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KENNETH A. WIGGINS V. EASTERN ASSOC. COAL
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FMSHRC-WDC
November 15, 1985

KENNETH A. WIGGINS

v. Docket No. WEVA 82-300-D

EASTERN ASSOCIATED COAL
CORPORATION

BEFORE: Acting Chairman Backley; Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This case involves a complaint of discrimination filed by Kenneth A. Wiggins pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $ 801 et seq. (1982). In his decision on the merits, a Commission administrative law judge concluded that Mr. Wiggins had been illegally discharged by Eastern Associated Coal Corporation ("Eastern") on April 9, 1982, in violation of section 105(c) of the Mine Act, 30 U.S.C. $ 815(c). 5 FMSHRC 1542 (September 1983)(ALJ). In a separate unpublished decision concerning remedies, the judge granted back pay and other benefits to Wiggins but denied him reinstatement rights. We granted both parties' petitions for discretionary review. For the reasons that follow, we affirm the judge's decisions, except that we conclude that Wiggins is also entitled to recall rights.

At the time of the key events in this case, Wiggins was a miner of 12 years experience, all at Eastern. For the nine years preceding his discharge, he had been a certified foreman working both service and production shifts. He had been rated by Eastern as an acceptable employee. Two series of events are significant in this case, the first of which occurred on March 26, 1982. Wiggins was working the

"B" shift, the evening production shift (3:30 p.m. to 11:00 p.m.), at Eastern's Keystone No. 1 underground coal mine. At approximately 9:20 p.m., the No. 1 conveyor belt broke. After verifying the location and severity

of the broken belt by mine telephone, Wiggins proceeded to prepare his crew to assist in the repair. Because of the location and extent of the belt break, Wiggins believed that he would not be able to return to the working face until near the end of the shift. Therefore, he proceeded to "fireboss" the face area -- that is, to carry out required ventilation examinations. In two of the entries in his section, he found that the air velocity was insufficient to turn the blades of his anemometer. Wiggins instructed his roof bolting crew to correct the ventilation problem by repairing a stopping curtain, which had been torn down as a result of a brow fall, before proceeding further with roof bolting. He then took the remainder of his crew to repair the broken belt. 1/

After repairing the belt, Wiggins returned to the face to collect his crew at approximately 11:00 p.m. He again firebossed the area and found that the repair to the stopping curtain had restored sufficient ventilation to the area. Wiggins' roof bolting crew, however, had completed only a portion of the assigned bolting operation after correcting the ventilation problem.

On March 27, 1982, Jackie Jackson, the assistant general mine foreman, met with Wiggins to discuss the roof bolting on the previous day's shift. Wiggins explained his belief that he was required to repair the ventilation problem before proceeding with roof bolting. Jackson admonished him for not completing the roof bolting and stated, "You are never to shut a roof drill down on a continuous mining section; that ... miner's usually waiting on the roof drill." Tr. 83. Jackson prepared a "notice of improper action" concerning this incident. The notice indicated that Wiggins had been asked to report to Jackson on March 27 for "inefficient or unsatisfactory work" because he had "shut bolter down at 9:00 p.m. on evening shift." The notice did not mention Wiggins' concerns regarding ventilation. The notice was signed by Jackson. Jackson did not inform Wiggins of this notice, but placed both

1/ The judge noted that there were conflicts between Wiggins' testimony concerning his actions on March 26 and the daily shift reports, which indicated required methane checks by Wiggins at times during which he testified that he was engaged in other activities. 5 FMSHRC at 1543-44. Wiggins testified that the practice of the foremen at the mine was to record their methane checks at approximate times, in regular intervals, rather than at the exact times the checks had been made. While we agree with the judge that this matter does not materially affect Wiggins' overall testimonial credibility as to the discrimination claim at issue, we note that the asserted practice

may violate mandatory testing and recordkeeping requirements in "Subpart D - Ventilation" of 30 C.F.R.  Part 75 and cannot be condoned.

his copy and Mr. Wiggins' copy in Eastern's personnel file for Wiggins. 2/ Later during his shift on March 27, Wiggins was informed that he was being transferred to the position of service foreman on the night or "C" shift beginning 24 hours later.

The second significant series of events in this case occurred on April 7 and 8, 1982 as a result of a citation Eastern received from the Department of Labor s Mine Safety and Health Administration ("MSHA") for an extensive coal spillage along a belt conveyor. Eastern was to have abated the violative condition by the start of the day shift on April 8. Wiggins' night crew was assigned to prepare the belt for the MSHA abatement inspection. According to Eastern, Wiggins was told that both he and his crew were to work overtime, if necessary, to finish the cleanup. Eastern asserts that Wiggins lied to management, informing them that the belt was ready, when it was not, in order to avoid having to work overtime. Wiggins testified that near the end of his shift, he notified Jackson that the belt area would not be ready for inspection. Wiggins maintains that he was asked only to try to persuade his crew to work overtime, and that he did so unsuccessfully. Wiggins also testified that he was not ordered to work overtime.

As a result of the events of April 7-8, Jackson apparently believed that Wiggins had lied about the progress of the cleanup. He prepared a second notice of improper action recommending Wiggins' suspension because of the incident. When Wiggins reported to work on April 9, 1982, he was told not to work the third shift but to report to Mine Superintendent Larry Fraley. He reported to Superintendent Fraley, and was informed by Fraley that he was fired because he had lied about the belt being ready for inspection and had refused an order to work overtime. When Wiggins objected to the validity of the charge, Fraley informed him that this was not the first incident involving Wiggins' conduct at work. Fraley referred to Jackson's notice of improper action concerning the shutting down of the roof bolter on March 26, 1982. Wiggins indicated this was his first knowledge that he had been written up for the March 26 incident and explained that there had been insufficient air. Fraley did not believe Wiggins and instructed the mine accountant to prepare the paperwork for the discharge.

Wiggins subsequently filed with MSHA a discrimination complaint alleging that his discharge violated the Mine Act. Following an investigation, MSHA determined that discrimination had not occurred and declined to prosecute a complaint on Wiggins' behalf. 30 U.S.C. $ 815(c)(2). Wiggins then initiated his own discrimination complaint

before this independent Commission. 30 U.S.C. $ 815(c)(3). Hearings before a Commission administrative law judge ensued.

2/ As the judge noted repeatedly, Jackson, seemingly a key witness for Eastern's defense, was not subpoenaed to testify. (He had quit Eastern only a few weeks before the trial.)

In his decision on the merits, the judge found that Wiggins' "failure to live up to expectations" with respect to roof bolting on March 26 was caused by his safety concerns regarding inadequate ventilation and that Jackson's notice of improper action, issued because of this protected activity, was an act of unlawful discrimination. 5 FMSHRC at 1544. The judge concluded that the discriminatory notice prepared by Jackson was in part responsible for Fraley's decision to fire Wiggins on April 9, and that Wiggins therefore had established, under applicable Commission precedent, a prima facie case that his discharge was discriminatory. 5 FMSHRC at 1547. In reaching this conclusion, the judge noted that although Fraley was not aware personally of Wiggins' protected activity prior to reaching his discharge decision, Jackson was, and the decision to fire Wiggins was a "company decision" for which Eastern must bear responsibility. Id. The judge expressed the opinion that Eastern had not attempted to offer any affirmative defense to overcome Wiggins' prima facie case and concluded that the discharge violated section 105(c) of the Mine Act. 5 FMSHRC at 1547-48.

In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of production and proof to establish that (1) he engaged in protected activity, and (2) 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 other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981); 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 not in any part motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it nevertheless may defend affirmatively by proving that (1) it was also motivated by the miner's unprotected activities, and (2) it would have taken the adverse action in any event for the unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Co., 4 FMSHRC 1935, 1936-38 (November 1982). The ultimate burden of persuasion does not shift from the complainant. Robinette, 3 FMSHRC at 818 n. 20. See also Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983); Donovan v. Stafford Constr. Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984)(specifically approving the Commission's Pasula-Robinette test). The Supreme Court has approved the National Labor Relations Board's virtually identical analysis for discrimination cases arising under the National Labor Relations Act. NLRB v. Transportation Management Corp., 462 U.S. 393, 397-403 (1983).

We turn first to the judge's conclusion that Wiggins established a prima facie case, and examine initially the issue of protected activity. The events of April 7-8, (the dispute over the cleanup of the belt line spill), did not involve any protected activity on Wiggins' part, and he does not contend otherwise on review. Rather, the protected activity

at issue occurred on March 26 when Wiggins instructed the roof bolting crew to cease bolting and to repair the damaged stopping. The judge found that these actions were based on Wiggins' safety concerns regarding the inadequate ventilation that he had detected while firebossing the face ares. Eastern does not challenge these findings and concedes that Wiggins was engaged in protected activity. We agree. In appropriate instances, as here, a miner's actions in ceasing a particular task, or changing the normal sequence of work, in order to make what the miner reasonably and in good faith believes is a needed safety repair warrant the Act's protection. 3/ See generally, Secretary on behalf of Cameron v. Consolidation Coal Co., 7 FMSHRC 319, 321-24 (March 1985); Secretary v. Metric Constructors, Inc., 6 FMSHRC 226, 229-31 (February 1984), aff'd sub nom. Brock v. Metric Constructors, Inc., 766 F.2d 469, 471-72 (11th Cir. 1985); Robinette, supra, 3 FMSHRC at 808, 812 (discussing "affirmative self-help").

The judge also found that the March 27 notice of improper action that Jackson prepared concerning Wiggins was based in substantial part, if not completely, on Wiggins' decision to have his bolting crew correct the ventilation problem before proceeding with bolting. Eastern does not seriously contest this determination on review. We affirm the judge's finding that the reasons prompting the issuance of the notice of improper action were discriminatory.

The judge further found and the record unequivocally shows that on April 9 Superintendent Fraley decided to discharge Wiggins for two reasons: (1) his belief that Wiggins had lied about the progress of the belt line cleanup and had refused an order to work overtime during the incidents of April 7-8, and (2) his concerns centering around Wiggins' conduct on March 26 and the notice of improper action regarding that conduct. Fraley reviewed Wiggins' personnel file, including the discriminatory notice of improper action, in reaching his discharge decision. Both Fraley and Wiggins testified that Fraley referred to the March 26 incident and to Jackson's notice in explaining to Wiggins the reasons for his discharge. Although Fraley did not believe Wiggins' explanation that there had been insufficient air that evening, his testimony shows nevertheless that he was concerned about the shutting down of the bolter and relied upon that incident and the write-up in discharging Wiggins. Under our precedent, a prima facie case is established if an adverse action is based in any part on a protected activity. Thus, we agree with the judge that "[i]nasmuch as the notice of improper action issued on March 27, 1982 was in itself an act of illegal discrimination and, inasmuch as that notice and events that brought it about, were in part

responsible for Wiggins' discharge, then under the Pasula test Wiggins established a prima facie case...." 5 FMSHRC at 1547.

3/ We note that 30 C.F.R. $ 75.302-2 requires that when line brattice or other ventilating devices are damaged to an extent that ventilation of the working face is inadequate, "production activities in the working place shall cease until the necessary repairs are made...."

On review, Eastern's primary objection to the finding of a prima facie case is that the judge "mechanically imputed" to Fraley Jackson's knowledge of the protected activity. 4/ While knowledge of protected activity (whether proven directly or through indirect evidence) is often an important ingredient in the establishment of a prima facie case, "an operator cannot escape liability by pleading ignorance due to the division of company personnel functions." Metric Constructors, supra, 6 FMSHRC at 230 n. 4. In any event, the focus of our present analysis is not so much upon Fraley's knowledge as it is upon the undoubted impact on his decision to fire Wiggins of a separate discriminatory act committed by his assistant, for which Eastern as the employing entity must assume responsibility. See generally, Vinson v. Taylor, 753 F.2d 141, 146-152 (D.C. Cir. 1985), cert. granted, 54 U.S.L.W. 3223 (U.S. Oct. 7, 1985) (No. 84-1979) (general discussion of the federal common law of imputation of discriminatory conduct to an employer even in the absence of direct knowledge).

The finding of a prima facie case does not resolve this proceeding on the merits. Eastern correctly objects to the judge's comments that it had not attempted to advance an affirmative defense. 5/ Eastern clearly contended before the judge, and maintains before us, that Wiggins would have been fired in any event for the April 7-8 belt line cleanup incident alone. There is no question that Fraley was motivated in part by his belief that Wiggins had lied to management regarding the status of the belt line cleanup. Regardless of the accuracy of Fraley's belief (see n. 6 infra), the evidence shows that, as the judge found in discussing other aspects of the case, his belief was bona fide and was a motivating factor in his decision to discipline Wiggins. Thus, Eastern has proved the first element of an affirmative defense -- a partial motivation for discipline not based upon protected activity. However, to prevail on its affirmative defense, Eastern must prove that it would have taken the adverse action of discharge in any event for the unprotected activity alone. We conclude that Eastern failed to meet this burden.

4/ We accept the judge's finding that prior to making the decision to terminate Wiggins, Fraley was not aware of Wiggins' reasons for shutting down the roof bolter on March 26. As noted above, however, during his termination interview on April 9, Wiggins explained that he had shut down the bolter because of insufficient air -- an obvious reference to safety concerns. Even if Fraley discredited this explanation, he was put on notice before the termination was finalized that a safety claim by the miner was implicated in the matter.

5/ The judge's confusion concerning Eastern's affirmative defense may be traceable to his own failure to organize his findings and discussion along the lines of the Pasula analytical framework.

A careful review of the totality of Fraley's testimony, discussed supra, convinces us that the decision to discharge Wiggins was inextricably linked to the earlier protected incident. The judge's findings, advanced in other contexts, are consistent with this conclusion. Thus, Eastern failed to carry its burden of proving that it would have discharged Wiggins in any event solely because of the events of April 7-8. Consequently, we hold that the discharge of Mr. Wiggins violated section 105(c) of the Mine Act. 6/

Issues remain concerning the judge's remedial order. The judge awarded Wiggins back pay and benefits from the date of his unlawful discharge until August 30, 1982, the date upon which the judge found that the "entire third shift, the one on which Wiggins was employed, was laid off. The layoff was for economic reasons and the testimony was that Wiggins would not have been rehired...." Decision Granting Back Pay and Other Benefits (December 19, 1983). The judge concluded, "Mr. Wiggins cannot be restored to a job that does not exist." Id. For this reason, the judge declined to grant Wiggins any future recall rights.

The evidence shows that on August 30, 1982, Eastern decided, for economic reasons (namely, depressed business conditions) to reduce costs by doing away with the service component of the "C shift and by making other layoffs as well. Eastern argues that the termination of the "C" shift service work meant that Wiggins would have been laid off on August 30, 1982. Wiggins does not challenge the conclusion that he would have been laid off the "C" shift on that date. Rather, he argues that but for discriminatory actions, he would have been working on the "B" shift as a production foreman and would not have been affected by the layoff of the "C" shift. However Superintendent Fraley testified that even if Wiggins had been on the "B" shift, he would have been laid off rather than either of the other two "B" production foreman who were laid off. Wiggins did not rebut Eastern's evidence that he would have

6/ The judge analyzed extensively the merits of the April 7-8 dispute concerning whether Wiggins lied to management and refused an order to work overtime. 5 FMSHRC at 1545-47. As emphasized above, no protected activity on Wiggins' part was associated with.this incident. Because it is undisputed in this case that the incident was partly involved in the decision to discharge Wiggins, the judge was required to determine whether management's concern over the matter was bona fide rather than pretextual and, if so, whether that concern alone would have led to Wiggins' discharge. Beyond those matters, however, the Commission's jurisdiction ended with respect to an incident which

did not involve protected activity. As we have stressed repeatedly, the Commission is not an arbiter of such industrial disputes. See e.g., Haro, supra, 4 FMSHRC at 1937-38, 1944. Thus, it was not the judge's proper task to opine as to whether Wiggins lied or whether Fraley's otherwise bona fide belief was "right" or "wrong."

been laid off even from the "C" shift on August 30, 1982. Therefore, we conclude that substantial evidence supports the judge's finding that Wiggins would have been laid off, from either the "B" or "C" shift, as of August 30, 1982.

Wiggins also challenges the judge's finding that as a result of the layoffs no job exists to which Wiggins can be returned and that he, therefore, has no future recall rights. The fact that an appropriate position may not have existed at the time of the hearing does not defeat Wiggins' right to reinstatement to an appropriate position should business conditions improve and result in recalls of Eastern's laid-off personnel. The remedial goal of section 105(c) is to restore the victim of illegal discrimination as nearly as possible to the situation he would have occupied, but for the discrimination. See, e.g., Secretary on behalf of Bailey v. Arkansas-Carbona Co., 5 FMSHRC 2042, 2049 (December 1983). For this same reason we further hold that Wiggins' recall rights extend to reinstatement to the same, or a substantially equivalent position on the "B" or "C" shift, whichever position first becomes available. 7/

The final issue is Wiggins' contention that the judge erred in not allowing the recovery of funds that Wiggins claims he is due stemming from his sale of stock in Eastern received by him upon his termination. Wiggins argues that he was forced to sell the stock to raise needed funds after being discharged and that the value of the sold shares appreciated after the sale. He seeks the difference between his proceeds and the present value of the shares. We hold that the judge correctly determined that this request is too remote and speculative to be granted. Nolan v. Luck Quarries, Inc., 2 FMSHRC 954, 960 (April 1980)(ALJ) is distinguishable. In Nolan the discriminatee, a stone hauler, was forced to sell his truck, for the amount he owed on it, because of the discrimination. As a result, the judge in that case found that it was clear that an ascertainable amount of equity, represented by prior payments on the note, was lost. Stocks are of a different character. Present stock value is not a function of cost or payments on a note, but of various market forces. Those forces can result in appreciation or depreciation in value. Here, Wiggins received a fair market value for his interests at the time of sale. No "loss" has been established and no further relief in this respect is due.

7/ Eastern objects to Wiggins' request that reinstatement rights also apply to the "B" shift positions. Although Eastern's position is not without some support due to the failure of Wiggins to clearly press this issue at the hearing, in light of our finding of illegal

discrimination, section 105(c)'s remedial purpose and the fact that the issue was raised in Wiggins' complaint and addressed by Eastern below, we conclude that Wiggins' reinstatement rights should be broadly framed.

Accordingly, on the foregoing bases, we affirm the decisions of the administrative law judge, except that Wiggins is entitled to future recall rights in accord with the views expressed in this decision. 8/

Richard V. Backley, Acting Chairman

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

8/ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. $ 823(c), we have designated ourselves as a panel of three members to exercise the powers of the Commission.

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