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CHARLES SMITH V. KEM COAL
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CHARLES T. SMITH

v. Docket No. KENT 90-30-D

KEM COAL COMPANY

BEFORE: Ford, Chairman; Backley, Doyle, Holen and Nelson, Commissioners
DECISION
BY THE COMMISSION:
This discrimination case arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. • 801 et seq. (1988)(the "Mine Act" or "Act"), is before the Commission by way of a petition for discretionary review filed on March 1, 1991, by Kem Coal Company ("Kem Coal"). In its petition, Kem Coal seeks review of Commission Administrative Law Judge William Fauver's decision on the merits issued October 31, 1990 (12 FMSHRC 2130), and of his final disposition on stipulated damages, costs and attorney fees issued January 31, 1991. 13 FMSHRC 166. Kem Coal asserts that substantial evidence does not support the judge's conclusion that Charles T. Smith established a prima facie case of discrimination under section 105(c) of the Mine Act, 30 U.S.C. • 815(c), and that, even assuming such a prima facie case was established, the judge failed to address Kem Coal's affirmative defense, which alleged that the operator would have discharged Smith in any event for activity not protected under the Mine Act. For the reasons that follow, we vacate the judge's decision and remand the matter for further proceedings consistent with this decision.
I. Factual and Procedural Background
Kem Coal operates a coal processing facility, known as the No. 25 Preparation Plant, located in London, Kentucky. 12 FMSHRC 2130. The plant utilizes three shifts per day (morning and afternoon production shifts and a night maintenance shift) and employs between 15 and 18 miners. Tr. 40, 58. The facility operates as follows: coal coming onto the property is fed onto a conveyor system that deposits the coal into two round storage bins called stacking tubes or stackers. The stackers are 20 to 25 feet high and have windows or chutes at both the top and the bottom. When coal builds up in a stacker to the level of the lower windows, it is supposed to spill out of the stacker and form a cone-shaped pile below. In turn this pile is supposed to fall through a hopper to a feeder system that carries the coal by conveyor to the facility's washing plant. When coal from the stacker spills away from the hopper area and the accumulation of material is

insufficient to maintain the automatic feeding system, a bulldozer is used to push coal into the feeder to maintain the flow of material to the washing plant. 12 FMSHRC at 2130-31.

Occasionally, the lower windows of a stacker become clogged with coal and mud, causing the stacker to fill up with material which is then discharged haphazardly from the upper windows of the stacker. The usual corrective procedure is either to use a high pressure water hose to unclog the windows or to lower a worker into the stacker on ropes to free up the obstruction. 12 FMSHRC at 2131.

Complainant Charles T. Smith began working at Kem Coal's preparation plant in October of 1988. He started as an oiler on the maintenance shift, but in April or May of 1989, he was transferred to the afternoon shift as a dozer operator. 12 FMSHRC at 2131-32. Tr. 42. His duties included pushing coal into the feeders, as described above, and consolidating and compacting refuse at a refuse pile located near the stackers. Tr. 59.

On June 20, 1989, Smith was operating the dozer and pushing coal at the No. 2 stacker when the lower windows of the stacker became clogged and coal began falling from the upper windows onto the dozer. He radioed the plant's control room and asked that his foreman, Henry Halcomb, be notified of the problem. According to Smith, Timmy Miller, who was operating the CB radio in the control room, subsequently relayed a message from Halcomb to Smith to "go ahead and run it." Thereafter, a chunk of coal hit one of the dozer windows and broke it. Smith again radioed the control room and told Miller the windows of the dozer were getting "knocked out of it and we don't have enough coal to push." Miller again relayed the message to "go ahead and run it." 12 FMSHRC at 2131.

At that point, a chunk of coal hit a wire in the dozer's electrical system and its lights went out. Smith informed the control room and was told by Miller that Halcomb had said if Smith did not want to run the machine he could park it and go home, and Halcomb would have a mechanic fix it. Smith pulled the dozer back from the stacker, repaired the lights, and proceeded to push coal into the feeder. Id.

Later in June, Smith confronted Halcomb and complained to him that Halcomb had put his life in danger by making him push coal while material from the upper windows was falling on the dozer. According to Smith, Halcomb replied that it was Smith's job to push coal. 12 FMSHRC at 2132.

On July 14, 1989, the incline feed belt that carries coal to the washing plant broke and the entire afternoon crew was assigned to replace it. The work was performed under the direction of Roger Cox, the plant superintendent. At some point during the shift, Smith asked Cox when he (Smith) would be given a dinner break. Cox replied that, once the belt had been replaced, Cox would have someone relieve Smith. Cox apparently went home after the belt replacement and no one relieved Smith. About an hour and a half before the shift was over, Smith asked Halcomb whether he could take a dinner break and was told it was too close to quitting time and he

would not get to eat. 12 FMSHRC at 2132.

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On July 15, 1989, Smith arrived at the mine with the intention of complaining to Cox about what he regarded as general harassment by Halcomb, but Cox was not at the mine. Smith went to the training room and found Halcomb and other members of the afternoon shift. Smith told Halcomb that he was going to complain to Cox about Halcomb's harassment and first cited his missed dinner break on the night before. Halcomb replied that, since Cox had supervised the belt replacement, Smith's argument was with Cox. 12 FMSHRC at 2132-33. As the argument progressed, the other members of the crew left the training room, leaving Smith and Halcomb alone. 12 FMSHRC at 2133.

Smith raised the June 20, 1989, incident at the coal stacker, when Smith felt his life had been put in danger, and threatened to report the matter to the Mine Safety Health Administration (MSHA). Halcomb denied that he had put Smith's life in danger and claimed that Smith's characterization of Halcomb's message as relayed by Miller was "hearsay" and that he had not said what Smith alleged. Smith then directed a vulgar epithet at Halcomb.(Footnote 1) At that point Halcomb, in effect, suspended Smith by telling him to "go to the house." Id.

Both Smith and Halcomb called Cox at home that afternoon but he was not in. Tr. 44. Later that evening, Cox returned Halcomb's call and Halcomb related his version of the afternoon's events. 12 FMSHRC 2133, Tr. 44. On Monday morning, July 17, 1989, Smith went to the mine and met alone with Cox. Smith complained to Cox about Halcomb's harassment and specifically mentioned the stacker incident and the missed dinner break. Cox asked Smith if he had sworn at Halcomb, and Smith told Cox that he had. Cox then told Smith that he was fired. 12 FMSHRC at 2133-34.

The judge found (1) that since Superintendent Cox was also an ordained minister, Halcomb "was aware of or could reasonably expect [Cox's] sensitivity to profane language and his philosophy of supporting his supervisors"; (2) that Halcomb "shaped his factual account to Cox concerning the argument with [Smith] to injure [Smith] in Cox's eyes" by inaccurately indicating to Cox that Smith used "God damn" in his epithet and that the epithet was expressed in front of other members of the crew; (3) that Halcomb did not tell Cox that Smith had apologized immediately after using the epithet; and (4) that Halcomb did not tell Cox that Smith had said he was going to take his safety complaints about Halcomb to MSHA. 12 FMSHRC at 2133.

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1 The precise wording of the epithet was in sharp dispute between the parties and, as will be discussed below, was a significant issue in the judge's ultimate determination in favor of Smith. Smith testified, and the judge found, that Smith called Halcomb a "lying son of a bitch." Tr. 24. Halcomb testified that Smith called him a "God damn son of a bitching liar." Tr. 88. Cox

testified that Smith had admitted using the latter phrase when Cox questioned him about the incident. Tr. 71. Smith also testified, and the judge found, that he apologized to Halcomb immediately after swearing at him, whereas Halcomb
testified that Smith offered no apology. Tr. 24, 89. Cox testified that neither Halcomb nor Smith indicated to him that Smith had apologized. Tr. 63.
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The judge determined that Smith's safety complaints constituted protected activity. The judge specifically cited the June 20, 1989, incident at the coal stacker when Smith radioed his safety complaints to Halcomb through the control room operator; the confrontation in late June when Smith complained in person to Halcomb about the stacker incident; and the confrontation on July 15, 1989, when Smith reiterated his complaints to Halcomb and threatened to take his complaints to MSHA. 12 FMSHRC at 2135.
The judge found that Halcomb took adverse action against Smith in retaliation for his protected activity by suspending Smith without pay on July 15, 1989, and by "giving a distorted factual account" of the July 15, 1989, argument to Cox "with the intention or expectation of influencing the superintendent to discharge [Smith]." 12 FMSHRC at 2136.
As a basis for the latter conclusion, the judge found that "Halcomb knew, or could reasonably expect that the superintendent, who was a practicing pastor, would be offended by the religious epithet he substituted for Complainant's actual language, and that the superintendent would consider cursing a foreman in front of his crew a dischargeable offense." 12 FMSHRC 2136.
The judge went on to conclude that the "distorted factual account" resulted in Smith's discharge because Cox fired Smith for insubordination and "cussing" at Halcomb; Cox was unaware that "God damn" was not used in the epithet or that the epithet was expressed when Smith and Halcomb were alone; and because, according to Cox, if Smith and Halcomb had been alone "`it could have probably been resolved', that is, without discharging [Smith]." 12 FMSHRC at 2136-37. Lastly, the judge held that even though Cox had been deceived by Halcomb, it did not alter the fact that management, through Halcomb, had taken discriminatory action against Smith that resulted in his discharge. Accordingly, the judge found Kem Coal in violation of section 105(c).
The judge ordered the parties to confer in an effort to stipulate damages, including back pay and litigation costs. By a subsequent decision issued January 31, 1991, the judge awarded Smith $21,864.18 in back pay and other damages plus any additional back pay accruing until his reinstatement or his rejection of reinstatement, and attorney fees of $4,522.50.
II. Disposition of Issues
The Commission has long held that a miner seeking to establish a prima facie case of discrimination under section 105(c) of the Mine Act bears the burden of production and proof to establish that he engaged in protected

activity and that the adverse action complained of was motivated in any part by that activity. Secretary o.b.o. 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 o.b.o. 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 not motivated in any part by protected activity. Robinette, 3 FMSHRC at 818 n.20. Failing
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that, the operator may nevertheless affirmatively defend against the prima facie case by proving that it was also motivated by unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. See also 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).

Substantial evidence supports the judge's conclusion that Smith engaged in protected activity when he complained about coal falling on his bulldozer on June 20, 1989, and when he complained again to Halcomb in their confrontations later in June and during their argument on July 15, 1989. Furthermore, it is undisputed that adverse action was taken against Smith by reason of his suspension without pay on July 15, 1989, and his ultimate discharge on July 17, 1989. The Pasula/Robinette test also requires the Commission and its judges to determine whether the adverse action complained of was motivated in any part by the complainant's protected activity.

The judge found that Halcomb was motivated to discriminate against Smith by Smith's safety complaints and his threat to take those complaints to MSHA. 12 FMSHRC 2136. The judge went on to find that Halcomb's discriminatory conduct included giving "a distorted factual account" of the July 15, 1989, argument to Cox "with the intention or expectation of influencing the superintendent to discharge [Smith]." Id. The critical elements of what the judge deemed Halcomb's "distorted account" to Cox were: (1) that, knowing Cox to be a practicing pastor, Halcomb told him that Smith had used a religious epithet; (2) that Halcomb failed to tell Cox that Smith immediately apologized; (3) that Halcomb told Cox that Smith swore at him in front of the crew; and (4) that Halcomb failed to inform Cox that Smith had threatened to take his complaint to MSHA.

In his decision the judge concludes that Cox, as a practicing pastor, would have been offended if the epithet Smith used was religious in nature and if it was said in front of other members of the crew. 12 FMSHRC 2136. "Halcomb was aware of, or could reasonably expect, the superintendent/ minister's sensitivity to profane language and his philosophy of supporting his supervisors." 12 FMSHRC at 1233. Aside from Cox's statement that he doesn't "use that kind of language" and that Smith had "no right to call a man those kind of names," (Tr. 71) Cox's testimony and other record evidence do not suggest any special susceptibility to Halcomb's alleged intrigue

owing to the superintendent's status as a "practicing pastor." While Cox's demeanor on the witness stand might have indicated a hypersensitivity to what might otherwise be considered garden variety discourse in the mining environment, the judge does not indicate that in his decision.

The judge's conclusions with respect to the motivations and conduct of Halcomb appear to be based upon certain credibility determinations and a series of inferences drawn from the evidence. It is clear that the judge believed the testimony of Smith and disbelieved the testimony of Halcomb and Miller with respect to the coal stacker incident, and that he believed Smith and disbelieved Halcomb on all disputed points thereafter. Kem Coal concedes that it is within the discretion of the trial judge to make such credibility determinations, and the Commission has held that a judge's

credibility resolutions cannot be overturned lightly. Robinette, supra, 3 FMSHRC at 813; Hall v. Clinchfield Coal Co., 8 FMSHRC 1624, 1629-30 (November 1986). As for the inferences drawn by the judge, we have held that such inferences "are permissible provided they are inherently reasonable and there is a logical and rational connection between the evidentiary facts and the ultimate fact inferred." Secretary v. Mid-Continent Resources, Inc., 6 FMSHRC 1132, 1134 (May 1984).

The confounding factor on review, however, and one vigorously argued by Kem Coal, is that the judge implicitly believed the testimony of Cox even though in some aspects it supports Halcomb's testimony while contradicting Smith's testimony. In other words, while the issues on review do not concern the credibility determinations made by the judge in evaluating the testimony of Smith versus Halcomb, they do concern the testimony of Smith when viewed against certain contradictory statements of Cox. It is neither appropriate nor possible for an appellate body to resolve such conflicts. Accordingly, we remand the matter to the judge for further credibility findings and for analysis and explanation of the bases for his ultimate conclusions regarding the nexus between Smith's protected activity and his discharge by Kem Coal. In particular, we direct the judge to set forth the evidentiary bases for the first three elements of Halcomb's "distorted account," set forth above.(Footnote 2)

First, with respect to the allegedly blasphemous component of the epithet directed at Halcomb by Smith, the judge concluded that Halcomb deceived Cox in that regard. Cox testified, however, that he specifically asked Smith whether he had called Halcomb "those names," and that he used the initials, "G.D. lying S.O.B.," in asking the question. Tr. 71-72. According to Cox, Smith admitted using those words. Id. As indicated above, however, (n.1), Smith denied using "G.D." Second, as to whether Smith immediately apologized to Halcomb for swearing at him, while the judge credited the testimony of Smith that an apology was made, the judge does not reconcile Smith's testimony that he had told Cox of the apology (Tr. 36) with Cox's testimony that he was not told by either Halcomb or Smith that

Smith had immediately apologized. Tr. 63. Third, there are unresolved ambiguities in the record as to how Cox arrived at the mistaken belief that Smith swore at Halcomb in the presence of other members of Halcomb's crew. The judge needs to explain the basis for his conclusion that "[t]he account that Halcomb gave Cox ... [that] Complainant cursed him in front of the crew ... was inaccurate" (12 FMSHRC at 2133).

Both Smith and Halcomb testified before the judge that they were alone when the swearing took place. Tr. 34, 120. Smith's testimony makes clear that he told Cox that his (Smith's) brother was not present (Tr. 28), but it does not indicate any conversation with Cox regarding the presence of

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2 There appears to be no question as to the fourth element listed above, Halcomb's failure to inform Cox that Smith had threatened to take his complaint to MSHA. Cox testified that he was not told that Smith had made such a statement (Tr. 48) and Halcomb admitted that he "[didn't] think" he relayed that information to Cox. Tr. 96.

others. Nor does Halcomb's testimony indicate that he discussed the presence of witnesses with Cox.

The only testimony from Cox as to the source of his belief that the crew members were present during the swearing is as follows:

Q. (By Mr. Endicott, counsel for Complainant) You went under the opinion that this argument that transpired between [Smith] and [Halcomb], when the words were spoken, there were other people present at the time?
A. (By Mr. Cox) Yes, sir.
Q. Is that what [Halcomb] told you?
A. Later on, other people came to me and rehearsed to me the seriousness of the situation, yes.
Q. What other people would that be?
A. One boy by the name of Bryan Collins. Bryan had -- the argument had gotten kind of out of hand and Bryan said he just got up and left, he knew it was getting bad. And -- well, he's the only one that knew of it, first hand, I think. I don't think anybody else was present.
Q. But he got up and left at that, didn't he, Bryan did?
A. Yes, after the words. Yes.
Q. After or before, are you sure?
A. I think he heard -- actually heard the words spoken from what he told me now.

Tr. 63-64.

Just before the above testimony, Cox stated that prior to discharging Smith, he had not spoken to anyone but Halcomb and his (Cox's) own supervisors. Tr. 63. Cox's testimony is ambiguous as to how he came to believe that Smith had "called [Halcomb] these names in front of [Halcomb's] people." Tr. 63. Cox's misapprehension of the facts as to who was present when the swearing took place admits of several possible explanations, e.g., Cox's recollection at trial was hazy; Cox's testimony on the issue was purposely evasive; Cox, having been told by both Smith and Halcomb that others were present when the argument began, mistakenly assumed that some crew members were still present when the swearing took place; or, as the

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judge concluded, Cox was deceived by Halcomb into thinking there were witnesses to the swearing. While we do not second-guess the judge as to the most plausible explanation for Cox's mistaken belief regarding the presence of witnesses to the swearing incident, it is necessary for purposes of "meaningful review" to know the reasons or bases for the judge's conclusion on this critical issue. Secretary v. Anaconda Company, 3 FMSHRC 299, 300 (February 1981).

Reconciling the ambiguities surrounding this issue is important because of Cox's frank admission elsewhere in the record that while the swearing was "still insubordinate ... if it had been a personal thing, just between [Smith] and [Halcomb], it could have probably been resolved, yes." Tr. 65. Resolving these ambiguities is a necessary prerequisite to an evaluation of Kem Coal's claims that it rebutted Smith's prima facie case or, in the alternative, that it affirmatively defended against the prima facie case by establishing that it would have discharged Smith, in any event, for his unprotected activity alone, i.e., his insubordinate swearing at Halcomb. We note that the judge did not expressly address the affirmative defense issue in his decision.

We find that the judge's failure to reconcile critical differences in the testimony of Smith and Cox and the lack of a clear connection between the evidence in the record and certain inferences drawn by the judge as to Halcomb's conduct preclude our meaningful review of the judge's conclusion that Smith was discriminated against in violation of the Act. Accordingly, we direct the judge to resolve the factual issues we have raised and then to determine anew, by applying the Pasula/Robinette test, whether Smith has established a prima facie case of discrimination. If the judge so finds, he should then determine whether Kem Coal has rebutted that case, or has affirmatively defended against it by demonstrating that it would have discharged Smith, in any event, for his unprotected activity alone.

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Accordingly, we vacate the judge's decision and remand the matter for further consideration in light of the questions raised in this decision.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner
Joyce A. Doyle, Commissioner
Arlene Holen, Commissioner
L. Clair Nelson, Commissioner