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KATHLEEN I. TARMANN V. INTERNATIONAL SALT  
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)  
Office of Administrative Law Judges

KATHLEEN I. TARMANN,  
COMPLAINANT

DISCRIMINATION PROCEEDING

Docket No. LAKE 89-56-DM

v.

MD 89-10

INTERNATIONAL SALT COMPANY,  
RESPONDENT

Cleveland Mine

DECISION

Appearances: Daniel Kalk, Esq., Valore, Moss & Kalk, Cleveland,  
Ohio for Complainant;  
Keith A. Ashmus, Esq., Thompson, Hine and Flory,  
Cleveland, Ohio for Respondent.

Before: Judge Melick

This case is before me upon the complaint by Kathleen I. Tarmann under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," alleging discriminatory suspension by the International Salt Company (International Salt) in violation of section 105(c)(1) of the Act.1

~1919

More particularly Ms. Tarmann alleges in her complaint as follows:

On October 19, 1988, I was discharged for allegedly being insubordinate to a reasonable order from my foreman Robert Hatfield.<sup>2</sup> The order was not only unreasonable, but discriminatory as well. Mr. Hatfield ordered me to abstain from a normal biological function. Mr. Hatfield refused to allowed me to go to the surface to use the ladies room, as the one in the mine was dirty. Mr. Hatfield told me that he would allow me a half hour to clean the bathroom. When I told Mr. Hatfield I couldn't wait that long he still refused to allow me to go. Mr. Hatfield and other foreman [sic] had allowed the men to go to the surface to use the bathroom when the ones in the mine are dirty. Mr. Hatfield had made several statements to get me prior to this incident and make me pay for causing him trouble with his boss. Mr. Hatfield made these statement on the skip and many people heard him. I belive [sic] Mr. Hatfield deliberately did not clean the womens [sic] bathroom to get back at me and forced me into the situation.

In order to establish a prima facie case of discrimination under section 105(c) of the Act, a complaining miner bears the burden of proving that (1) he engaged in protected activity and (2) the adverse action complained of was motivated in any part by the 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 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981).

The mine operator may rebut a 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 the

~1920

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. 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 (C.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-6 (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 a nearly identical test under the National Labor Relations Act).

As clarified at hearings in this case the Complainant is maintaining that her suspension by International Salt on October 19, 1988, was a discriminatory response to the following protected health and safety complaints: (1) on or about October 8, 1988, to her foreman Robert Hatfield and to Hatfield's supervisor, Mine Superintendent Bruce Higgins, that Hatfield was sleeping at his desk in the shop office during their workshift and that he had also taken the phones off the hook in his office, and (2) during the midnight shift on October 18-19, 1988, she complained to Hatfield that the ladies toilet in the shop area was not in a sanitary and safe condition. The fact that complaints of this general nature were made is not disputed. The first element of a prima facie case has therefore been established.

The second element of a prima facie case is a showing that the adverse action was motivated in any part by the protected activity. Direct evidence of motivation is rarely encountered. More typically, the only available evidence is indirect. Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508 (1981). In the instant case it is clear that management had knowledge of the cited protected activities. The Complainant further maintains that foreman Hatfield displayed hostility toward her complaints about his sleeping on the job by statements purportedly made on a crowded "skip" or elevator as the midnight shift crew was being transported to work one evening. Complainant described the alleged threats in the following colloquy at trial:

Q. [By Counsel for Complainant] Now, how do you know that the actions taken against you were as a result of

~1921

your health and safety complaint to Higgins and your health and safety complaints to Hatfield?

A. [Complainant Tarmann] Because Bob told me on the skip.

Q. Bob who?

A. Bob Hatfield.

Q. Okay.

A. On the skip told me that the person responsible for him having to take a extra vacation, an unscheduled vacation, was going to pay. He said that.

THE COURT: When was this stated?

THE WITNESS: Pardon Me.

THE COURT: When was this statement made?

THE WITNESS: It was on the skip coming up out of the mine the next day.

THE COURT: After the incident discussing the toilet conditions?

THE WITNESS: No, the next day after I talked to his boss about him sleeping.

Q. And that would have been approximately what date?

A. Probably the 12th or 13th.

THE COURT: Of October 1988?

A. Right.

Q. Okay, and what did he tell you?

A. He said that I was going to pay.

Q. For what?

A. For going over his head, for causing him trouble with his boss and causing him to have to take an extra vacation and --

~1922

Q. Did you explain to him that you were simply doing your job as health and safety representative?

A. At that time?

Q. Yes.

A. On the skip or talking to him?

Q. Talking to Hatfield.

A. Yeah.

Q. And what did he say about that?

A. He didn't say much of anything. He didn't say anything.

Q. Now, from the date that you caught him sleeping, which was approximately the 10th of October, to the date that you were suspended, approximately the 19th of October, how many discussions did you have with Hatfield when he either warned you or told you about his plans as they related to you because of your activity?

A. I'd say it went on for three days on the skip, two or three days.

Q. Were there other people on the skip at the time that you heard this?

A. Oh. yeah.

Q. And who were they?

A. John Budziak, Richard Fisher, Brad Diven, Bob Damron, and there were other people too.

Q. And they heard everything you heard?

A. I guess they did, yeah. They did, yeah.

Q. And tell the judge the rest of what they said to you regarding your health and safety complaints and the action he was going to take against you?

A. Well, he said that I was definitely going to pay. he looked straight at me, and I mean there was no love in his eyes either, and he told me I guarantee you, she will pay.

~1923

Several of the Complainant's witnesses claim to have heard different variations of the these alleged statements. In any event Hatfield explained in the following colloquy at trial the most credible explanation for what occurred on the elevator:

Q. [By Counsel for Respondent] Do you recollect making some kind of comment on a skip about vacation?

A. [Hatfield] Yes I do.

Q. Can you describe to the judge exactly what you recall about that?

A. Well, what it was, on the vacation, I had a vacation scheduled for later that year. And Bob Foster, he was a relief foreman underground at the time, and he was getting ready to go upstairs. And so Baker, Mr. Baker asked me if I could take a vacation a couple weeks early.

THE COURT: Who's Baker now?

THE WITNESS: He's a superintendent of maintenance underground.

THE COURT: All right. He's your boss?

A. Right. He asked me if I could take my vacation early so Bob could fill in for me, and I said sure, I could. So we scheduled it up early. And I've got a foreman that always sort of riled up a little bit, and I told him to give me an extra vacation because he knew when my vacation was.

Q. Who was that foreman?

A. Jim Bannerman.

\* \* \* \*

A. And so he must have got the word around that I was getting an extra vacation, because I told him I was working so hard that he was going to give me an extra vacation, and so Gene Sharpe on the skip, he said --

THE COURT: Who's Gene Sharpe now?

THE WITNESS: One of the employees that used to work for me in '88.

Q. Hourly employee?

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A. Hourly employee, yes, he said, Bob said, "I hear tell you're getting an extra vacation". I said "yeah". I said "people's complained that I've been working too hard and they're giving me an extra week's vacation. I sure appreciate that. I'd like to thank whoever got this started", just more or less joking around. And that was about all that was said.

Q. And did you actually ever take an extra vacation or this changed vacation?

A. No, I didn't. Bob Foster got sick and so I couldn't take my vacation when we re-arranged it, so I ended up taking it the same week that I had it -- already had it scheduled.

Q. Now, in that skip when you said that, you were talking to Gene Sharpe at the time?

A. Yes.

(Tr. 287-289)

Hatfield accordingly maintains that the statement attributed to him on the skip was certainly not retaliatory. Inasmuch as the persuasive credible evidence clearly shows that Hatfield was never in fact required to change his vacation and was not in fact subject to discipline, and that management knew he was then being treated for narcolepsy, I conclude that Hatfield did not demonstrate any retaliatory motivation towards Ms. Tarmann in this regard.<sup>3</sup>

Tarmann also cites her subsequent complaints to Hatfield on the October 18-19, midnight shift about the conditions of the ladies shop area toilet as a basis for her suspension. Hatfield made notes of events shortly after they occurred that evening. (See Appendix I) I give these contemporaneous notes, which were corroborated in essential respects at hearing, significant weight and indeed I find this version of events to be the most credible. I find then that Ms. Tarmann's suspension was the result of her refusal to clean the toilet as she had been directed to do earlier on the shift before her alleged "emergency" need to use the toilet and for her use of an apparent duplicitous subterfuge to use the outside toilet facilities in violation of the direct order of her foreman. These activities are clearly not protected activities and reliance on these (in addition to her previous disciplinary record) by management in suspending the Complainant was not in contravention of Section 105(c) of the Act. There is moreover insufficient credible evidence to show that management was motivated in any part by her protected activities. Under the circumstances I find that there was no violation of Section 105(c) and that this case must be dismissed.



APPENDIX I

On October 19, 1988, I, Bob Hatfield, was approached by Kathy Tarmann at 12:05 AM and she was upset about her bathroom. She said her bathroom looked like a pig's eye [sic] or something like that and she couldn't use it. Mike Miller and both utility men, Jose Sanchez and Mark Miller were present and this incident happened in front of the electrician's pad. I asked her if they didn't change her bathroom today and yes but they didn't clean it good enough for her to use. I told her she would have to make do, clean it enough to use and I'd talk with Mike in the morning. Then she said this place never learns and she was going to take this damn company to court and sue them. She kept talking like this until she was out of ear shot.

The next time I went by her bathroom, I was going to check it but it was locked and I didn't have the key on me so I just glanced at the other two and they seemed very clean to me. Then about 1:50 AM I was going toward the substation and Kathy came raging out of the substation cursing, not really at me, but at the company in general, saying things like she was taking this G.D. company to court and she has complained about the bathrooms for years now and no damn body tries to help her. Then when she got to where I was she told me that she wasn't about to use the bathroom and she was going to go upstairs where they had a decent damn bathroom. This conversation took place in front of 3 air door and present were Kathy, myself, Mike Miller and Mark Miller. Jose Sanchez, Ken Mate and Jim Swann had stopped as they were going to the shop. I told Kathy in a calm but to the point voice that she could not go upstairs because if I let her go I'd have to let everyone go and I'd never get anything done with my men yo-yoing up and down the skip. I also explained to her that if she needed time to clean her bathroom to go ahead and clean it so she could use it, but no way was she going upstairs. At this she really started raging and told me that she would have my M.F. ass into court along with the G.D. company and sue us, that we'll never learn until she sues our damn asses. She said other things until I told her if she didn't calm down

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and quit cursing and raving, I'd have to ask her to leave the mine until we could meet with higher people than me. She quit cursing and was just raging under her breath and started walking toward the storeroom. I told Mike Miller to jump on my cushman and I started to take him down into the mill. That's when I decided to go to the office to get Kathy some rags to clean the bathroom. When I was getting her rags she was yelling at me saying it was a shame that a big company couldn't provide her with a clean bathroom and that she needed to clean her bathroom and that she wasn't supposed to have to clean her bathroom and she needed rubber gloves, etc. etc. I told her the gloves were next door in the storeroom. I was getting back on my cushman when she came out of the storeroom and she was ragging [sic] again, cursing and saying she was going to teach this G.D. company a lesson, she was going to sue this G.D. place and all she wanted was a clean bathroom and it wasn't her job to clean it. Swann, Mate, Mark and Jose were in front of the storeroom at this point and she came to my cushman, jumped on it and threw the rags and gloves on the seat, pushed them back behind us and said I'm going home, take me out. I don't have 30 minutes to clean my damn bathroom so I'm going home. I told her fine and I took her to the serving skip.

Kathy had mentioned calling Bruce Higgins when she was in my office to get her rags and I told her she wasn't going to wake up anybody over such a petty thing as this, but when I went down to the mill with Mike Miller, Jose Sanchez and Mark Miller, Mark said she was probably up there calling Bruce and I 'd be in big trouble tomorrow. I didn't comment and then Mark said Kathy gets mad and goes home and we have to do her work. I told Mark, no, he's to do the work I assigned him. this was about 2:10 AM. After Mark and Jose and Mike got the cable through the conduit, I went down to where Gene Sharp was working to check on his job when Joe the mill man yelled at me saying the phone was for me. It was Kathy and I thought that she was calling telling me she was up and ready to go home so I asked Joe to find out what she wanted and she told Joe she wanted to talk with me. I went back to the phone and she said, "I'm back from using the bathroom and I'm in the shop." I said that she said she was going home and I told her to stay there that I'd be up at the shop. I went to the shop and Kathy was in front of my office by herself so I drove up and she got on my cushman and just sat there. I went in my office to make sure that my desk was locked then I told you you couldn't go upstairs to use bathroom and you said you were going home so you'd

~1928

better go! She asked "Where do you want me to work?" This was about 2:18 AM. I started taking her down the shop toward the lunchroom telling her that I wasn't going to assign her any work and she said wait a minute, do I get paid for the rest of the night? Do I need my Steward and a meeting? At this I turned around and immediately started back to the office where I started to call Bill Baker or Bruce Higging. Then I stopped and told Kathy that I wasn't going to call in anyone but I'd work her under protest until in the morning when Bill comes in and we can have a meeting. I also read her Plant Rule #5 -- Failure or refusal to obey reasonable instructions of a supervisor. She broke this rule when she didn't clean the bathroom and when she went upstairs (as if she was going home) just to use the bathroom when I told her she couldn't. She also came back underground without asking permission. I read her Plant Rule # 34 -- As a condition of employment hourly employees shall not leave the plant (which means underground if you are assigned there), nor visit the parking lot without supervisor's permission. She did not have my permission to leave the mine to use the bathroom; she left on her own supposedly to go home.

Kathy said, "I need my Steward." I told her I'd call one in and she should go and help Mike. She asked where he was and I told her in the mill at 21 MCC.

During lunch I called Len Davis and told him to get hold of John Shumney and let him call me. John called about 3:05 AM and I explained what happened and that I was working Kathy under protest until Bill comes in for a meeting. Shumney said he'd be better talk to Kathy and said he'd call about 4:30 AM to see when Bill was coming in. Bill was going to come in early anyway, which I mentioned to John.

I made the rounds in my work area to make sure everyone was busy and I started thinking that at this plant, no one was ever worked under protest so I'd better get my boss in. At about 4:00 or 4:15 AM I called Bill Baker after I wrote down everything that had happened. When I went out I bumped into Kathy and Karl on Dave Green's cushman. I asked Dave why Kathy was on his cushman and he said she took it. At the first part of the shift she tried to take my mechanic's cushman and I told my mechanic to go get it back. the electrician's cushman was down. Anyway, Kathy and Karl asked me if they could have a meeting and I told them it would have to be later. I checked on a couple of

~1929

jobs while waiting for Bill to show up. I got hold of Bruce who said they would be down since Bill should be in anytime. I bumped into Kathy and Karl again and said they would be down since Bill should be in anytime. I checked on a couple of jobs while waiting for Bill to show up. I got hold of Bruce who said they would be down since Bill should be in anytime. I bumped into Kathy and Karl again and said I was waiting for Bill so they drove off. they had been in front of the bathrooms earlier so I assumed Karl was investigating. I got a call from John Good wanting to know if I was through with Karl and I told John that I didn't send for Karl but I was going to have a meeting with him, Kathy and Baker when Bill came in. Not long after, Bill and Bruce came in and we had the meeting, and Kathy was suspended after this meeting.

Nothing else happened until I went up with my people to the United Way meeting. After I got back from that meeting and went out to get the hourly timecards, someone from the waiting room yelled and said, "Kathy says you're not going to make it home!" When I got back underground and was doing my paperwork, someone went by the office and said, "you've had it when you go home!" Then Frank Smutko came into the office and asked if I had a magic marker and when I gave it to him he marked an X over my heart and said that was where I was going to get it on the way home or in the near future and laughed. Nothing happened on the way home or at home on the 19th.

Under protest due to the early hours and not wanting to wake someone up, I worked Kathy until my boss showed up for the meeting. My recommendation is to suspend Kathy until further investigation into this matter.