

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
601 New Jersey Ave., N.W., Suite 9500  
Washington, DC 20001-2021

October 31, 2005

MARK W. GIBSON	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. LAKE 2005-84-D
v.	:	VINC CD 2005-01
	:	
TRIPLE C TRUCKING, INC.,	:	Craney Mine
Respondent	:	Mine ID 12-01732 FIK

## **DECISION**

Appearances: Mark W. Gibson, Washington, Indiana, *Pro Se*;  
Billy R. Shelton, Esq., Jones, Walters, Turner & Shelton, PLLC, Lexington,  
Kentucky, for Respondent.

Before: Judge Hodgdon

This case is before me on a Complaint of Discrimination brought by Mark W. Gibson against Triple C Trucking, Inc., pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). A trial was held in Washington, Indiana. For the reasons set forth below, I find that the Complainant was not discharged by Triple C because he engaged in activities protected under the Act.

## **Background**

Triple C Trucking, owned and operated by Michael Childers, has been in the coal hauling business for almost 29 years. It began operating in eastern Kentucky and moved into southern Indiana about three and one half years ago. The company now operates 18 or 19 trucks a day hauling coal from two sites.

Mark Gibson was hired as a truck driver by Triple C in late October 2004. He had on-the-job training on November 4, and began working on November 5, 2004. He worked six days a week, except for Thanksgiving and some other days off, through December 11, 2004. He was discharged on December 11.

Alleging that he was terminated for engaging in activity protected under the Act, Gibson filed a discrimination complaint with the Secretary of Labor's Mine Safety and Health Administration (MSHA), under section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2), on January

10, 2005.<sup>1</sup> On March 24, 2005, MSHA informed him that, on the basis of a review of the information gathered during its investigation, “MSHA has determined that facts disclosed during the investigation do not constitute a violation of section 105(c).” Gibson then instituted this proceeding with the Commission, under section 105(c)(3), 30 U.S.C. § 815(c)(3), on March 30, 2005.<sup>2</sup>

### **Findings of Fact and Conclusions of Law**

Section 105(c)(1) of the Act, 30 U.S.C. § 815(c)(1), 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 right afforded by this Act.”

In order to establish a *prima facie* case of discrimination under section 105(c)(1), a complaining miner must show: (1) That he engaged in protected activity; and (2) That the adverse action he complains of was motivated at least partially by that activity. *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (Apr. 1981); *Secretary on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 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 either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Pasula*, 2 FMSHRC at 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 Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

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<sup>1</sup> 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.”

<sup>2</sup> Section 105(c)(3) provides, in pertinent part, that: “If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary’s determination, to file an action in his own behalf before the Commission . . . .”

In his complaint to MSHA, Gibson claimed that he was discriminated against by Triple C because: “I was discharged by the Shop Supervisor (Merle) and (Owner) Mike Childers for reporting unsafe conditions on the trucks I was assigned to operate. I reported these conditions on the Vehicle Inspection Report.” (Comp. Ex. 4.) The termination notice given Gibson stated that he was being discharged for “insubordination” and recited as justification:

Not following a direct order from Shop Supervisor. Pre-trip inspection that you filled out stated that rear tires was [*sic*] worn excessively. Shop Supervisor told you that this truck was parked until new tires could be put on. Mark started the truck and was going to drive it even though he had been told not to. During probation period your performance does not meet our requirements.”

(Comp. Ex. 3.) As discussed below, I find that Gibson did engage in protected activity, but that his discharge was not related to that activity.

There is no dispute that Gibson engaged in protected activity. He did so by filling out a pre-trip inspection report indicating that truck 567 had three worn tires. Nor is there any doubt that he was fired. The question in this matter, as it frequently is in discrimination cases, is whether Gibson was fired because he wrote up the truck. The answer is that the evidence is clear that he was fired as the culmination of several instances of failure to follow instructions, bad attitude and insubordination, not because he caused truck 567 to be taken out of service.

Gibson said that he first filled out an inspection report on truck 567 on November 30. He testified that on December 11, at the start of work:

I was standing up on the running board [of truck 567] and [Merle Covert] was screaming and hollering at me, something. And so, I got down off the side of the truck and went over to him. And he said, you’re not supposed to be operating that truck because you wrote up on the inspection sheet the tires were bad.

(Tr. 17-18.) Gibson testified that he did not drive truck 567, but drove trucks 780 and 763 that day. (Tr. 18.) He related that when he returned at the end of the day, he was given his termination notice. (Tr. 18-19.) He claimed that he had no argument with Merle Covert, the shop supervisor, nor did he cuss at him. (Tr. 56.)

The company’s version of this incident is contrary to Gibson’s.<sup>3</sup> Jeremy Bell testified that on the morning of December 11, he went in to talk to Covert, while his truck was being fueled. Covert told him he wanted to see Gibson to let him know not to drive truck 567. Bell testified

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<sup>3</sup> Covert died prior to the hearing. (Tr. 64.)

that:

I went out and was looking around, walking around my truck, you know, looking to see if he's out in the parking lot or out at one of the trucks. And, I seen him, and I told him Merle wanted to talk to him. And, he said, what about.

And, I told him that it was, 567 was being shut down because of the tires that had been wrote up on them, that Merle said to go ahead and drive 797. And, whenever I told him that, he said he wasn't driving, you know, F'ing 797, he was driving F'ing 567 and walked off.

(Tr. 83-84.)

Childers testified that on the afternoon of December 11, Covert told him that he had had a confrontation with Gibson over truck 567. He stated that: "It was related to me that Merle seen Mark start the truck, and he went out and he told Mark that he could not drive that truck that day, and Merle told me that Mr. Gibson told him that he was going to drive that truck . . ." (Tr. 102.) Childers said that after hearing this, he started doing some investigating. He testified that:

I called the lady at the scale house who weighs the trucks. And, she also told me she had had problems with Mr. Gibson. And, a couple of other guys, the loader guys there in the coal yard.

And then I talked with Jeremy B[e]ll, the lead driver. He said he had had a confrontation with him. And, the other lead driver at the time which was Mark Winager, he had said he had a confrontation with him. And, I just thought it was time to cut our losses, before he got someone hurt.

(Tr. 102.) He went on to state that he learned of other problems with Gibson, such as: "Other issues like not being on the right channel, not communicating with the guys. You know there's intersections, they run end dumps on the same roads we run scrapers. You know it's imperative that these guys stay on the right channel, so they know about traffic and communication." (Tr. 103.)

When specifically asked if he fired Gibson for reporting the tires on truck 567, Childers responded: "Has nothing to do with that. If I fired every guy that wrote up a safety issue, I wouldn't have a man out there." (Tr. 109.) Glendon Hayes, the truck supervisor, testified that pre-shift inspection reports are filled out daily on the trucks, that they deal with safety issues on a regular basis as a result of the reports and that no one had ever been discharged for filling out such a report. (Tr. 74.) Bell concurred. (Tr. 88.)

### Conclusion

Gibson engaged in protected activity when he reported three tires that he believed needed to be replaced on truck 567. His discharge was precipitated by his confrontation with Covert over truck 567, but he was not fired because he filed the pre-shift inspection report. Rather, the unrebutted evidence conclusively demonstrates that he was fired because he failed to follow directions and he had encounters with both lead drivers, the woman at the scale house, loaders at the coal piles and finally with the shop supervisor. In addition, I did not find Gibson to be a credible witness. His testimony was characterized by evasiveness and inconsistencies. Further, he was argumentative throughout the trial and evidenced a temper which makes reports of his confrontations very believable. Consequently, I conclude that the Complainant was not discharged for engaging in protected activity, but discharged for reasons completely unrelated to the protected activity.

### Order

Gibson has not established that he was fired for engaging in activity protected under the Act. Accordingly, his Discrimination Complaint filed against Triple C Trucking, Inc., under section 105(c) of the Act, is **DISMISSED**.

T. Todd Hodgdon  
Administrative Law Judge

Distribution: (Certified Mail)

Mark W. Gibson, 235 Apraw Rd., Washington, IN 47501

Billy R. Shelton, Esq., Jones, Walters, Turner & Shelton, PLLC, 151 N. Eagle Creek Drive,  
Suite 310, Lexington, KY 40509

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