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DILLARD SMITH V. RECO
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FMSHRC-WDC
June 30, 1987

DILLARD SMITH

v. Docket No. VA 86-9-D

RECO, INC.

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

In this discrimination proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $ 801 et seq. (1982), Commission Administrative Law Judge James A. Broderick issued a decision dismissing discrimination complaints filed by Dillard Smith and Lonnie Smith. 8 FMSHRC 1592 (October 1986)(ALJ). The Commission granted Dillard Smith's petition for discretionary review. For the reasons that follow, we affirm the judge's decision.

Complainant Dillard Smith ("Dillard") and Lonnie Smith ("Lonnie"), his brother were employed from 1977 until November 26, 1985, by Reco, Inc. ("Reco"), located in Tazewell, Virginia. Reco was in the business of selling and servicing mine batteries. The Smiths' duties primarily involved the servicing of mine batteries, and at times they were required to work in underground coal mines. Each performed somewhat more than forty hours of such underground work in the six months prior to November 26, 1985.

In November 1979, Dillard had received underground miner training approved by the Department of Labor's Mine Safety and Health Administration ("MSHA") and had earned the appropriate training certificate. See 30 C.F.R. Part 48 (training regulations). Subsequently, he did not receive any annual refresher training or

any further underground mining training. Lonnie had never received any training for underground mines.

In June 1985, Dillard had become concerned about working in underground mines without adequate training and he contacted MSHA. He was informed that his training certificate had expired and that he needed forty hours of additional training. That same month he asked his foreman, Steve Williams, about annual refresher training for himself and

underground training for Lonnie. Williams nodded but did not otherwise respond. Dillard did not raise the subject again until the day after his employment terminated.

On November 26, 1985, Dillard and Lonnie were servicing batteries at Reco's shop. Around 9:00 a.m., Williams told Dillard that he had a service call. Dillard asked if the service call was in an underground mine. Williams informed him that it was. Dillard told Williams that he was not going. Williams responded: "Change your clothes and you know where the door's at." Tr. 31. A similar exchange then occurred between Williams and Lonnie. Shortly thereafter, the brothers turned in some company property and left the premises.

On November 26 neither Dillard nor Lonnie told Williams or any other Reco representative his reasons for refusing underground work. When asked on cross-examination at the hearing in this matter why he had not told Williams of his reasons for refusing his assignment, Dillard replied: "[Williams] did not ask me." Tr. 32.

The next day, on November 27, 1985, Dillard returned to Reco's offices for his paycheck. He was told by Reco's receptionist/secretary that it had been mailed to him the previous day. Dillard told the secretary to tell Jack Pyott Reco's president, that the reason he did not go underground was that [his] training had expired." Tr. 61.

Meanwhile, also on November 26, Reco had decided to terminate its mine battery sales and service business. This decision followed discussions with Commonwealth of Virginia officials concerning health and safety violations cited during an August 1985 state inspection. The Virginia officials agreed not to pursue the violations contingent on Reco's terminating its mine battery business. The company ended its battery business on December 6, 1985, although certain limited wrap-up functions were performed for a few months thereafter.

Dillard and Lonnie filed discrimination complaints with MSHA pursuant to section 105(c) of the Mine Act, 30 U.S.C. $ 815(c), but following an investigation of their allegations MSHA determined that no discrimination had occurred and declined to prosecute complaints on their behalf. 30 U.S.C. $$ 815(c)(2) & (3). The complainants then filed their own discrimination complaints with this independent Commission pursuant to section 105(c)(3) of the Act. 30 U.S.C. $ 815(c)(3). Commission Judge Broderick consolidated the cases and held a joint hearing. On October 17, 1986, the judge issued his

decision dismissing both complaints. Only Dillard sought review before the Commission.

In his decision, Judge Broderick initially concluded that the complainants had engaged in a protected work refusal on November 26. He found that they had a reasonable belief that it was hazardous to work underground without the miner's training mandated by section 115 of the Mine Act, 30 U.S.C. $ 825, and the Secretary's implementing regulations at 30 C.F.R. Part 48. 8 FMSHRC at 1596. He also stated that "there is no evidence that [their work refusal] was other than in good faith." Id. Resolving conflicts in testimony as to whether Foreman Williams had

fired the brothers immediately after their November 26 work refusal, he found that they were in fact discharged at that time. Id. The judge went on to conclude, however, that the complainants "were not discharged for activity protected under the Act" (8 FMSHRC at 1597) because they had failed to communicate adequately their safety concerns, citing Simpson v. Kenta Energy, Inc., Roy Dan Jackson. 8 FMSHRC 1034, 1038-40 (July 1986), pet. for review filed, No. 86-1441 (D.C. Cir. August 7, 1986); and Secretary on behalf of Dunmire & Estle v. Northern Coal Co., 4 FMSHRC 126, 133-35 (February 1982). 8 FMSHRC at 1596-97.

Specifically, the judge found that it was "clearly reasonably possible" for the complainants to have told Williams on November 26 that they were refusing to work underground because of their perceived lack of required training. 8 FMSHRC at 1597. The judge found that Dillard's single request for training in June 1985 was insufficient to supply the necessary communication on November 26, 1985. The judge determined that Dillard's statement to Reco's secretary on November 27, the day after the refusal, was inadequate communication of a safety concern under Simpson and Dunmire & Estle, supra. The judge also noted that by November 27, Reco "ha[d] already decided to cease operations, so it would not have been possible for it to 'address the perceived danger.'" Id., quoting Simpson, supra, 8 FMSHRC at 1039. Accordingly, the judge concluded that no violation of section 105(c) had been established and dismissed the Smiths' complaints.

The general principles governing analysis of discrimination cases under the Mine Act are settled. In order to establish a prima facie case of discrimination under section 105(c) of the Act, a complaining miner bears the burden of production and proof in establishing that (1) he engaged in protected activity and (2) the adverse action complained of was motivated in any part by that protected 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 (3rd Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 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 protected activity. If an operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. Pasula, supra; Robinette, supra. See also Eastern Assoc.

Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987); Donovan v. Stafford Construction Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983)(specifically approving the Commission's 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).

In this proceeding, the fact that Dillard refused an underground work assignment on November 26, 1985, and was fired by his foreman because of that refusal is not in dispute. The primary issue presented, therefore, is whether Dillard's work refusal was protected under the Mine Act. See, e.g., Secretary of Labor v. Metric Constructors, Inc.,

6 FMSHRC 226, 229-30 (February 1984), aff'd sub nom. Brock v. Metric Constructors, Inc., 766 F.2d 469, 472-73 (11th Cir. 1985); Dunmire & Estle, supra, 4 FMSHRC at 132-33.

A miner has the right under section 105(c) of the Mine Act to refuse work if the miner has a good faith, reasonable belief that continued work involves a hazardous condition. Pasula, supra, 2 FMSHRC at 2789-96; Robinette, supra, 3 FMSHRC at 807-12. See also, e.g., Metric Constructors, supra. However, where reasonably possible, a miner refusing work ordinarily must communicate or attempt to communicate to some representative of the operator his belief that a hazardous condition exists. Simpson, supra, 8 FMSHRC at 1038; Dunmire & Estle, supra, 4 FMSHRC at 133-35. See also, e.g., Miller v. Consolidation Coal Co., 687 F.2d 194, 195-97 (7th Cir. 1982)(approving Dunmire & Estle communication requirement). Among other salutary purposes, the communication requirement is intended to avoid situations in which the operator at the time of a refusal is forced to divine the miner's motivations for refusing work. As we emphasized in Simpson: "[T]he right to make safety complaints and to refuse work under the Mine Act is premised on the belief that communication of hazards and response to such hazards are the means by which the Act's purposes will be attained." 8 FMSHRC at 1039 (citations omitted). As further stated in Simpson, a miner's failure to communicate his fear regarding a hazard negates the opportunity for the operator to address the perceived danger and would have the effect of requiring us to accept the untenable presumption that no action would have been taken by the operator regarding the miner's concern. 8 FMSHRC at 1039-40.

Neither of the Smith brothers communicated to Reco on November 26 any reason for his work refusal on that date. The judge found that "[i]t was clearly reasonably possible for Complainants to tell Williams that they refused to work underground because they lacked training" (8 FMSHRC at 1597), and substantial evidence supports this conclusion. Dillard was asked several times at the hearing why he had not communicated his asserted training concern, but provided no answer other than that Williams had failed to ask him his reasons for refusing his work assignment. The responsibility for the communication of a belief in a hazard that underlies a work refusal rests with the miner. The record also supports the judge's conclusion that Dillard's single question concerning training some five months prior to his refusal was too far removed in time and too limited in nature to supply continuing notice of a complaint or an implied communication of safety or health concerns on November 26. Although Dunmire & Estle indicates that under appropriate limited

circumstances a post-work refusal communication may suffice, there must be good reason for any delay. On the facts of this case, Dillard has not advanced any acceptable reason for his failure to communicate the hazard that he perceived until one day after his termination.

Thus, Dillard failed to make the necessary communication of a belief in a hazard and, accordingly, his work refusal was not protected under the Mine Act. Because Dillard's work refusal was not protected, his termination by Reco because of that refusal did not violate the

Act. */

On the foregoing bases, the judge's decision is affirmed.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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*/ To the extent that the judge held that Dillard had engaged in a protected work refusal apart from his failure of communication, the judge erred. Proper communication of a perceived hazard is an integral component of a protected work refusal in the first instance rather than a wholly separate requirement. Further, under the circumstances of this case, the fact that Reco had determined to cease its battery business is not determinative of the issue whether section 105(c)(1) of the Mine Act was violated. Also, given our disposition, we need not pass on the judge's findings that Dillard had a reasonable, good faith belief in hazards associated with his limited training. We note, however, that it is far from clear on the present record precisely what type of training Reco, as a contractor, was obligated to provide the Smiths in view of their occasional and intermittent servicing work in mines. See 30 C.F.R. $ 48.2 (definitions of "miners" who must be provided with new miner training, refresher training, and hazard training). Under the circumstances, that point need not be resolved here.

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