

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

601 New Jersey Avenue, N.W., Suite 9500

Washington, D.C. 20001

April 29, 2003

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2001-23-D
on behalf of MARK GRAY,	:	BARB-CD-2000-13
Complainant	:	
v.	:	
	:	
NORTH STAR MINING, INC.,	:	
MIKE CAUDILL and JIM BRUMMETT,	:	No. 5 Mine
Respondents	:	Mine ID 15-17437

Appearances: MaryBeth Bernui, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, on behalf of Complainant;
John W. Kirk, Esq., Kirk Law Firm, Paintsville, Kentucky, on behalf of Respondent, NorthStar Mining, Inc.;
Hugh Richards, Esq., London, Kentucky, on behalf of Respondent, Mike Caudill;
Jim Brummett, Arjay, Kentucky, *pro se*.

Before: Judge Bulluck

DECISION

This case is before me on a Discrimination Complaint filed by the Secretary of Labor (“the Secretary”) on behalf of Mark Gray, against North Star Mining, Inc. (“North Star”), Mike Caudill and Jim Brummett, under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (“the Act”), 30 U.S.C. § 815(c)(2).¹ The Complaint alleges that North Star, through its employees, Caudill and Brummett, forced Gray to quit his job as roof bolter, in retaliation for his involvement in a federal grand jury investigation of safety issues at North Star.² The Secretary

¹ Section 105(c)(2) provides, in pertinent part, that “Any miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination.”

² The Complaint was also brought on behalf of Roscoe Ray Young. Young declined to pursue his cause of action and withdrew his Discrimination Complaint prior to the hearing.

seeks back pay with interest, employment benefits and seniority for Gray, and civil penalties in the amount of \$50,000.00 against North Star, \$10,000.00 against Caudill and \$10,000.00 against Brummett, for their respective violations of the Act.³

A hearing was held in Kingsport, Tennessee. Prior to convening the hearing, the Secretary and Brummett negotiated a settlement agreement, the terms of which were read into the record by the Secretary's representative:

The agreement that's been reached between the Secretary and Mr. Brummett - - Mr. Brummett is no longer represented by counsel. At one point, he had been. Mr. James Wren, his attorney, had been called for National Guard duty in Italy . . . and the Secretary and Mr. Brummett have agreed that Mr. Brummett is admitting liability, and pursuant to his Plea Agreement, he has cooperated with the government and he has showed [sic] remorse and regret for his actions. He is currently employed but is not making a salary that would allow him to pay a \$10,000.00 civil money penalty. In light of that, the Secretary has agreed to reduce his civil money penalty to \$1,000.00.

Tr. 9-11. The parties presented testimony and documentary evidence, and filed post-hearing briefs. For the reasons set forth below, I find that the Secretary has failed to prove a violation of section 105(c) of the Act and, therefore, I dismiss the Discrimination Complaint against all Respondents. Furthermore, because I find that Jim Brummett did not threaten Gray, as alleged, I disapprove the settlement agreement between the Secretary and Brummett.

I. Factual Background

North Star, co-owned by Carl Kirk and Harold Porter, performs contract mining for larger companies and operates the No. 5 and 6 Mines, situated on opposite sides of a mountain approximately 1/4 mile apart, in Leslie County, Kentucky. Mark Gray was employed as a roof bolter in the No. 5 Mine on the second shift, 3 p.m. to 11 p.m., from December 21, 1999, to August 16, 2000, upon referral of his friend and former co-worker at other mines, Jim Brummett. Tr. 24-25, 28, 58-59, 150-51. Mike Caudill was superintendent of the No. 5 and 6 Mines, Thomas ("Eddie") Spurlock was assistant superintendent of No. 5 and Brummett, initially section foreman on Gray's shift in No. 5, transferred to No. 6 as assistant superintendent on May 1, 2000. Tr. 24-25, 148-49, 225.

At some point in late July 2000, due to an injury sustained by day shift roof bolter Terry

³ Under the plain language of the Act, individuals may be held liable for violations of section 105(c). Section 105(c)(1) provides, in pertinent part, that "No *person* shall discharge or in any manner discriminate against or otherwise interfere with the exercise of the statutory rights of any miner . . ." 30 U.S.C. § 815(c)(1) (emphasis added). "Person" is defined in the Act as "any *individual*, partnership, association, corporation, firm, subsidiary of a corporation, or other organization." 30 U.S.C. § 801(f) (emphasis added).

Roark, Gray was afforded the opportunity of transferring to the first shift, 7 a.m. to 3 p.m.; his pinning partner was Ray Young. Tr. 26-28. Gray commuted with Young to work each day from their homes in Harlan County, and when they had previously worked together on the second shift, they had ridden together during those times. Tr. 29.

In May of 2000, MSHA special investigator Gary Harris interviewed Gray at his home pursuant to an investigation of alleged roof support, ventilation and smoking violations at North Star. Tr. 17, 29, 128-29. Young was also interviewed. Tr. 30. As a result of its investigation, MSHA referred the matter to the United States Attorney for the Eastern District of Kentucky, and it was assigned to Assistant U.S. Attorney H. Davis Sledd. Tr. 128-29. On July 22, 2000, Gray and Young were subpoenaed to testify before a federal grand jury on July 27, 2000, in London, Kentucky. Tr. 17-18, 30-31. While Gray and Young were the only two miners subpoenaed in July, several others were subpoenaed and testified on August 31, 2000. Tr. 130.

After their next shift ended at 3 p.m., Gray and Young took their subpoenas to Mike Caudill in the No. 5 Mine office, with Eddie Spurlock and "parts man" James also present, and obtained permission to take leave to testify on July 27th. Tr. 30-33, 235-37, 260, 263-64, 275-76, 281. Prompted by questions from Gray and Young as to what the subpoenas were about, Caudill telephoned Sledd, who was referenced at the bottom of the subpoenas. Tr. 22, 202, 260. Caudill either identified himself as Gray or stated that he was inquiring about the nature of Gray's subpoena. Sledd responded that the grand jury was investigating unsafe mining practices at North Star's No. 5 Mine. Tr. 32-33, 191-93, 235, 260, 314-15, 324.

On July 27, 2000, Gray and Young traveled together and reported to the courthouse in London, Kentucky. Sledd and Harris were at the courthouse and took charge of the miners' activities. Young was called first to testify, while Gray sat outside the courtroom with Harris. At the conclusion of Young's testimony, Sledd determined that Gray's testimony would be essentially the same as Young's and decided not to call him to testify. Tr. 35-36.

Upon returning to work on the next day shift, and being asked by several co-workers, aware of the grand jury investigation, what had happened in London, Gray declined to say anything about his experience at the courthouse. Tr. 36-40. At some later date, which is unclear from the record, Spurlock told Gray that Brummett wanted to talk with him at the No. 6 Mine at the end of his shift, but Gray and Young went directly home. Tr. 41-42.⁴ When Gray reached

⁴ Gray testified that his telephone conversation with Brummett occurred a couple of days after he appeared in London to testify on July 27, 2000. Tr. 40-41. However, Exhibit G-4, the transcript of that conversation, is marked August 15, 2000. Both dates are inconsistent with Gray's other accounts of the sequence of events. Working backwards from the date he worked his last shift, a reasonable construction is that the telephone conversation occurred on or around Friday, August 11th; Gray and Young visited Brummett at No. 6 on Saturday, August 12th; Gray was informed that he would be returning to the second shift sometime around Tuesday, August 15th; and he worked his last day on Wednesday, August 16th.

home and discovered a telephone message to call Brummett at No. 6, Gray summoned Young back to his house. Tr. 40-42. After Young returned, Gray taped Brummett's second call because, in Gray's words, he "just had a feeling that [Brummett] wanted to discuss the grand jury - - just a feeling." Tr. 42-45; ex. G-3, G-4. During the conversation, Brummett made numerous inquiries about what happened in London and whether Gray or Young had testified against him. Gray, clearly nervous and upset, described the experience as a horrible ordeal, and repeatedly assured Brummett that he hadn't said anything about him. Gray told Brummett that he "[didn't] want no hard feelings over it," and Brummett responded, "No, they ain't no hard feelings, unless you put the screws to me, then I'll kill you." Ex. G-4. The conversation concluded with Brummett asking Gray to stop by No. 6 with Young the next day, and he assured Gray that he need not worry about losing his job or anything else. According to Gray, it was then that he began to seek other employment. Tr. 54.

After they finished working the following day, around 3 p.m. on Saturday, Gray and Young drove to No. 6 to see Brummett. Tr. 157. Due to a recent roof fall at the mine, two MSHA inspectors were in the mine office, and Brummett spoke to Gray and Young out in the yard. Tr. 157-58. During this conversation, Brummett is alleged by Gray to have sought assurances that Young had not testified against him, and to have threatened that if "anyone laid the screws to him that he would whip their ass." Tr. 49-50. Thereafter, Gray and Young left the mine in Young's truck, without incident, and Gray and Brummett had no further contact with each other until the hearing in this matter.

According to Gray, a couple of days after he and Young had visited Brummett at No. 6, Gray was informed by either Caudill or Spurlock that he was being transferred back to the second shift, because Roark was returning to his roof bolter position. Tr. 52. After returning to the second shift for one day, without notice to anyone at North Star, Gray quit his job and went to work for Cumberland Valley Resources. Tr. 52-54. According to Gray, he was unemployed only one day between jobs. Tr. 56. Gray filed a Discrimination Complaint at the MSHA field office in Harlan, Kentucky on August 31, 2000, alleging that he "was forced to quit because of constant harassment and required to go to second shift because of [his] Grand Jury involvement in an MSHA investigation," and named Caudill, Spurlock and Brummett as responsible management officials. Ex. G-2. At the time he filed his Complaint, Gray turned over the taped conversation with Brummett to MSHA officials who, upon Sledd's recommendation, turned the matter over to the Federal Bureau of Investigation ("FBI"). Tr. 19-20, 127-28, 200. There is no evidence that the FBI took any action respecting the Gray/Brummett tape.

As a result of criminal indictments brought by the U. S. Attorney, Caudill and Brummett entered into Plea Agreements with the United States. On July 13, 2001, Caudill pled guilty to knowingly and willfully violating a mandatory health and safety standard under the Mine Act, by failing to follow the approved ventilation plan at the North Star No. 5 Mine, was sentenced to probation, and nominally fined. Tr. 198-99; ex. G-6. Brummett pled guilty on October 25, 2001, to knowingly and willfully violating a mandatory health and safety standard under the Mine Act, by failing to follow the approved ventilation plan at the North Star No. 5 Mine, was sentenced to

one year probation, fined \$250.00, and prohibited from directly supervising any crews of miners in any coal mine while serving his probation. Tr. 160-61, 175-77, 196-97; ex. G-5. The Plea Agreements required that Caudill and Brummett “fully cooperate with the United States in the further prosecution and/or investigation of the matters set forth in the Information herein and any and all related matters, including but not limited to testifying truthfully in any and all proceedings related thereto if called as a witness therein.” Ex. 5, 6. Each Plea Agreement also provided that, in the event of Defendant’s breach, the United States could declare the Agreement null and void and could reinstate the charges then pending and/or seek an indictment for any and all violations of federal laws, including perjury or giving false statements. Ex. 5, 6.

II. Findings of Fact and Conclusions of Law

In order to establish a *prima facie* case of discrimination under section 105(c) of the Act,⁵ a complaining miner bears the burden of establishing that 1) he engaged in protected activity and 2) the adverse action of which he complained was motivated in any part by the protected activity. *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (April 1998); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981); *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (October 1980), *rev’d on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981).

The operator may rebut the *prima facie* case by showing that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Pasula*, 2 FMSHRC 2799-800. If the operator cannot rebut the *prima facie* case in this manner, it, nevertheless, may defend affirmatively by proving that it was also motivated by the miner’s unprotected activity and would have taken the adverse action for the unprotected activity alone. *Id.* at 2800; *Robinette*, 3 FMSHRC at 817-18; *see also Eastern Assoc. Coal Co. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987). While the operator must bear the burden of persuasion on its affirmative defense, the ultimate burden of persuasion remains with the complainant. *Pasula*, 2 FMSHRC at 2800; *Schulte v. Lizza*, 6 FMSHRC 8, 16 (January 1984).

In determining whether a mine operator’s adverse action was motivated by the protected activity, the judge must bear in mind that “direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect.” *Secretary of Labor on behalf of Chacon*

⁵ Section 105(c)(1) of the Act provides that a miner cannot be discharged, discriminated against or interfered with in the exercise of his statutory rights because: (1) he “has filed or made a complaint under or related to this Act, including a complaint . . . of an alleged danger or safety or health violation;” (2) he “is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101;” (3) he “has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding;” or (4) he has exercised “on behalf of himself or others . . . any statutory rights afforded by this Act.” 30 U.S.C. § 815(c)(1).

v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510 (November 1981), *rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983). "Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence." *Id.* (Citation omitted). In *Chacon*, the Commission listed some of the more common circumstantial indicia of discriminatory intent: (1) knowledge of the protected activity; (2) hostility or animus towards the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. *See also Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 530 (April 1991). The Commission has also held that an "operator's knowledge of the miner's protected activity is probably the single most important aspect of a circumstantial case" and that "knowledge . . . can be proved by circumstantial evidence and reasonable inferences." *Secretary of Labor on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (September 1999) (citing *Chacon*).

Gray claims that, as a result of his grand jury involvement, he was transferred back to the second shift, constantly harassed, threatened, and forced to quit his job, i.e., constructively discharged. Tr. 52.

It is well settled Commission precedent, by application of an objective standard, that "[a] constructive discharge is proven when a miner engaged in protected activity shows that an operator created or maintained conditions so intolerable that a reasonable miner would have felt compelled to resign." *Dolan v. F & E Erection Co.*, 22 FMSHRC 171, 176 (February 2000); *Secretary of Labor on behalf of Bowling v. Mountain Top Trucking Co.*, 21 FMSHRC 265, 272 (March 1999); *Simpson v. FMSHRC*, 842 F.2d 453, 461-63 (D.C. Cir. 1988). This reasonable person test focuses on the impact of the employer's actions, whether deliberate or not, upon a "reasonable" employee. *Levendos v. Stern Entertainment, Inc.*, 860 F.2d 1227, 1230 (3rd Cir. 1988). A forced resignation, then, is converted to a legally constructed discharge because "[c]onstructive discharge doctrines simply extend liability to employers who indirectly effect a discharge that would have been forbidden by statute if done directly." *Secretary of Labor on behalf of Nantz v. Nally & Hamilton Enterprises, Inc.*, 16 FMSHRC 2208, 2210 (November 1994) (citing *Simpson*, 842 F.2d at 461). Moreover, under any of the approaches used by the courts, it is not easy to meet the requirement that conditions be "intolerable," and "[m]inor or technical violations of the Mine Act, or those that do not endanger health and safety, ordinarily will not support a finding of constructive discharge." *Simpson*, 842 F.2d at 463. Whether conditions are so intolerable as to cause a reasonable person to feel compelled to resign is a question for the trier of fact. *Id.* The Commission has directed that, in resolving that question, factors be viewed in terms of the cumulative effect they could have on a reasonable employee alleging such conditions. *Bowling*, 21 FMSHRC at 276 (citing *Stephens v. C.I.T. Group/Equipment Financing, Inc.*, 955 F.2d 1023, 1027-28 (5th Cir. 1992); *Levendos*, 860 F.2d at 1230-31; *Williams v. Caterpillar Tractor Co.*, 770 F.2d 47, 50 (6th Cir. 1985). Finally, while an employee has a right to abandon a hostile work environment because he reasonably believes there is no chance of fair treatment, "an employee must give an employer a reasonable opportunity to work out a problem before quitting." *Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568, 574 (8th Cir. 1997) (citing *West v. Marion Merrell Dow, Inc.*, 54 F.3d 493, 497 (8th Cir.

1995)); *see Dolan*, 22 FMSHRC at 176 (in explaining that the key inquiry in a constructive discharge case is whether intolerable conditions existed such that a reasonable miner would have felt compelled to resign, the Commission emphasized that it is the operator's failure to reasonably remedy such conditions that converts the resignation into an adverse action); *see Simpson*, 842 F.2d at 459 (where reasonably possible, a miner refusing work should ordinarily communicate, or attempt to communicate, to some representative of the operator, his belief in the safety or health hazard at issue, unless unusual circumstances excuse a failure to communicate). This qualified communication requirement, then, is fundamental to claims arising under anti-discrimination statutes, because their protective "policies are best served when the parties, if possible, attack discrimination within the context of their existing employment relationships." *Levendos*, 860 F.2d at 1232 (citing *Watson v. Nationwide Ins. Co.*, 823 F.2d 360, 361 (9th Cir. 1987)).

Section 105(c)(1) of the Act specifically prohibits discrimination against miners who have "testified or [are] about to testify" in any proceeding under or related to the Act, and the parties have stipulated that Gray's involvement with the federal grand jury in London, Kentucky, was protected activity. Tr. 104. Caudill and Spurlock obviously had knowledge of the protected activity when Gray and Young took their subpoenas to the mine office seeking permission to be excused from work. The evidence indicates that Caudill's telephone inquiry to Sledd was made at the request of Gray and Young and, irrespective of the manner in which he introduced himself, he did not learn appreciably more from Sledd's general response - - the grand jury was investigating unsafe mining practices at North Star No. 5 - - than was obvious from the subpoenas on their face. Moreover, there is no indication from that encounter that Caudill attempted to influence or inhibit their testimony in any way. The unrebutted testimony is that, when asked by Gray and Young what they should do when they appeared before the grand jury, Caudill told them to go and "tell the truth." Tr. 260, 263-64, 315-16.

Gray must prove, therefore, that his transfer to the second shift was an adverse action and that it was motivated in any part by his protected activity or that, as a result of his protected activity, his work environment became so intolerable that he was forced to resign, i.e., constructively discharged.

II. A. Shift Change

While Gray has established that he engaged in protected activity, he has failed to establish a *prima facie* case because he has not shown that North Star took an adverse action against him when he was returned to the second shift.

North Star hired Gray for the second shift in December 1999, and he pinned on that shift until day shift roof bolter Terry Roark became disabled. While it has not been established exactly when that occurred, Gray was pinning with Young on the first shift when they were subpoenaed on July 22, 2000. According to Gray, when Caudill told him that he could transfer

to the day shift, he inquired whether it was “full-time,” and Caudill said that it was. Tr. 26-27. Assuming that this exchange took place exactly as Gray described, Gray asked the wrong question, since it is obvious now that he wanted to know whether the transfer was permanent, rather than full-time. In any case, there is ample evidence that Gray was told that he would be filling in until Roark returned to duty. Spurlock testified that when Roark got injured, he and Caudill told Gray that he could work the day shift until Roark returned. Tr. 230-31. When he informed Gray that Roark would be returning to his job, Spurlock testified, Gray was upset at the prospect of going back to his original shift. Tr. 231-32, 261. Spurlock further stated that, because Gray was regarded as a good roof bolter, he had told Gray that if Roark could not handle the job, they would put him back on the day shift. Tr. 262-63. According to Spurlock, when Roark could not perform his full-time duties on the day he returned, North Star had planned to return Gray to the day shift, except that Gray had quit, without notifying anyone at North Star. Tr. 232-35. It is North Star’s policy, Spurlock testified, to return injured workers to their positions. Tr. 233. This testimony was unrebutted by the Secretary, who has failed to show that Gray was treated any differently than other miners transferred as fill-ins for temporarily disabled miners. Caudill testified that Gray was a good worker, that when Roark got injured, Gray was “next in line,” and that both he and Spurlock had told Gray that the assignment was temporary. Tr. 335-36. The decision had been made by him and Spurlock to put Gray back on the second shift, Caudill stated, because Roark was returning to full duty. Tr. 335.

I credit Caudill and Spurlock’s testimony that Roark retained entitlement to his position while he was injured, and that Gray had been told that his transfer was only temporary. I also credit Spurlock’s testimony that, had Gray stayed on the job instead of quitting, he would have been assigned permanently to the day shift. On the other hand, for lack of any supporting evidence, whatsoever, I reject Gray’s assertions that he was transferred back to the second shift because of his grand jury involvement, and that North Star wanted to separate him from Young. Tr. 53. While Gray may have preferred the earlier shift, the Secretary has not shown an entitlement by Gray to the day shift while Roark encumbered that position, or that Gray suffered an adverse action when he was returned to the shift to which he had been assigned when he took the job. Assuming, *arguendo*, that Gray’s transfer had been shown to constitute an adverse action, North Star has proven that its actions were in no way based on Gray’s grand jury involvement, but solely on legitimate business concerns, respecting seniority rights of its workforce.

Although Gray’s transfer to the second shift did not constitute an adverse action, it will be revisited in the constructive discharge analysis in combination with his allegations of harassment, in order to determine whether his working conditions were intolerable.

II. B. Harassment and Constructive Discharge

1. Constant Harassment

Gray alleges that, following his grand jury involvement, he was subjected to constant harassment. On direct examination, he specified what he meant by this allegation:

Q. When was the next time you went to work at North Star after you had gone to London to testify?

A. The following day.

Q. When you returned to work, what happened?

A. It was just, "What'd you say in court," and stuff like that.

Q. Who said that to you?

A. Well, mainly employers [sic]. You know, the employees - - the employees and stuff like that the next day. Mainly, employees - - harassment by them Just harassment by the employees, you know. The employees was . . . wanting to know what was going on because they'd say, "Well, we were supposed to be interviewed," and stuff like that. So they wanted - - I guess, wanted to be prepared or something. I don't know.

Q. And did that bother you in any way?

A. It did, but you know, I didn't say anything.

THE COURT: You didn't tell them that you didn't testify?

A. No, ma'am, I didn't say a word I didn't say anything.

Q. Were there any supervisors who spoke to you about your testimony?

A. Mr. Spurlock was the only one that discussed it with me. He said that what I needed to do was just tell them that I'm a bolt man, not a curtain man, or anything like that.

A. Mr. Spurlock's a nice guy.

Q. Other than Mr. Spurlock, were there any other mine supervisors or supervisors at the mine who spoke to you about your testimony?

A. Mr. Brummett.

Tr. 36-40. By his own testimony, the constant harassment to which Gray referred amounted to inquiries made by his co-workers, who were anticipating being called to testify, themselves. There is no evidence that Gray seriously protested. Spurlock's comment does not establish that Gray had complained to him of harassment, but suggests that Spurlock appreciated Gray's

discomfort and offered a mechanism by which Gray could minimize friction between himself and the crew. Therefore, I do not find that the questioning to which Gray was subjected amounted to harassment. There are no other instances of “constant harassment” cited by Gray, except for the threats alleged to have been made by Brummett, which are discussed in detail below.

By all accounts, Brummett and Gray had been friends since they had worked together for several years at Calvary Coal and Good Coal, where Brummett had been superintendent. In fact, Brummett was responsible for getting Gray hired at North Star. Much has been made by North Star about the affection and comradery between Gray and Brummett at the hearing, both inside the courtroom and during lunch recess, but personal observation of their behavior simply corroborates what is amply established by the record - - that they were good “buddies.” Tr, 163-64, 270-72. It is abundantly evident that they highly regarded one another and harbored no animosity respecting the incidents giving rise to the “threat” allegations. Tr. 58-60, 112-13, 156, 214, 302-03. It is against the backdrop of this friendship that perhaps the most serious allegation, i.e., that Brummett threatened Gray with bodily harm, must be evaluated.

2. Phone Call and Visit to No. 6

Brummett’s testimony is unclear as to whether Caudill *suggested* that Brummett call Gray if he wanted to ask his friend about the grand jury proceeding, or *directed* him to make the call. Tr. 152-53, 156, 185-86. Brummett testified that he would have made the call anyway, because Gray was his friend. Tr. 156. Caudill, on the other hand, testified that he does not remember telling Brummett that Gray and Young had been subpoenaed, or requesting that Brummett call Gray. Tr. 311-12. On this point, neither gave reliable testimony.

There are some compelling factors which most likely had a chilling effect on Caudill and Brummett giving truthful testimony. Both witnesses were questioned about their Plea Agreements and, at the time of the hearing, neither had completed his probation. Recapping a pertinent part of the Plea Agreements, they mandated full cooperation with the government in all matters related to the unsafe practices at North Star, including testifying truthfully in all related proceedings, under penalty of indictment for violation of federal laws, including perjury. The Secretary’s representative even incorporated Brummett’s “cooperation with the government” into their proposed settlement agreement in the instant case. Moreover, Assistant U.S. Attorney Sledd and MSHA investigators Harris and Brock, all involved to some degree in the investigation and ultimate indictments of Caudill and Brummett, were present in the courtroom and testified at the hearing. Caudill faced the dilemma of appearing *uncooperative* had he denied responsibility for Brummett’s call to Gray or that he had wanted to get rid of Gray, and incriminating himself by admission. He tried his best to straddle the fence by claiming lack of memory; otherwise, his testimony was credible. Brummett, on the other hand, unrepresented and extremely nervous, did a poor job of attempting to *cooperate* with the government, while defending himself at the same time. His statements to the effect that Caudill transferred Gray back to the second shift to separate him from Young, and that Caudill commented, “there’s trouble gone,” after Gray had quit, are inconsistent with the balance of the evidence and

transparently self-serving. Brummett had been backed into a corner. After all, he had already been indicted, fined and was serving probation. Furthermore, from his vantage point, he had just avoided a \$10,000.00 penalty by admitting that he had made the threatening statement, appearing remorseful, and agreeing to pay \$1,000.00 to settle the matter. At this juncture, because Caudill provided no insight into the scenario, I find that Caudill suggested that Brummett call his friend for information. Had he directed that Brummett do so, however, there is no indication that he instructed Brummett to threaten or otherwise intimidate Gray; nor was there any reason for Caudill to believe that Brummett would do so.

I have thoroughly reviewed the tape and transcript of the telephone conversation between Brummett and Gray. It is noted at the outset that the tape begins with the conversation already in progress, and portions of some statements are inaudible.

Brummett, obviously concerned that he would be held legally responsible for the alleged violations under investigation, and anticipating being called to testify, himself, sought general information about the grand jury proceedings, and reassurance that Young and Gray had not told the grand jury anything that would incriminate him. Tr. 170. Because Gray's charges of harassment by Brummett are so egregious, it is important to view the alleged threat in the context of the broader conversation:

BRUMMETT: Hey, what did you'uns talk about down there?

GRAY: Ah, buddy, I, I didn't say nothing, Jim.

BRUMMETT: Did Ray put the fucking to me?

GRAY: Buddy, I don't know, buddy. Jim they [took] us in . . .

BRUMMETT: . . . in separate?

GRAY: Yeah.

BRUMMETT: You didn't put the fucking to me, did you?

GRAY: Ah buddy, I, I didn't say nothing to them, Jim.

BRUMMETT: You should have told them what, how safe a miner I was.

GRAY: (Laughter) I didn't say nothing, buddy. Buddy, that place flipped me out down there.

BRUMMETT: What's that mean?

GRAY: Shit, you've [sic] got frisked, handcuffed and everything else.

BRUMMETT: They didn't handcuff you, did they?

GRAY: No, it was probably next - - that's what I was afraid they were going to do next thing.

BRUMMETT: (Laughter) I bet you was scared to death, I bet . . .

GRAY: Yeah.

BRUMMETT: . . .you spilt your guts on me, didn't you?

GRAY: Naw, I didn't say nothing.

BRUMMETT: What all did they ask you?

GRAY: Buddy, just a bunch of stupid questions, you know? About five seconds worth of questions.

BRUMMETT: Did they ask you anything about me?

GRAY: Buddy, not really, Jim.

BRUMMETT: Just about North Star?

GRAY: Mainly. Mainly, Jim.

GRAY: I don't see why they put me in this position, you know what I'm saying?

BRUMMETT: Ah, you can't pay no attention [to] the mother fuckers . . .

BRUMMETT: . . . you didn't break no law.

GRAY: Shew. They just worry me, buddy.

BRUMMETT: (Laughter).

GRAY: (Laughter).

BRUMMETT: They want a man to say something so they can get a big lot of money out of somebody. That's all it's about.

BRUMMETT: Yeah, you don't want to go, but I'll be a going, I'd say.

GRAY: Well, it shocked me that when they gave me that summons there . . .

BRUMMETT: You should have brought it to me.

BRUMMETT: (Laughter) Hey, tomorrow, tell Ray to stop over, hear me? You'uns working tomorrow?

GRAY: Yeah.

BRUMMETT: Tell him to, I'd like to talk to him about five minutes.

GRAY: Well.

BRUMMETT: I mean, it ain't no, I ain't going to say what you tell me.

GRAY: Yeah.

BRUMMETT: If I was to go down there . . . You know what I'm going to tell them? When they call me down, I'm going to tell them to kiss my ass, if they say much to me.

GRAY: Buddy, they're scary down there, Jim.

BRUMMETT: They don't scare me.

BRUMMETT: You know, they're not investigating you'uns. I know, me's the one they're after.

GRAY: I don't know what they're after, buddy.

BRUMMETT: I know what they're after. They're after every man that's got foreman's papers

BRUMMETT: You ain't no boss. They can't fine you.

GRAY: They just scare me to death, Jim.

BRUMMETT: Don't worry about that shit. They can't, they can't bother you.

GRAY: You know, they all think, you know, that I'll wind up losing my job over there.

BRUMMETT: No.

GRAY: I don't want no hard feelings over it.

BRUMMETT: **No, they ain't no hard feelings, unless you put the screws to me, then I'll kill you.**

GRAY: (Laughter).

BRUMMETT: (Laughter) You know how I always try to treat everybody right, try to do the safest thing I know how.

GRAY: Yeah.

GRAY: You all working tomorrow?

BRUMMETT: Yeah, yeah, you'uns are too, ain't you?

GRAY: Yeah, I'd say, we'll have to run coal tomorrow.

BRUMMETT: Yeah, I'd say you're right.

GRAY: I finally, I, I tell you, I just need a break from all this, buddy.

BRUMMETT: (Laughter)

GRAY: I'm serious, I need a break. All this stuff's got me nervous as a cat, buddy. I'm as nervous as a long tail cat in a house full of rocking chairs.

BRUMMETT: You tell Ray to stop over here and talk to me a minute.

GRAY: Well, I will.

BRUMMETT: I'd like to know what's going on 'for I have to go down there. You know, I don't want to be surprised when I walk in that room.

GRAY: Shew (laughter)

BRUMMETT: You don't have to worry about losing your job or getting screwed over. That ain't going to happen.

GRAY: Well, I didn't, I, it, it shocked me having to go down there. Jim, I didn't even know.

BRUMMETT: That's strange, getting the bolter men and not the one that told them which place to bolt, isn't it.

GRAY: I, I asked them, I said, how come me and my buddy got picked here? He said, well, it's this way, said you all were at the top of the list.

GRAY: But I don't know, Jim, I swear I don't.

BRUMMETT: Why don't you stop over here at the mine tomorrow?

BRUMMETT: You know, I'll be outside here.

GRAY: Well, we will.

BRUMMETT: Don't worry about it.

GRAY: Whew, okay.

BRUMMETT: Okay.

GRAY: Okay, we'll see you later, Jim.

BRUMMETT: See you.

GRAY: Bye.

BRUMMETT: Bye.

Ex. G-4 (emphasis added).

The question presented by this conversation is whether Brummett meant the literal meaning of the words, "I'll kill you," or whether he was speaking figuratively, as in, "I'll *really* be upset with you." A good starting point in resolving this question is the declarant's explanation of what he meant or, in this case, did not mean, by his choice of words. One consistent thread running throughout Brummett's testimony was his insistence that he never meant to threaten Gray, he "wasn't going to kill him," and he used the words only as a "figure of speech." Tr. 168. On the other hand, Gray testified that fear for his life and the lives of his family shocked, frightened and worried him. He also attested to having been confused by Brummett's comment. Tr. 47-48, 55, 67, 89-90, 112-13, 292-93, 302-03. For example, when asked on direct examination whether Brummett's laughter lessened the impact of the words, Gray had this to say: "In a way, yes; but, yeah, in a way, because . . . I was kind of shocked at - - you know, because he would say that, you know, because he never had before." Tr. 48.

Gray acknowledged that the grand jury experience in London had been intimidating and

highly stressful. Tr. 70, 90-93, 298-301. His behavior, recalling Young to his house and running the tape when Brummett called, establishes that he was already distraught before the conversation began. Talking about the London experience seemed to have worsened matters, especially since Brummett broached one of the subjects that Gray feared most - - that he was being regarded as a snitch. Gray repeatedly told Brummett that he was “all shook up’ over the trip to London and used figures of speech, himself, e.g., “frisked, handcuffed and everything else,” to describe how the courthouse had “flipped him out.” In response, Brummett devoted considerable effort to assuaging Gray’s fears by reassuring him that he was not in danger of losing his job and that he was not a target of the government. Because of Brummett’s protective behavior toward Gray, along with fits of interspersed laughter on both parts, I am convinced that Brummett’s statement amounted to no more than an exaggerated expression, commonly used between friends who expect loyalty from one another. This would explain why Gray made no protest or defense, whatsoever, and gave Brummett no indication that he had taken offense to his comment. Tr. 291-92. Moreover, Gray admitted that he told no one about the alleged threat. Tr. 62-63. While Gray was observed to have a quiet manner, he did not impress me as totally passive. In fact, in that same discussion, Gray agreed to visit Brummett at No. 6 the next day. It strains credulity that Gray would voluntarily seek out the person to whom he attributed threats to his life, especially since that person had no supervisory authority over him. In any case, although I find that Brummett did not threaten Gray over the telephone, given Gray’s fragile emotional state after his trip to London, I give him the benefit of the doubt and accept, for the sake of argument, that he *believed* Brummett had threatened him.

Brummett told Gray to stop by No. 6 with Young because he did not want to be surprised when he had to testify before the grand jury. It is reasonable to surmise that he wanted Young’s version of what had transpired in London. Brummett testified that two MSHA inspectors and a few other miners were at No. 6, and that he spoke with Young and Gray together in the mine yard, mostly about the recent roof fall and, maybe, what was said to the grand jury. Tr. 157-58. He stated that he did not threaten Gray. Later in his testimony, Brummett completely changed his story. According to him, his request had been an invitation that Gray and Young attend an Employee Appreciation Day dinner, catered by his wife, at the mine. Not only did they attend, Brummett asserted, but they sat down and ate along with the MSHA inspectors. Tr. 165-68. Mary Ann Brummett gave credible, detailed testimony about the dinner she had catered for the miners, but was unable to specify the Saturday on which the event occurred or whether Gray and Young had attended, since she had never met either miner. Tr. 268-74. Therefore, I ascribe no weight to her testimony. Gray testified that he did not observe a dinner being held at No. 6 and gave a different account of the meeting. Tr. 213, 276-77. He testified that Brummett spoke with him and Young separately in the yard. According to Gray, Brummett questioned whether Young had said anything negative about him and threatened that “if [he found] anybody laid the screws to [him] . . . [he’d] whip their ass.” Tr. 77-80, 283. Gray did not testify that he questioned Brummett about the remark, protested or made any response. Thereafter, he and Young left the mine. Brummett’s altered recollection so late in the proceeding defies reason and, therefore, his testimony on this issue is wholly unreliable. From Gray’s own testimony, it appears that Brummett’s apprehension about Gray had been quieted, but that he still had concern about

Young. Because Brummett called the meeting to grill Young about his grand jury testimony, I find that he made the “whip ass” statement, as alleged. I am persuaded, however, that it was directed at Young, not Gray, and that it was no more than an exaggeration like the telephone “threat,” rather than an intent to harm anyone. It would have been helpful to have heard from Young as to what had been said between him and Brummett, but he was not called as a witness. While I find that Brummett did not threaten Gray, it is also my finding that Gray *believed*, once again, that he had been threatened and, as in the case of the phone conversation, he did not report the incident.

3. The Work Conditions

The seminal question is whether North Star created or maintained conditions so intolerable that it was reasonable for Gray to quit his job. Gray makes no claim that anyone at North Star attempted to influence his testimony before he went to London. That Caudill told him and Young to go and tell the truth was un rebutted. Gray testified that being subpoenaed to testify had been extremely upsetting and stressful. Tr. 90-93. He explained that he had not wanted to testify and had worried about his reputation, because the code among coal miners is that what happens underground stays underground. Tr. 299-302. Over a relatively short period of less than three weeks, but on the heels of his grand jury involvement in London, Gray claims that queries by his coworkers, threats over the telephone and at No. 6 by Brummett, and transfer back to the second shift constituted compelling reasons for him to walk off the job. Curiously, he told no one that he felt harassed or that he planned to leave. Gray admitted that North Star’s management, with the exception of Brummett, treated him fairly, and that he had no reason to believe that Caudill or other company officials were involved in Brummett’s actions. Tr. 296-97. He also acknowledged that there was no basis for assuming that bringing the alleged harassment to North Star’s attention would have been futile. Tr. 80, 293-94. When asked why he had failed to complain about being harassed to anyone at North Star, or to an MSHA inspector when the incident occurred at No. 6, Gray responded that he had no reason, he wasn’t thinking straight - - that he had decided to diffuse it by getting away from it. Tr. 290-95. He also admitted that, because he had not brought his concerns to North Star’s attention, it could not have “fixed” the problem. Tr. 295. Apparently, he focused his attention elsewhere, considering that, by his own account, it took him only three to four days after the call from Brummett to find another job. Tr. 54. Clearly, he had an alternative to searching for employment; he could have chosen to apply his efforts to the job he held.

Viewing Gray’s work environment in terms of the cumulative effect of the alleged harassment, I do not find that conditions were so intolerable that it was reasonable for him to quit his job. Assuming that they were, however, Gray has failed to establish that the circumstances surrounding the incidents, taken individually or cumulatively, prevented him from effectively communicating to management his belief that he was being harassed, so as to afford North Star the opportunity to resolve the problem. Based on Gray’s own testimony, there is every indication that North Star would have taken appropriate action to protect him from any perceived threat to his health or safety, had it been given the opportunity. There is no evidence that North Star

supported any harassment or that it would have been tolerated by the company. Moreover, Gray's effectiveness in securing other employment persuades me that he was capable of effectively communicating with North Star, had he wished to remain employed. Therefore, his failure to communicate is not excused.

Based on the record in its entirety, I find that Gray's resignation from North Star, without notice, was entirely voluntary, and that the Secretary has failed to establish, by a preponderance of the evidence, that he suffered any adverse action or was constructively discharged. Therefore, the Secretary has not proven that North Star discriminated against Gray.

III. Motion to Approve Settlement

The issue of Brummett's alleged threats was fully litigated in the Secretary's claim against North Star, and I have found that no threat occurred. I have also found that Gray voluntarily resigned from North Star and that he was not constructively discharged. In the absence of an adverse action, no finding of discrimination can be made. *See Dolan, 22 FMSHRC at 175.* Accordingly, I disapprove the settlement agreement, consistent with my finding of no discrimination in this case.

ORDER

Accordingly, inasmuch as the Secretary has failed to establish, by a preponderance of the evidence, that Gray was transferred to the second shift for engaging in activity protected under the Act, or that he was constructively discharged, it is **ORDERED** that the motion for approval of settlement agreement between the Secretary of Labor, on behalf of Mark Gray, and Jim Brummett is **DENIED**, and this Discrimination Complaint against North Star Mining, Inc., Mike Caudill, and Jim Brummett, under section 105(c) of the Act, is **DISMISSED**.

Jacqueline R. Bulluck
Administrative Law Judge

Distribution: (Certified Mail)

MaryBeth Bernui, Esq., Office of the Solicitor, U.S. Dept. of Labor, 2002 Richard Jones Rd., Suite B-201, Nashville, TN 37215

Mark Gray, P.O. Box 465, Grays Knob, KY 40769

John W. Kirk, Esq., Kirk Law Firm, P.O. Box 339, Paintsville, KY 41240

Hugh Richards, Esq., 215 South Main Street, London, KY 40741

Jim Brummett, P.O. Box 174, Arjay, KY 40902

\ej