FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

November 30, 2001

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of JOHN NOAKES	:	
v.	:	Docket No. CENT 2000-75-DM
GABEL STONE COMPANY	:	

BEFORE: Verheggen, Chairman; Jordan, Riley, and Beatty, Commissioners

DECISION

BY THE COMMISSION:

In this discrimination case, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), brought by the Secretary of Labor on behalf of John Noakes against Gabel Stone Company, Inc. ("Gabel Stone"), Administrative Law Judge T. Todd Hodgdon awarded back pay to Noakes for Gabel Stone's discrimination against Noakes. 22 FMSHRC 1160 (Sep. 2000) (ALJ); 23 FMSHRC 171 (Feb. 2001) (ALJ). The Commission granted Gabel Stone's petition for discretionary review, but only on the issues of the mitigation of Noakes' damages and the amount of the back pay award. Direction for Review dated March 20, 2001. For the reasons that follow, we affirm the judge's decision as to those issues.

I.

Factual and Procedural Background

Noakes, a loader operator earning $7.00 per hour, was discharged by Gabel Stone in December 1998. 22 FMSHRC at 1161; 23 FMSHRC at 175. Immediately after his termination, Noakes applied for and received unemployment compensation and food stamp benefits through separate state agencies. Tr. 108-09; S. Penalty Br., Noakes Aff. at 1-2, ¶¶2-3. Each agency had

job search requirements that Noakes fulfilled. Noakes Aff. at 1-2, ¶¶2-3. In addition, he applied for work through temporary employment agencies. *Id.* at 2, ¶4; Tr. 216.

In January of 1999, Noakes also began taking classes during evening hours at Southwest Missouri State University in West Plains, Missouri, towards an associate's degree in computer science, with the idea of eventually obtaining a bachelor's degree. 23 FMSHRC at 175; Tr. 46-48. On February 2, 1999, Noakes obtained a weekend position with Town Square Internet in West Plains, and became a full-time Internet Technician there in June 1999. Tr. 106.

Noakes' discrimination complaint against Gabel Stone was filed on December 14, 1998, with the Department of Labor's Mine Safety and Health Administration. 22 FMSHRC at 1161. After a hearing, the judge determined that Noakes' discharge was discriminatory and therefore violated section 105(c)(1) of the Mine Act.[1] *Id.* at 1163-67. Though the judge ordered the parties to confer regarding the back pay due Noakes and the civil penalty to be assessed, they failed to agree on those issues and subsequently briefed their respective positions. *Id.* at 1167-68; 23 FMSHRC at 172.[2] In his supplemental decision and final order, the judge rejected Gabel Stone's claim that Noakes did not present any evidence that he looked for work to mitigate his damages. 23 FMSHRC at 174. The judge held that Gabel Stone had failed to carry its burden of demonstrating that Noakes did not make a reasonable job search, and found that, in any event, Noakes' affidavit established that he did make a reasonable effort to find, and in fact eventually found, another job. *Id.* at 174-75.

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[1] Section 105(c)(1) provides in part:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner . . . because such miner . . . has filed or made a complaint under or related to [the Act], including a complaint notifying the operator . . . of an alleged danger or safety or health violation in a coal or other mine, . . . or because of the exercise by such miner . . . of any statutory right afforded by [the Act].

30 U.S.C. § 815(c)(1).

[2] The Secretary attached to her brief an affidavit from Noakes providing details of his attempts to find work after his discharge. *Id.* at 173. Gabel Stone filed a motion to strike the affidavit, which the judge attempted to resolve by having the parties depose Noakes, so that Gabel Stone would have the opportunity to cross-examine him on the affidavit. *Id.* at 172-73. The deposition was never held, however, as Gabel Stone refused to depose Noakes unless the judge issued all seven of the subpoenas it sought. *Id.* at 173. The judge refused as to all but two of the subpoenas, on the ground that the documents already provided to Gabel Stone by the Secretary clearly indicated that nothing else was available. *Id.*

The judge also found that Noakes' enrollment in college in January of 1999 was not sufficient to show, by itself, that Noakes had removed himself from the job market. *Id.* at 175. The judge was persuaded by the fact that all of Noakes' classes were at night, and that Noakes, while taking classes, obtained a part-time day job that eventually blossomed into a full-time job. *Id.* The judge concluded that Noakes was entitled to $9,157.60 in back pay, which was the amount of earnings Noakes lost from the time of his discharge until he secured full-time employment, less any interim earnings, plus interest. *Id.* at 176-77. The judge also assessed a $5,000 civil penalty against Gabel Stone. *Id.* at 177-79.

II.

Disposition

The scope of the Commission's review of a judge's remedial order, such as a back pay determination, is one of abuse of discretion. *See Sec'y of Labor on behalf of Reike v. Akzo Nobel Salt Inc.*, 19 FMSHRC 1254, 1257-58 (July 1997); *see also Miller v. Marsh*, 766 F.2d 490, 492 (11th Cir. 1985) (applying standard to determination that discriminatee, as full-time student, was not ready, willing, and available for alternative employment and thus failed to mitigate her damages). "Abuse of discretion may be found when 'there is no evidence to support the decision or if the decision is based on an improper understanding of the law.'" *Reike*, 19 FMSHRC at 1258 n.3 (quoting *Mingo Logan Coal Co.*, 19 FMSHRC 246, 249-50 n.5 (Feb. 1997)).

With respect to back pay, the Commission has recognized that, while it "is ordinarily the sum equal to gross pay the employee would have earned but for the discrimination less his actual net interim earnings" a discriminatee's award of "back pay may be reduced in appropriate circumstances where an employee incurs a 'willful loss of earnings.'" *Sec'y of Labor on behalf of Dunmire v. N. Coal Co.*, 4 FMSHRC 126, 144 (Feb. 1982) (quoting *Oil, Chem. & Atomic Workers Int'l Union v. NLRB*, 547 F.2d 598, 602-03 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1078 (1977)); *see also Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197-98 (1941) ("[s]ince only actual losses should be made good, its seems fair that deductions should be made not only for actual earnings by the worker but also for losses which he wilfully incurred."). Pursuant to the duty to mitigate damages from discrimination,

> a discriminatee is not entitled to back pay to the extent that he fails to remain in the labor market, refuses to accept *substantially equivalent employment*, fails diligently to search for alternative work, or voluntarily quits without good reason. . . . .
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> In order to be entitled to back pay, an employee must at least make reasonable efforts to find new employment . . . . However, . . . [the employee is] held . . . only to reasonable

> exertions in this regard, not the highest standard of diligence. [T]he principle of mitigation does not require success; it only requires an honest good faith effort . . . .

NLRB v. Madison Courier, Inc., 472 F.2d 1307, 1317-18 (D.C. Cir. 1972) (citations omitted) (alterations and emphasis in original) (cited with approval in *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231 n.16 (1982));[3] *see also Metric Constructors,* 6 FMSHRC at 231-33 (applying "reasonable efforts" standard to mitigation efforts of four discriminatees).

Failure to mitigate damages is an affirmative defense, and the burden of proving it is therefore on the operator. *See NLRB v. Laredo Packing Co.*, 730 F.2d 405, 407 (5th Cir. 1984); *Hanna v. Am. Motors Corp.*, 724 F.2d 1300, 1307 (7th Cir.), *cert. denied*, 467 U.S. 1241 (1984); *Metric Constructors*, 6 FMSHRC at 233; *Secretary of Labor on behalf of Jackson v. Mountain Top Trucking Co.*, 21 FMSHRC 1207, 1214 (Nov. 1999). The determination of whether the duty to mitigate has been met "is made on the basis of the factual background peculiar to each case." *Metric Constructors*, 6 FMSHRC at 232.

We have rejected a per se rule that an operator meets its burden simply by showing that the complainant attended college during the back pay period. *Jackson*, 21 FMSHRC at 1214. We emphasized in *Jackson* that a complainant's "status as a college student does not necessarily mean that he must be found to have failed to mitigate his damages during the time he was enrolled in college." *Id*. Instead, we have held that to mitigate his damages, a discrimination complainant attending college is still expected to search for work and quit school if work becomes available. *Id*.[4]

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[3] "Because the Mine Act's provisions for remedying discrimination are modeled largely upon the National Labor Relations Act, [the Commission] ha[s] sought guidance from settled cases implementing that Act in fashioning the contours within which a judge may exercise his discretion in awarding back pay." *Metric Constructors, Inc.*, 6 FMSHRC 226, 231 (Feb. 1984), *aff'd*, 766 F.2d 469 (11th Cir. 1985). The NLRB continues to apply the same mitigation standard. *See, e.g., Atl. Limousine, Inc. v. NLRB*, 243 F.3d 711, 721 (3rd Cir. 2001).

[4] Similarly, under other federal discrimination statutes where the employer bears the burden of proving a failure to mitigate on the part of the discriminatorily discharged employee, the discriminatee's attendance at school during the back pay period does not automatically establish that the employee failed to mitigate his damages during the time he was in school. *See, e.g., Miller v. AT&T Corp.*, 250 F.3d 820, 838-39 (4th Cir. 2001) (Family and Medical Leave Act); *Dailey v. Societe Generale*, 108 F.3d 451, 456-57 (2d Cir. 1997) (Title VII); *Hanna*, 724 F.2d at 1307-09 (employer's reliance solely on Title VII discriminatee's college attendance to establish a failure to mitigate rejected). "Rather, the central question . . . is 'whether an individual's furtherance of his education is inconsistent with his responsibility to use reasonable diligence in finding other suitable employment.'" *Dailey*, 108 F.3d at 456-57 (quoting *EEOC v. Local 638*, 674 F. Supp. 91, 104 (S.D.N.Y. 1987)). A discriminatee who ceases her job search

Here, Gable Stone argues that Noakes's college attendance, by itself, established he had removed himself from the job market and thus failed to mitigate his damages. GSC Br. at 16. But, as our holding in *Jackson* set forth above makes clear, this argument must fail. As a threshold matter, we thus conclude that the judge did not abuse his discretion in rejecting this argument made by Gable Stone.

On the issue of Noakes's diligence in searching for substitute employment, the judge credited Noakes' statements regarding his employment search both in his affidavit[5] and in two state employment agency documents, copies of which had been submitted by Gabel Stone. 23 FMSHRC at 174-75. In his affidavit, Noakes states that he was required, in order to qualify for unemployment benefits, to engage in at least two employment inquiries each week, and that he consistently met or exceeded that standard. Noakes Aff. at 1, ¶2. Noakes also set forth how he was required, in order to qualify for food stamps, to register with a "work search organization," and that he sought employment through temporary employment agencies and "network[ed] through friends and family." *Id.* at 2, ¶3. In the state unemployment agency documents, Noakes specified the potential employers he had contacted the preceding week. Resp't Ex. 76, 77.

A judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981). We see no reason to overturn the judge's crediting of Noakes with respect to his job search efforts. Consequently, the evidence supports the judge's determination that Gable Stone did not carry its burden of showing that Noakes failed to adequately search for a job. *See Sprogis v. United Air Lines, Inc.*, 517 F.2d 387, 392-93 (7th Cir. 1975) (rejecting failure-to-mitigate claim where employer failed to show that discriminatee's job search did not include steps reasonable person would take in pursuing employment, and discriminatee was credited regarding extent of her search).

We also reject Gabel Stone's contention that Noakes failed to show that he diligently searched for a job between his termination and the January time period covered by his statements to the state employment agency. GSC Br. at 19, 21. As discussed, Gabel Stone is mistaken regarding the burden of proof in this instance. In addition, the judge determined that Noakes was

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and attends school after diligent efforts have proven fruitless will not necessarily be found to have failed to mitigate her damages. *See, e.g, Dailey*, 108 F.3d at 457.

[5] We find unavailing Gable Stone's argument that the judge improperly accepted the Noakes affidavit. *See* GSC Br. at 19. After the liability phase of the proceedings below, the judge properly directed the parties to confer regarding back pay (22 FMSHRC at 1167-68), and when the parties could not reach any agreement on the issue, properly conducted further proceedings, which included the filing of the Noakes affidavit by the Secretary. *See* 23 FMSHRC at 172-73. Gable Stone is hardly in a position to raise the propriety of the affidavit in light of the fact that the company failed to fully avail itself of the opportunity afforded it by the judge to cross examine Noakes on his affidavit in a deposition. *Id*.

diligent in his search for full-time employment (23 FMSHRC at 174), and the judge's crediting of Noakes' affidavit is more than enough evidence to support the judge's determination. While Gabel argues that state employment agency documents it submitted do not address the efforts Noakes made in the first month or so after his termination, Noakes' affidavit — credited by the judge as a "convincing[] demonstrat[ion] that [Noakes] made a reasonable effort to find" another job — does not support Gable Stone's suggestion that Noakes waited a month before beginning his job search efforts. *See id.*; Noakes Aff. at 1-2, ¶¶2-4.

The evidence also supports the judge's finding that the question whether Noakes would have chosen a full-time position over school is irrelevant in this case, given that Noakes' classes were held between 5:30 and 8:30 p.m. 23 FMSHRC at 175. This time period did not conflict with the 6:00 a.m. to 5:30 p.m. time period Noakes was required by state law to be available for work in order to qualify for the unemployment benefits. Noakes Aff. at 2 ¶5*; see Nord v. U.S. Steel Corp.*, 758 F.2d 1462, 1471 (11th Cir. 1985) (evidence showed that discriminatee's college attendance did not preclude her from holding down a full-time job); *see also Washington v. Kroger Co.*, 671 F.2d 1072, 1079 (8th Cir. 1982) (recognizing that full-time college student can, by attending classes at night, be full-time employee during the day, and that in such an instance discriminatee should not be held to have failed to mitigate damages).

Gable Stone also points out that, in the two state employment agency documents, Noakes declared that he would not have quit school to accept a full-time position that conflicted with his class schedule at night. GSC Br. at 18. However, the judge correctly held that Noakes' statements must be understood in the context in which they were provided: he was attending school in the evening, and had been discharged from a full-time day position. 22 FMSHRC at 175. The statements do not support the notion that Noakes intended that his college attendance preclude him from working full time, and indeed in each statement Noakes describes his availability and active search for a full-time day position. Resp't Ex. 76, 77.

Finally, as for whether the statements made by Noakes to the state employment agency that he would only accept a day position that paid at least $6.00 per hour establish that Noakes unreasonably restricted his job search, Gable Stone did not raise this issue to the judge when it had the opportunity to do so in response to the judge's request for the parties' positions on back pay. *See* GSC Supplemental Br. to ALJ. Section 113(d)(2)(A)(iii) of the Mine Act provides that "[e]xcept for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge had not been afforded an opportunity to pass." 30 U.S.C. 823(d)(2)(A)(iii); *accord* 29 C.F.R. 2700.70(d). *See Shamrock Coal Co.*, 14 FMSHRC 1300, 1304 (Aug. 1992); *Shamrock Coal Co.*, 14 FMSHRC 1306, 1312-14 (Aug. 1992); *Beech Fork Processing, Inc.*, 14 FMSHRC 1316, 1321 (Aug. 1992). In the absence of an explanation from Gable Stone why it failed to raise this issue before the judge, we cannot find good cause to consider Gabel Stone's arguments on the issue.

III.

Conclusion

For the foregoing reasons, we affirm the judge's decision on back pay and mitigation of damages.

Theodore F. Verheggen, Chairman

Mary Lu Jordan, Commissioner

James C. Riley, Commissioner

Robert H. Beatty, Jr., Commissioner

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