

CCASE:
ROY LEE STROUD V. CBM MINING
DDATE:
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ROY LEE STROUD, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. KENT 91-986-D
: :
CBM MINING, INC., : PIKE CD 91-09
ROY F. COLLIER AND :
JAMES H. BOOTH, : No. 2 Mine
Respondents :

DECISION

Appearances: Tony Opegard, Esq., Appalachian Research & Defense Fund of Kentucky, Inc., Lexington, Kentucky, for Complainant;
Michael J. Schmitt, Esq., Wells, Porter, Schmitt & Walker, Paintsville, Kentucky, for Respondent.

Before: Judge Maurer

This proceeding concerns a discrimination complaint, as presently amended, filed by the complainant, Roy Lee Stroud, against the corporate respondent, CBM Mining, Inc. (CBM), and the individual respondents, Roy F. Collier and James H. Booth, who are both part-owners and corporate officials of CBM, pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (the "Act").

Pursuant to notice, a hearing was conducted in Paintsville, Kentucky, on April 15-16, 1992. Subsequently, both parties filed post-hearing briefs and/or proposed findings and conclusions, which I have considered along with the entire record of proceedings in this case in making the following decision.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Complainant, Roy Lee Stroud, is the brother-in-law of respondent, Roy F. Collier. Collier is married to Stroud's sister, Patricia.
2. Over the previous several years, going back to at least 1986, Stroud had sought employment at one or the other of Collier's businesses to no avail. They had a very poor personal and family relationship and Collier absolutely did not like Stroud for a variety of personal reasons. The record reflects a long history of animosity between them. However, Collier's wife,

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Patricia, wanted him to give her brother a job, so at one point he finally gave his approval for Stroud to work for CBM and he was subsequently hired as a belt shoveler at \$8.00 per hour.

3. His career at CBM was short-lived, however. Stroud's first day of work was January 29, 1991. He worked 8 hours that day. The next day, January 30, 1991, he worked 2 hours and walked off the job over a dispute with the mine superintendent about his rate of pay. The superintendent had erroneously told him that his rate of pay was going to be \$6.00 per hour. When Collier learned of this later, and was teased about it, he became quite upset and threatened to whip Stroud the next time he saw him.

4. On February 5, 1991, Stroud filed a complaint of discrimination with MSHA, falsely alleging that he had been fired from his job as a beltline shoveler, by Superintendent Tommy Rouse on January 31, 1991, ostensibly because he had complained to Rouse about his smoking underground.

5. MSHA mailed two separate copies of Stroud's discrimination complaint to CBM on February 5, 1991, each with a cover letter informing the company that a discrimination complaint under section 105(c) of the Mine Act had been filed against it. One of the letters was addressed to Booth (Complainant's Exhibit No. 3); the other letter was addressed to Rouse (Complainant's Exhibit No. 4). The complaints were both received by the company on February 7, 1991.

6. Even though Collier and Booth claim not to have known about this section 105(c) complaint until sometime later, the circumstantial evidence is strong that both Collier and Booth knew that Stroud had filed a section 105(c) complaint with MSHA on or about February 7, 1991, and in any event before the assault actually took place on February 8, 1991 (See Finding and Conclusion No. 8, *infra*). In accordance with the preponderance of that evidence I find that all the respondents did have knowledge that Stroud had engaged in protected activity, i.e., filed a section 105(c) complaint, prior to the adverse action that was taken against him.

7. In the days between January 30, 1991 and February 8, 1991, Collier was becoming still angrier with Stroud because he would stop by the mine office frequently trying to pick up his paycheck for the 10 hours pay he had coming. The regular payday was not until February 15, 1991, but Stroud continued to stop in the office seeking his check. Collier had asked one of the clerks there, Gladys Parsons, to notify him the next time Stroud came into the office.

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8. On February 8, 1991, Stroud once again was on his way to the mine office to check on his paycheck. On his way to the office, Stroud drove by Collier's home in nearby Beauty, Kentucky. When Stroud passed Collier's home around noon, Collier was standing outside talking with Booth. Collier and Booth saw him and followed him to the mine office, arriving separately, but simultaneously a few minutes later. Collier told Booth to clear the female employees out of the front office and he picked up an 18-inch long piece of hydraulic hose and went into the office after Stroud. Booth did as he was requested. Collier then entered the office and started whipping Stroud with the hydraulic hose. He struck him multiple blows on the head and back while Stroud attempted to fend off the blows. Booth did not participate in the assault.

9. Prior to February 8, 1991, Booth and Stroud had no personal relationship whatsoever; and I find no credible evidence in this record to prove that Booth participated in the assault on Stroud. The only evidence to that effect comes from Stroud himself, whose credibility approaches zero. The mere fact that Booth was present in the office and did not come to the aid of Stroud or try to stop Collier does not amount to taking adverse action against Stroud on the part of Booth. Therefore, I am ordering dismissal of Stroud's complaint against Booth on this basis alone.

10. On February 8, 1991, after being examined at a hospital for the injuries he received during the assault, Stroud notified MSHA by telephone of the assault. MSHA thereafter investigated Stroud's assault claim as part of his previously filed discrimination case.

11. On April 3, 1991, MSHA issued its determination that in its opinion, a violation of section 105(c) had not occurred. Stroud then filed a pro se complaint with the Commission alleging that he had been discharged by CBM for reporting safety violations and that he had also been "beaten by officials of the company" after reporting safety violations to the Department of Labor, meaning the original discrimination complaint filed with MSHA.

12. On October 22, 1991, I granted Stroud's motion to amend his pro se complaint. By this time he was represented by counsel. Stroud's amended complaint dropped his claim that he had been discharged by CBM in violation of section 105(c) of the Mine Act, but retained the claim that he had been assaulted by officials of the company because of the filing of his original discrimination complaint with MSHA. In addition, the amended complaint added Collier and Booth as individual respondents, based on Stroud's allegation that Collier and Booth assaulted him on February 8, 1991.

DISCUSSION WITH FURTHER FINDINGS AND CONCLUSIONS

The general principles governing analysis of discrimination cases under the Mine act are well 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).

There is no doubt that Stroud engaged in protected activity in this instance. The mere filing of a discrimination complaint under section 105(c) of the Mine Act constitutes protected activity. And that is so even if that complaint contains allegations which are known to be false by the complainant at the time he makes them. There is also no doubt that adverse action in the form of a physical assault on the person of Stroud was taken by Collier on February 8, 1991, some 3 days after he filed that discrimination complaint. Furthermore, the preponderance of the circumstantial evidence is clearly to the effect that Collier's assault on Stroud was motivated at least in part by complainant's filing of the discrimination complaint with MSHA. The coincidence in time alone is enough to convince me that the two events are related.

Collier has, however, raised an affirmative defense in this case. He maintains that he was motivated to assault the complainant by his unprotected activity and in fact assaulted him for that reason alone. But since I have already determined above that he was motivated at least in part by Stroud's protected activity, he then urges that this is a mixed motivation case and that he would have taken the adverse action in any event for Stroud's unprotected activity alone.

There is certainly more than adequate evidence in this record of trial that there have been hostile feelings both ways between Stroud and Collier for years prior to this assault at bar. They have been on the threshold of coming to blows on several prior occasions. The police have been called on one occasion. There is jealousy on the part of Stroud over Collier's material possessions. There is disdain on the part of Collier towards Stroud because he perceives him to be a ne'er-do-well, dependent on the charity of his family, most particularly when it involves his own wife, Patricia. The fact that Collier for years would not give him a job in one of his many businesses grated on Stroud. Then when Collier finally relented and gave him a job, he only lasted 2 hours into the second day before he quit. That embarrassed and grated on Collier, especially when others teased him about it, as did State Mine Inspector Sexton at the CBM Mine Office the same day that Stroud quit. Collier at that time already promised to whip Stroud the next time he saw him. Stroud continued to aggravate the situation by frequently stopping by the mine office trying to pick up his paycheck for the short time that he did work. Collier perceived this as harassment of his clerical help. Finally, he received word somehow, I am quite sure, that Stroud had filed the discrimination complaint with MSHA.

It is difficult in this case to determine at what exact point Collier was pushed to his limit and formed the intent to perpetrate the assault on Stroud. It does not help that there is little in the way of credible evidence contained in this lengthy record from the principals involved. I find the credibility of Stroud, Collier, and Booth to be tainted by inconsistent and illogical testimony. And the testimony of the supporting witnesses, which primarily consists of various members of the Stroud family, is mostly in direct conflict depending on which side that particular witness supports. The Stroud family siblings are split over whether they are on the side of Collier and his wife, Patricia, or Stroud and his wife, Rose.

This is basically a domestic relations case that wound up before this Commission simply because a coal mine was peripherally involved as the situs of employment of the complainant. The case has nothing to do with mine safety or health issues. The incident giving rise to the case could just as easily have played out in one of Collier's gas stations. Perhaps more appropriately, there is also concurrently a civil tort action pending in state court in Kentucky for damages as a result of the admitted assault.

After reviewing the evidence once again and considering the arguments of the parties, I find that the assault on Stroud by Collier was based upon long-standing personal animosity between the two men, and would have taken place with or without Stroud filing the discrimination complaint. Accordingly, I find that

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Collier would have taken the adverse action complained of herein because of the unprotected activity of the complainant, Stroud, alone.

ORDER

In view of the foregoing findings and conclusions, and on the basis of a preponderance of all the credible testimony and evidence adduced in this case, I conclude and find that the complainant has failed to establish a violation of section 105(c) of the Act. Accordingly, his complaint IS DISMISSED, and his claims for relief ARE DENIED.

Roy J. Maurer
Administrative Law Judge

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