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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
ON BEHALF OF
FORD ALLEN AMOS,
COMPLAINANT

DISCRIMINATION PROCEEDINGS

Docket No. KENT 88-175-D
BARB CD 88-24

Kay Jay Mine

v.

NALLY AND HAMILTON
ENTERPRISES, INC.,
RESPONDENT

DECISION

Appearances: William F. Taylor, Esq., Office of the
Solicitor, U.S. Department of Labor, Nashville,
Tennessee for the Complainant;
Lloyd R. Edens, Esq., Cline & Edens, Middlesboro,
Kentucky for the Respondent.

Before: Judge Melick

This case is before me upon the Complaint by the Secretary of Labor on behalf of Ford Allen Amos under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," alleging that Mr. Amos was discharged by Nally and Hamilton Enterprises, Inc. (Nally) on February 22, 1988, in violation of section 105(c)(1) of the Act. (Footnote 1) The Secretary seeks reinstatement, damages and interest for Mr. Amos as well as civil penalties against Respondent Nally. Nally maintains that Amos was in fact not discharged but quit on his own volition and therefore suffered no adverse action within the meaning of section 105(c)(1).

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In order to establish a prima facie violation of section 105(c)(1), the complainant must prove by a preponderance of the evidence that he engaged in an activity protected by that section and that he suffered an adverse action that was motivated in any part by that protected activity. Secretary on behalf of Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980) rev'd on other grounds sub nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3rd Cir.1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981).

It is not disputed that during the week before Mr. Amos' February 22, 1988, departure from the Nally Kay Jay Mine he had been "docked" 30 minutes pay for purportedly having stopped work early on several occasions. Amos' foreman, Johnny Jackson, testified that he watched Amos and fellow truck driver Wayne Roark quit early on two occasions and explained this to Amos when Amos complained of his paycheck. Amos disputed that he had quit early and the matter was still at issue at the time of a confrontation between Amos and Jackson on February 22, 1988. At this time Jackson was admittedly also angry, believing that Amos was stirring up employee dissension by spreading rumors that he would complain of his reduced pay to company owner Tommy Hamilton.

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According to Amos, on the evening of February 22, 1988, Jackson appeared at the worksite and called he and Darryl Akers off their 50 ton haulage trucks. A heated exchange followed. Amos explained what happened in the following colloquy:

We were standing there and Johnny looked at me and said "I want all this talk about going to Tommy Hamilton stopped." I said "Johnny, I can't get you to fix my truck, you won't do nothing for the truck and if you don't believe me, get up there and drive it." I said "now you come up here and cut my time for something I didn't do." That's when he said "as of right now your time is stopped." I said "what do you mean, Johnny? He said "you are fired." (Tr. 111) (Footnote 2)

While Amos maintained at hearing that he was in fact discharged at the time of this confrontation, he nevertheless immediately returned to work driving his 50 ton haulage truck. Amos also acknowledged that Jackson saw him get back into the truck. This evidence is consistent with Jackson's testimony that after the confrontation he told Amos to go back to work. At hearing, Amos confirmed that he continued working after the confrontation in which he claims he was fired but claims he did so because he thought he could get his job back.

After continuing to work for about three hours, Amos decided to leave. He drove his pick-up truck to the mine exit where he met Matt Roark and Jackson. Amos described what happened as follows:

When I reached the shop there was Matt Roark, he was standing beside the shop and I stopped there first and hollered at Matt Roark to come over to my truck. I had a blanket in my truck which there was a guy that rides to work with me and he sat on the blanket on the way home because he was a grease man and he got oily and stuff. I said "Matt" and Matt looked at me and said "what is it?" I said "Johnny fired me." I said "I want you to give this blanket to Ronnie so he could drive in the other guy's truck." I pulled alongside Johnny. He said "what is it?" I said "you fired me." He just grinned at me. (Tr. 112).

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Foreman Johnny Jackson testified that indeed he found that Amos and Wayne Roark had been quitting work early. He observed them do so on several occasions before docking their pay. When Amos received his short paycheck Jackson explained the reason for the deduction. Jackson later became concerned because he heard rumors that Amos was threatening to take his complaints to company owner Tommy Hamilton. According to Jackson this was causing turmoil among his workers and therefore, at the February 22, confrontation, he told Amos in essence that if he did not stop the rumors he would be fired. Jackson testified that he then told Amos to "get on your truck and haul rock". (Footnote 3)

Jackson also described what happened later when Amos approached the exit gate:

At the time that he come up there, Matt got out of my pickup and walked around to the front and he asked Mr. Amos was he broke down and what was wrong. He said "no, Johnny fired me a while ago," and he pulled up and Matt was standing, you know, like at the corner of my pickup and I said "what is your problem?" He said "you fired me." I said "no, son, I didn't fire you." (Tr. 251).

After this exchange Amos left the job site and did not return. He later was paid for the additional work he performed that evening after the initial confrontation.

The credible evidence in this case shows clearly that after Amos claims he was "fired" he nevertheless, in the presence of the man who purportedly fired him, immediately returned to work driving his haulage truck and continued to work for another three hours before deciding to leave the job. This behavior is totally inconsistent with what would be expected from someone who has just been fired and what would be permitted by a foreman who has just fired him. While Amos testified that he continued to work because he thought he might thereby be able to retain his job, this testimony only confirms that there had never been any real termination of Amos' employment in the first place.

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3 Charles Jackson a company "oiler" testified that he overheard Johnny Jackson tell Amos "to get on his truck and haul rock".