

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
601 NEW JERSEY AVENUE, N.W., SUITE 9500  
WASHINGTON, D.C. 20001

August 30, 2007

STEVEN C. COLLINS, : DISCRIMINATION PROCEEDING  
Complainant :  
 : Docket No. KENT 2007-15-D  
v. :  
 : Mine No. 4  
NORTHFORK COAL COMPANY, : Mine ID 15-18340  
Respondent :

**DECISION**

Appearances: Daniel F. Dotson, Esq., Whitesburg, Kentucky, on behalf of the Complainant;  
Melanie J. Kilpatrick, Esq., Rajkovich, Williams, Kilpatrick & True, PLLC,  
Lexington, Kentucky, on behalf of the Respondent.

Before: Judge Melick

This case is before me upon a complaint of discrimination filed by Mr. Steven Collins pursuant to Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, the “Act”, alleging that he was discharged by the Northfork Coal Company (Northfork) on August 8, 2006, presumably in violation of Section 105(c)(1) of the Act.<sup>1</sup> More particularly, Mr. Collins alleges in his complaint filed with the Department of Labor’s Mine Safety and Health Administration (MSHA) on August 9, 2006, as follows:

---

Section 105(c)(1) of the Act provides as follows:

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, representative of miners or applicant for employment in any coal or other mine subject to this Act, because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to the Act, including a complaint notifying the operator or the operator’s agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment 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 because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

I made safety complaints several weeks about a grinder that I used daily, nothing was done. I was struck by a piece of steel on 8/8/06 from the grinder, complained again and was discharged.

A miner alleging discrimination under the Act establishes a *prima facie* case of prohibited discrimination by proving that he engaged in protected activity, that adverse action was taken by his employer and that the adverse action was motivated in any part by that protected activity. *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-8000 (October 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981). For the reasons that follow, I find in this case that, while Mr. Collins did engage in protected activity, he suffered no adverse action from Northfork. Indeed, the credible evidence shows that Collins voluntarily resigned from his job with Northfork on August 8, 2006.<sup>2</sup>

There is no dispute that on August 8, 2006, as well as before that date, Mr. Collins complained about the brush portion of the grinder machine used by roof bolters to smooth the rough edges on their steel roof bolts. There is also no dispute that the brush had been worn down and on August 8, 2006, a piece of steel struck a can of snuff Collins had in his shirt pocket as he was using the brush. There is also no dispute that he then almost immediately complained to supply clerk Raymond Sturgill and shortly thereafter to mine manager Bill Robinson, about the worn brush and the fact that he had been struck by a piece of steel while using it.<sup>3</sup>

Collins testified that on August 8, 2006, he was working as a roof bolter. He had 11 years prior experience as a roof bolter and had worked for Northfork for two years. Collins testified that before entering the mine it was his practice to prepare extra "steel". On the morning at issue, he was using the grinder to take the edge off the steel that had been cut. According to Collins, all of the bolters used the grinder to clean slag off the steel. Slag is cleaned to facilitate the insertion of the steel into the mine roof. As he was using the brush portion of the grinder on that date, a piece of steel hit him. According to Collins, the brush was worn and the bristles were brittle. He told clerk, Raymond Sturgill, that a piece of steel hit him and asked Sturgill when he was going to get a new brush. Mine superintendent Bill Robinson then passed by and Collins asked him why he did not get a new brush. According to Collins, the following exchange then occurred:

---

<sup>2</sup> There is no claim in this case that Collins' departure was based on a "constructive discharge" theory. See *Dolan v. F&E Erection Co.*, 22 FMSHRC 171, 176 (February 2000).

<sup>3</sup> While it is also undisputed that Collins also complained about the safety of the worn brush to state and federal mine inspectors, it is clear that those complaints were made after his employment had already been discontinued (Tr. 59-60, 155-156).

Q. All right. Tell me who you ran into that morning to complain about the grinder and the brush again?

A. First I had seen Raymond, like I said, he was the guy that ordered the stuff and I asked him, I said - - well, the piece of steel had flew up and hit me up underneath the arm and I had a can of Skoal in my pocket and it knocked it out.

I asked him, I said, Raymond, when are you all going to get us a brush. He started cussing and stuff and he said I told you I can't get you one.

I said well - - and Bill come out there, just right after that.

Q. Who is Bill?

A. He's the superintendent.

Q. What is his last name?

A. Robinson.

Q. Okay. Go ahead.

A. And I asked Bill, I said, Bill, I said why don't you get us a brush, buddy. I said we've got the have one; I said that makes two or three times that piece of steel has flew up and hit me. I said it's wore out; somebody is going to get killed. I said it could have flew up and hit me in the face which it probably would have if it hadn't hit me underneath the arm.

And he said what do want me to do, and which he said a bunch of bad words.

JUDGE MELICK: Well you will have to say the words that were used.

BY MR. DOTSON:

Q. We are over 18, Stevie. Tell him what he said to you.

A. He said what do you want me to do, shit one out. I said, well, I said the only thing I want is one. He said, well, he said I can't get one. That's the exact words he said.

Q. What happened next?

A. So then I stood in there a minute and I said, well, I'm going to talk to him, then we had an inspector there. He was in the other - - he walked over to the other building.

JUDGE MELICK: Mr. Robinson left at that point?

THE WITNESS: Yes, he left. And so I didn't want to cause any trouble, you know, around the inspector. I didn't want to get you know the inspector to know, you know, get him in any kind of trouble.

So I called him outside, I said, Bill, I said why don't you go, you know, get us a brush.

JUDGE MELICK: Wait a second. Are you talking to the inspector now?

THE WITNESS: No, I'm talking to Bill.

JUDGE MELICK: Why did you say he left the scene?

THE WITNESS: Yeah, he left out the one building and walked over to the other building.

JUDGE MELICK: I see. And then you followed him?

THE WITNESS: Yeah. I followed him over there. He walked in the building. I walked over there and I said, Bill, I said come out here a minute and let me talk to you. So he walked outside and I said, Bill, I said all I want is a brush. I said, you know, I said I've got to work; I've got a family to take care of.

He said I told you once I can't get no damn brush. I said, well, it's been like that for over two months. He said, I know he said it's been like that for two damn months but he said like I told you I can't get one.

I said well - - he said furthermore he said if you don't like the way I run - - or I asked him, I said, well, I said if you can't get me one I said give me Ross Kegans' phone number. He wouldn't do it.

And the way he got things over there you are supposed to go to your boss, then to your superintendent and they go to the main one which is Ross Higgins.

JUDGE MELICK: Ross Higgins, what is his position?

THE WITNESS: He was the main one over the company.

JUDGE MELICK: He was over Mr. Robinson?

THE WITNESS: Yes. yes.

JUDGE MELICK: Higher management?

THE WITNESS: Yes.

JUDGE MELICK: Do you know what his exact title was?

THE WITNESS: He's over the whole company I do believe. I'm not for sure.

MR. DOTSON: Your Honor, for the record, he's referring to a fellow by the name of Ross Kegan. It's not Higgins.

JUDGE MELICK: Is that stipulated?

MS. KILPATRICK: How do you spell his name?

MR. DOTSON: As best I remember, Your Honor, It's K-E-G-A-N OR K-E-AG-A-N?

MS. KILPATRICK: I think it's one N and one A. K-E-G-A-N.

JUDGE MELICK: Okay. Kegan it's stipulated that his name is Ross Kegan.

THE WITNESS: And I asked him for his phone number and he said I ain't giving you his damn phone number; you don't need it. I said, well, Bill, you know I said we've got a chain of command I said they us [sic] whenever I got hired on here I said that's what we're supposed to do, you know, we go to our boss first, to you, I said then if you don't satisfy our needs then we go to Kegan.

He said, well, you are not getting his phone number. I said well. He said if you don't like the way I run things here he said there's the damn road hit it. He said, as a matter of fact, there's the damn road and you can hit it anyhow.

(Tr. 23-29)

Only later, under cross examination did Collins claim that Robinson also told him at this time that "you're fired, just find yourself another job" (Tr. 58-59). Collins claims that Robinson told him that he was fired before he talked to the state inspector (Tr. 59-60). The alleged adverse action would also have occurred before Collins requested the telephone number for MSHA (Tr. 155-156).

William McFern, another Northfork roof bolter who also worked with Collins, testified that he too had used the brush after cutting some steel that morning and agreed that the brush needed to be replaced. That same morning he saw Collins after a piece of steel knocked a can of snuff out of Collin's pocket. Contrary to the Complainant's testimony, McFern testified that Raymond Sturgill and possibly mine manager Robinson, also told the Complainant that they had ordered a new brush but that it had not come in yet. According to McFern, Robinson also told Collins that he just

“couldn’t shit one”. McFern testified that, while the brush makes it easier to clean the steel, it is not necessary to use the brush and you can use alternative methods to get the steel inserted.

Barry Honaker was also a roof bolter operator on the Complainant’s shift on August 8, 2006. He too had used the grinder and brush to clean burrs off the steel to make it easier to insert. He too had asked Sturgill several times before that date to get a new brush. Honaker testified that Sturgill told him that a new one had been ordered. Honaker observed that after the piece of steel struck Collins, Collins asked Sturgill if he was going to replace the brush and Sturgill told him not to use the “damn thing”. Honaker recalled that Robinson also told Collins not to use “the damn thing”.

Mine superintendent Billy Ray Robinson testified that, at the beginning of the shift on the morning of August 8, 2006, the Complainant approached him asking for a layoff slip to take to the employment office to draw unemployment benefits (Tr. 96). Robinson testified that he told Collins that they were not laying off and refused to give him a layoff slip. Collins was complaining also at that time that the third shift had not been loading the roof bolts correctly. Robinson described these and subsequent events in the following colloquy at hearings:

A. [Robinson] I said [to Collins] I’m not going to jump on the third shift over the way they load a roof bolter because some nights you’re lucky even if they’re loaded because of just things going on on the shift. And I’m definitely not going to jump onto them about the way they turn the bolt heads on a bolter, when they load the pinner.

Well, he went off, he got frustrated at that point and he walked off. Well a few minutes later he come back and said - - exactly how was it he said it? He said you’re going to have to do something about that grinder out there.

I didn’t know that him and Raymond [Sturgill] had done had an interaction inside the shop.  
Q. Okay.

A. And he said I got hurt on that grinder out there a minute ago. I said what do you mean you got hurt. He said I was trying to clean my steel up, dress my steel up and he said it flew up. He said we told you that it needs a brush put on it.

I said, Thirty-eight [Collins’ nickname], we’ve got one ordered. That’s all I can tell you; it’s ordered. The one that came in was not the proper brush for it. Earl had to - - the guy we ordered it from, Electric Motor, Earl Booher is the salesman. I said he had to order another brush; that brush does not work. It won’t work on that grinder.

And he said, well, I got hurt on it. He said it flew up and hit me in the arm and he said - - then he started going on about how I didn’t know how to manage a coal mines.

He said this is the most mismanaged place that I’ve ever worked in I mean there is nothing else I can do, my hands are tied. I’ve got the parts ordered.

But when he told me that I didn’t know how to manage a coal mines, I got pretty frustrated and I looked at him and I said, now listen, if you don’t like the way I manage this coal mine, then the best thing I can tell you is you need to find you another job. And that was my words, if you don’t like the way I manage this mines.

Q. Did you tell him that he was fired?

A. No, ma’am. That was never uttered out of my mouth. And he turned and went into the changing room - - now I guess at that point because I had other guys coming to me and

talking to me about a number of different things, so you know as far as the time frame I can't precise chronological - - but then he came back and he handed me his - - he had his rescuer in this hand.

I said put it in the office. He went on in - - he went on in the foreman's office while I was talking to some else. A few minutes later he came back and he said - - no, he didn't say nothing to me.

He went back in the changing room and I guess he talked to some of them boys over there. I don't know. Then a few minutes later, I don't know how many minutes it was, it was probably - - the mantrips I guess had done left at that time.

I saw him back his truck down there and he had a tote that he carried his stuff in. He kept his stuff, a lot of guys keep a tote just like a Rubbermade tote. They keep their stuff locked up in it rather than haul it back and forth in their vehicle.

Q. Where did they keep the tote?

A. In the changing room.

Q. At the mine?

A. Yeah. It's just a little ole trailer there where everybody changes clothes in. And then as he was leaving, he said I'm going to get to this bottom of this. He said I'm going - - I'm going, I'm going to get to the bottom of this somehow.

Q. I'm sorry. What did he do with his tote?

A. He put it in the back of his truck and left.

Q. Took it out of the changing room?

A. Yeah. Put it in the back - - he backed his truck down there to the office. They normally park up the hill. He went up and got his truck and brought it down there and backed it in there to load his tote in.

Well he said something to the effect I'm going to get to the bottom of this. Well during that time I get phone calls every morning from my bosses. They want to know what the previous day's productions were.

Q. Let me stop you and go back on something. When he gave you his self-rescuer and when you saw him load up his tote out of the changing room, how did you interpret that action?

A. He quit. I mean normally when a guy goes and gets his rescuer and brings it and hands it to you that's a pretty good sign that he's quit, you know.

JUDGE MELICK: Has that been done before? Have you had other employees just hand you their self-rescuers?

THE WITNESS: Yes, I mean get their stuff, hand you the rescuer and never say nothing. I had a guy one day just never said anything to me. He got his payroll check, went over in the shop - - I mean over in the office got his stuff, came over and laid his rescuer on the desk and went up the hill and never said nothing to nobody.

JUDGE MELICK: What is the practical effect of leaving your rescuer? Is that mine property?

THE WITNESS: Yes.

JUDGE MELICK: Self rescuers?

THE WITNESS: Yes, yes. That's something we issue to the employees. Self contained self-rescuers.

JUDGE MELICK: All right. You need that and it's required by law to take that into the mine with you; correct?

THE WITNESS: Yes, it is. Uh-huh. Yeah.

JUDGE MELICK: And if you don't have that are - -

THE WITNESS: You can't go underground.

JUDGE MELICK: All right. So for all practical purposes you interpret that as what?

THE WITNESS: As he quit. He turned it in.

(Tr. 97-103)

Northfork mine clerk Raymond Sturgill testified that he, as mine clerk, was in charge of ordering supplies. He observed the confrontation on the morning of August 8, 2006, and described it in the following colloquy:

Q. Okay. Tell us if you would go back and tell us about your first contact with Mr. Collins on that day?

A. On that day that morning I was in the shop, I was doing inventory to see what we needed for parts that day. Mr. Collins was over there at the grinder where they grind their steel off. I heard a loud thump. I turned around, he had grinding on his steel and he told me, he said you all are going to have to fix this damn thing.

Q. Okay. Are those the exact words that he said?

A. That's the exact words he said.

Q. Okay. And what was your response?

A. I told him, I said, Steve, we've got the parts ordered for the grinder and you was not supposed to be using it.

Q. Okay. Had you previously told Mr. Collins not to use the grinder?

A. I don't specifically remember if I told him specifically but they knew.

Q. Okay. Who is they?

A. All the pinner men that use the grinder to grind their steel off.

Q. How did they know?

A. We had told them not to - - not to use it until the part come in.

Q. Okay. Had you told all of them not to use the brush - - first of all, are we just talking about the brush side of the grinder or - -

A. The brush side, yes.

Q. Had you told all the pinner men not to use it?

A. To the best that I can remember, I don't know if I told them all or not.

Q. So you say the parts had been ordered for the grinder?

A. Yes, we had ordered - - we had ordered the part prior to this and they had sent the wrong brush and we had to send it back because it was the wrong part. It wouldn't fit the - - it wasn't the right size.

Q. Okay. And as of August 8, 2006, the day that this happened had the new brush, the correct brush come in yet?

A. No, it hadn't.

Q. Was it still on reorder?

A. Yes, ma'am.

Q. An what happened next?

A. You know after I told him that we had the part ordered for it, they wasn't supposed to be using it, Bill come into the shop and he started on Bill.

Q. Okay. What did he say to Bill?

A. He just told him, said he was going to have to fix the grinder, you know, and Bill told him we had the part ordered for it.

Q. What - - what was Mr. Collins' tone of voice?

A. He was very loud.

Q. In your opinion was it an appropriate way to speak to the boss?

A. No, ma'am.

JUDGE MELICK: In what way was it inappropriate?

THE WITNESS: He just about screaming, Your Honor.

JUDGE MELICK: He was what?

THE WITNESS: He was very loud?

BY MS. KILPATRICK:

Q. And what was Mr. Robinson's response? Do you recall exactly what Mr. Collins said to Mr. Robinson?

A. I don't know. I walked out and went back to my office.

Q. Okay. You didn't hear any of the exchange between Mr. Collins and Mr. Robinson?

A. No.

Q. Okay. Did you see Mr. Collins again that day?

A. Yeah, it was probably about five minutes later they was out on the porch of my office. What brought it to my attention they was real loud.

Q. Mr. Robinson and Mr. Collins were talking again?

A. Yes.

Q. Okay. And did you hear what was being said this time?

A. Mr. Collins told Bill that he didn't know how to run a mines. And Bill told him if he didn't like the way he run the mine, you know, to find him another job.

So he just a few minutes later he come in the office where we store our self-rescuers and threw his rescuer on the desk.

Q. Mr. Collins did?

A. Yes.

Q. Okay.

A. And then he went and got in his truck and come down to where the changing room is and he got his belongings and he left.

Q. How did you interpret that action?

A. To me I thought he quit.

Q. Okay. Was that the last time that you saw Mr. Collins that day?

A. No, ma'am.

Q. Okay. When - - when else did you see him?

A. Probably ten minutes later, maybe ten minutes later he come back down to the office again.

Q. And what happened?

A. He come in there demanding - - he wanted the phone numbers to the president of the company.

Q. Did he mention that person by name?

A. Ross Kegan.

Q. Okay. Who was he asking for the phone number from?

A. Bill I guess. You know, there was three or four of us still in the office.

Q. And what else did Mr. Collins say?

A. I don't know exactly - - he was asking for the MSHA's number and all this stuff. Bill just told him that, you know, the was through talking to him.

Q. Okay.

A. And he asked me to escort him off the property.

Q. And what did you do?

A. I told Steve that he was going to have to leave. I escorted him to his truck. I told him if he come back we would call the law on him and have him charged with trespassing.

(Tr. 142-148)

On cross examination Sturgill testified that, during the confrontation, Collins was "loud" and that Robinson was "normal". He noted that Collins did not request the telephone numbers of vice president Kegan and MSHA until he had already quit, had departed, and then returned. Sturgill denied that he had ever touched Collins but only told him that he would have to get off mine property or that he would have to call the Sheriff's department.

Another Northfork roof bolter, Glen Sizemore, was also present during the confrontation on the morning of August 8, 2006. He recalled that there was indeed a problem with the brush in that it was worn. Sizemore testified that Sturgill had previously told him not to use the brush and that he was "pretty sure" that Collins had been told this. Sizemore observed Collins using the brush that morning and observed that he was not using it correctly and that he put the steel straight into the brush. He noted that following the initial argument between Collins and Sturgill, mine superintendent Robinson walked in. He observed that Collins did not proceed underground as he did but followed Robinson into his office and spoke in a "hateful" voice which he felt was not an appropriate way to talk to your boss.

Northfork personnel director, Richard Raleigh, testified that he heard of the incident on August 8, 2006, and was told by vice president Kegan and safety director Cohelia, to offer Collins his job back. Raleigh testified that his notes confirmed that he called Collins at 6:00 p.m. on August 8, 2006, and offered him his job back without any loss of pay. Collins told him that Bill and Ray would "make it hard on him" and that he wanted their certification revoked so that they would never work again, apparently as a condition for his return.

In evaluating the evidence in this case, I conclude that the testimony of mine superintendent, Bill Robinson that Collins resigned and was not discharged by Northfork as the most credible. His testimony is also corroborated in significant respects by the credible testimony of Northfork mine clerk, Raymond Sturgill. The absence of animus toward the Complainant is also apparent from the willingness of both Robinson and Sturgill, later on the same day the Complainant resigned, to offer the Complainant his job back with no loss of pay (Tr. 189). The response of the Complainant to this offer also suggests that he resigned only because of his unhappiness with Robinson and Sturgill and not for any safety concerns (Tr. 182) Collins admitted that he wanted both Robinson and Sturgill fired, apparently as a condition of his return to Northfork (Tr. 45, 53-57).

In reaching my conclusions herein, I have not disregarded the decision of the referee in Mr. Collins' case before the Kentucky Division of Unemployment Insurance in which it was determined that Collins "was discharged for reasons other than misconduct and [was] not disqualified from unemployment insurance benefits" (Exh. C-1). I am unable to give the referee's decision any weight, however, since it is clear on the face of the decision that the referee misconstrued the sequence of events. The Complainant himself testified under oath at the Commission hearings at bar that he was terminated before he talked to the state inspector and by inference therefore, also before he had threatened to call vice president Kegan and MSHA. It is also apparent from the decision that critical witnesses for Northfork did not testify and that the referee had only Collins' version of events from which to reach his conclusions. In addition, without a complete record, including a transcript of the proceedings before the referee, the referee's decision could be given but little weight. *See Pasula 2 FMSHRC at 2795.*

Within the above framework of law and evidence, I conclude that Mr. Collins voluntarily resigned his position with Northfork and, accordingly, the discrimination complaint herein must be dismissed.

### **ORDER**

Discrimination proceeding Docket No. KENT 2007-15-D is hereby dismissed.

Gary Melick  
Administrative Law Judge  
(202) 434-9977

Distribution: (Certified Mail)

Daniel F. Dotson, Esq., 178 Main Street, Suite 1, Whitesburg, KY 41858

Melanie J. Kilpatrick, Esq., Rajkovich, Williams, Kilpatrick & True, PLLC, 2333 Alumni Park Plaza, Suite 310, Lexington, KY 40517

/lh