice, with specificity, of his deficiencies and the consequence of failure to timely improve. For the lack of sufficient circumstantial evidence, as explained above, I am unwilling to take the broad leap necessary to conclude that the absence of professionalism and fairness attendant Lehoux's employment at Plourde was, in any part, due to his cooperation with MSHA. Accordingly, it is my finding that Lehoux's discharge was in no part motivated by his protected activity.

Assuming, *arguendo*, that Lehoux had established a *prima facie* case of discrimination under Section 105(c), Plourde has clearly rebutted his case by proving that Lehoux was terminated for a legitimate, business-related reason: that he was not performing to the Plourde's satisfaction and would have been terminated for that reason alone prior to Brent Blackey's death, had Don Davis reported to duty in November 1997, as had been originally scheduled.

### **ORDER**

Accordingly, inasmuch as Lehoux has failed to establish, by a preponderance of the evidence, that he was terminated for engaging in protected activity under the Act, it is **ORDERED** that the complaint of John D. Lehoux against Plourde Sand and Gravel, under Section 105(c) of the Act, is **DISMISSED**.

Jacqueline R. Bulluck  
Administrative Law Judge

Distribution:

Susanna G. Robinson, Esq., Douglas, Robinson, Leonard & Garvey, P.C., 6 London Road,  
Suite 502, Concord, NH 03301 (Certified Mail)

Frank Spinella, Esq., Hall, Morse, Anderson, Miller & Spinella, P.C., P.O. Box 2289, Concord,  
NH 03302 (Certified Mail)

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