

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 21, 2003

RONALD D. GEISLER,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEST 2002-481-D
	:	DENV CD 2002-9
	:	
v.	:	Mine I.D. 05-04452
	:	Sanborn Creek Mine
OXBOW MINING, LLC,	:	
Respondent	:	

DECISION

Appearances: Ronald D. Geisler, Hotchkiss, Colorado, pro se;
Andrew W. Volin, Esq., Sherman & Howard, Denver, Colorado,
for Respondent.

Before: Judge Manning

This case is before me on a complaint of discrimination brought by Ronald D. Geisler against Oxbow Mining, LLC, (“Oxbow”), under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c)(3) (the “Mine Act”). Mr. Geisler alleges that Oxbow terminated him for raising safety issues and drug abuse problems at the mine. An evidentiary hearing was held in Delta, Colorado.

I. BACKGROUND, SUMMARY OF THE EVIDENCE, AND FINDINGS OF FACT

Oxbow operates the Sanborn Creek Mine, an underground coal mine, near Somerset, Colorado. Geisler was hired by Oxbow on November 7, 1991, as a utility man. (Tr. 26). He worked in various positions at the mine and he received his foreman papers in 1996. He was a section foreman for several years before he became a longwall production foreman in 1998. (Tr. 27). He was a longwall production foreman when he was terminated on April 4, 2002. (Tr. 25). Geisler filed a complaint of discrimination with the Department of Labor’s Mine Safety and Health Administration (“MSHA”) which alleged as follows:

In my opinion I was terminated for being a leader and pointing out personnel and safety problems over a period of 2 years. I went from one of the mine’s top section foremen to termination. I have had personal problems from Nov. [2001] to my termination date.

The day I was fired, Jim Cooper said I wasn't performing my duties, but now I hear through the grapevine he said I refused to get help for my personal problems due to stress from the job from them not following MSHA regulations or trying to enforce them. By taking this action, I feel I won't be able to work in the North Fork Valley or maybe in this profession anymore.

(Ex. R-16). After MSHA determined that Geisler was not discriminated against, he brought this case on his own behalf. At the hearing, Geisler raised a number of instances in which he believes that he complained about safety and drug abuse. Geisler and Oxbow witnesses also testified about other events that led up to his termination. I discuss all of these events in chronological order.

In June or July 2001, there was a bounce at the mine. (Tr. 30). An MSHA inspector was at the mine taking dust samples. The ribs had blown out and the entry was reduced from a nine foot ceiling to a five foot ceiling. The beltline was blown out for 300 feet. (Tr. 31). Geisler's crew had to clean up the area and get the belt running. Geisler believes that mine management put too much attention on production and not enough on safety. (Tr. 33).

On May 14, 2001, Jim Cooper, Oxbow's mine manager, had a meeting with Geisler in his office. Randy Litwiller, Oxbow's mine superintendent, and Joe TERNYK, Geisler's immediate supervisor, also attended the meeting. According to Geisler, Cooper asked him why he was taking personal days off without giving sufficient notice. (Tr. 22). At the end of this meeting, Geisler was given five days off without pay for unsatisfactory performance. (Ex. R-12). Geisler testified that he was treated differently than other employees because he pointed out personnel and safety problems. (Tr. 27). Specifically, he believes that he was harassed for not having the section in production despite the fact that he was not given the materials that he needed to get any repairs completed on time. (Tr. 25, 27). He states that he gave management three hours notice that he was going to take two personal days off and he was only required to provide two hours notice. Geisler testified that he needed to take the personal days off because of stress. *Id.*

Cooper testified that the events leading up to the May 14 meeting occurred during a longwall move. (Tr. 199). He stated that during a longwall move some crews may be required to work on a different rotation than normal. Geisler's crew was "extremely upset that they were going from teardown to setup and were staying on the same shift they had been on through the teardown."

(Tr. 199-200). Cooper testified that Litwiller and TERNYK told him that, as a consequence, Geisler "had cleaned out his locker, filled up his clothes bag, and said I'll get my days off, and he left the mine." (Tr. 200). The next two days, he called the mine and said he would not be in because he was taking leave. *Id.* When Geisler returned to the mine on May 14, 2001, Cooper met with Geisler, Litwiller, and TERNYK. Cooper testified that Geisler was told that his behavior was not appropriate for a supervisor. *Id.* Cooper further testified that Geisler admitted that he

set a bad example but he had a lot of personal problems. Geisler was given a week off without pay. (Tr. 200; Ex. R-12).

Geisler testified that the mine had to move a longwall in September 2001. Geisler testified that 77 out of 87 flippers on the longwall shields were not functioning. (Tr. 34). He stated that these flippers extend the shields to help hold the top up at the end of the mining cycle in a section. (Tr. 36). He states that when he complained about the defective flippers, he was accused of worrying too much and being a crybaby. (Tr. 35). Geisler testified that it is unsafe to operate the longwall just before it is moved when the flippers are not working. (Tr. 36-37). He stated that “[w]e did get the flippers done by the time we moved, but my crew did 57 of them out of 87.” (Tr. 40-41). Litwiller testified that flippers generally have to be repaired at the time of a move so the events of September 2001 were not unusual. (Tr. 174). He denied ever telling Geisler not to report broken flippers on his production reports. (Tr. 181).

Geisler testified that on December 27, 2001, he arrived on his section on time at 11:00 p.m., did the onshift examination, and then realized that his mind was not on his work. (Tr. 29). He was scheduled to work the graveyard shift that day. He tried to contact Mike Morgan, the shift foreman, without success. Instead, Geisler talked to Kevin Lee, a maintenance foreman, and told him that he was going home. Geisler walked to the “top of the section” at about 12:30 a.m. and Lee gave him a ride out of the mine. *Id.* He arrived at the surface at 1:00 a.m. and Lee was back on the section by 1:30 a.m. Geisler testified that he notified his crew that he was leaving, he told them what they were expected to do during the shift, and told them that Lee would be taking over. Geisler testified that he left the mine that night because he and his wife were having personal problems and his mind was not on his work. (Tr. 30). Cooper talked to Geisler the next day and advised him that his performance as a supervisor was not acceptable. (Tr. 202). Cooper told Geisler that he was upset that he had left his crew. (Tr. 202, 238). Cooper testified that he advised Geisler that “he had to separate home and work and . . . start applying himself diligently to his work responsibilities or be removed from Oxbow employment.” (Ex. R-13). He said that he warned Geisler that he “didn’t have any more flexibility to offer him.” (Tr. 202). Geisler and Cooper talked about Geisler’s personal problems. (Tr. 203). Geisler denies that Cooper gave him such a warning and he left the meeting believing that Cooper was satisfied with his response. (Tr. 40).

On February 25, 2002, Geisler injured his ear. When he showed his ear to his shift foreman the next day, Geisler was sent home. (Tr. 42-43). Geisler testified that it was injured when calcium chloride pellets stuck to his outer ear. When he put a cold pack on it at home, the pack leaked, further injuring his ear. On March 4, 2002, Geisler met with Litwiller to show him the infected ear. On March 7, 2002, Geisler saw a dermatologist about his ear. The dermatologist wrote him a note excusing him from work. (Tr. 44). Geisler did not return to work until March 20, 2002.

On Thursday, March 28, 2002, Geisler testified that he met with Litwiller to ask for vacation time so that his ear could completely heal. *Id.* According to Geisler, Litwiller kept

telling him that the mine needed him at work and denied his request. Geisler kept telling Litwiller that he could not work underground. The time that Geisler wanted off included the Easter weekend.¹ (Tr. 63-64). Litwiller testified that Geisler merely asked for personal days off that weekend. (Tr. 158). Litwiller testified that, although Geisler may have mentioned his ear, he asked for personal (vacation) days off. (Tr. 158, 183-84, 188-89). Litwiller also testified that he denied Geisler's request because he was needed at work. (Tr. 159). Geisler worked on March 29. (Tr. 159; Ex. R-41).

On Saturday, March 30, 2002, Geisler went to the mine to tell Annette MacDonald, a secretary at the mine, that he would not be working that day. (Tr. 44-45). He provided this notice 30 minutes before the start of his 3:00 p.m. shift. (Tr. 44-45). Geisler explained that he had debated "whether or not to go to work, back and forth, back and forth." (Tr. 45). He testified that he knew that he was needed at work but that his ear was deteriorating. His dermatologist sent a fax to the mine on April 1, 2002, excusing him from working.

Annette MacDonald testified that Geisler came to the mine at 2:30 p.m. on March 30, 2002, to report off on his shift that began that day at 3:00 p.m. (Tr. 151; Ex. R-33). She testified that Geisler did not tell her that he was sick or that he could not work underground because of the injury to his ear. (Tr. 152). She filled out Geisler's absentee slip that day. *Id.* MacDonald told Geisler to inform the foreman that he would be absent, but he did not do so. (Tr. 153-54).

Geisler testified that he had a fight with his wife on Monday, April 1, 2002, and the police were called. (Tr. 70). He further testified he told Officer Neil Schweiterman of the Paonia, Colorado, police department about his personal problems, his drug use, and the fact that there is a problem with drug abuse at the mine.² (Tr. 14, 71). Officer Schweiterman called Litwiller on April 2, 2002, and told him that "he was really concerned about [Geisler's] behavior, and knowing that coal mining was a dangerous business he was concerned . . . about [Geisler] returning to work and thought that [Litwiller] should know about it." (Tr. 13-15, 72,160). Geisler testified that the officer also told Litwiller that Geisler had complained that miners were abusing illegal drugs at the mine. (Tr. 12-13). Geisler further testified that because it is unsafe for miners to be using illegal drugs underground, he was acting as a whistle-blower when he told Officer Schweiterman about drug abuse. (Tr. 18).

Litwiller testified that Officer Schweiterman did not mention drug abuse at the mine during his April 2, 2002, conversation with Litwiller. (Tr. 161, 178, 184, 187). Litwiller testified that he was very concerned about the call from Officer Schweiterman and believed that it warranted further attention because police officers are experienced in evaluating people with problems. (Tr. 161-62). Litwiller believed that Geisler's attitude had changed to "the negative" for at least the previous six months. (Tr. 163). Litwiller discussed the officer's call with Cooper.

¹ The mine was closed Easter Sunday, but was open Saturday and the following Monday.

² At the time he was employed by Oxbow, Geisler lived in Paonia, Colorado.

(Tr. 168). They decided that they would have a meeting with Geisler at the mine to see if Geisler would seek some professional help. If Geisler refused help or was blind to the fact that he needed help, then they believed that Oxbow would have no choice but to terminate him. (Tr. 168-69). Litwiller and Cooper testified that they did not know, prior to his termination, that Geisler abused illegal drugs at the mine. (Tr. 173, 178, 204). Cooper stated that he was unaware that Geisler complained of drug abuse by mine employees. (Tr. 205, 229, 232). Oxbow was generally aware that illegal drugs were being used by employees and it had instituted a mandatory drug testing program prior to Geisler's termination. (Tr. 214).

Geisler did not work at the mine April 1-4, 2002. On April 4, Geisler was called at home and told to come to the mine to meet with Cooper and Litwiller. At Geisler's request, he met privately with Cooper. Geisler's testimony about what happened at the meeting differs from Cooper's testimony. It is clear that Cooper told Geisler that he was not performing his duties. (Tr. 47). Geisler replied that he had been off work because of stress and an injury, but that he was performing his duties. According to Geisler, after the two men discussed the matter for a few minutes, he asked Cooper if he was being fired. Cooper told Geisler that he was going to fire him. Geisler testified that he then started telling Cooper about problems he was having at home including a clothes dryer that was leaking carbon monoxide. Geisler then turned on his tape recorder and told Cooper everything that he thought was wrong at the mine. (Tr. 48). Geisler testified that he told Cooper about the drug abuse problems at the mine. (Tr. 72). He also testified that Cooper talked about his management philosophy. (Tr. 51).

Cooper testified that at this April 4 meeting, he advised Geisler that Oxbow would be relieving him of his responsibilities at the mine because of his mental state and that he should get help to work through his problems. (Tr. 191; Ex R-1). Cooper told Geisler that he could get information about professional help from the mine office. Cooper testified that Geisler told him that he did not need any help, that he was "the best supervisor on the property," and a great Oxbow employee. (Tr. 192, 233). Geisler told Cooper about his problems he was having with his wife, carbon monoxide poisoning at home, and teenagers in his back yard. (Tr. 192; Ex. R-1). Cooper said that Geisler was agitated and kept saying that he was not crazy. *Id.* Cooper also testified that Geisler talked about "invisible miners." (Tr. 193-94). After Geisler refused to seek any help, Cooper advised him that he had no choice but to terminate him. *Id.* Cooper testified that if Geisler had agreed to seek professional help at the meeting, Geisler would have been put on leave of absence without pay, but that his medical benefits would have continued.³ (Tr. 195). Cooper further testified that, prior to returning to work, Oxbow would have required Geisler to provide a letter from the professional person stating that Geisler was "in a stable position." *Id.* Cooper testified that Geisler was terminated from his employment because he refused to consider the offer of help and he continued to act in an agitated and irrational manner during the meeting.

³ The cost of at least part of this professional help would have been covered under Oxbow's medical plan. (Tr. 226).

Carol Edwards, a secretary for Oxbow, testified that prior to the April 4, 2002, meeting Cooper asked her to try to get information about counseling that might be available for Geisler. (Tr. 142; Ex. R-11). She testified that, after the meeting, Geisler was very agitated and upset. Geisler seemed out of sorts, he did not talk in coherent or complete sentences. (Tr. 143-44). She encouraged him to seek help for his marital and personal problems and gave him the names of counselors. He also complained that mine management never listened to him and he talked about drug use at the mine. (Tr. 144-45). They discussed his ear, but Edwards testified that it looked like it had improved and Geisler told her that it was “doing better.” (Tr. 146).

Officer Schweiterman called Kathy Welt, an Oxbow employee, on April 7, 2002, and told her that Geisler was in jail, that Geisler told the police that miners were abusing drugs at the mine, and that Geisler admitted that he used methamphetamine while underground in June 2001. (Ex. R-2). Officer Schweiterman also told Welt that Geisler told the police that drug use is rampant underground. At the hearing, Geisler admitted that he used methamphetamine, often called “speed,” with a miner on his crew in June 2001. (Tr. 55). He also admitted that he used methamphetamine away from the mine, “on and off,” between June 2001 and April 2002. (Tr. 56).

Geisler testified that his use of methamphetamine had a severe impact on his personal life. (Tr. 58). The methamphetamine made Geisler paranoid and, beginning in November 2001, he wrongly suspected that his wife was having an affair.⁴ (Tr. 59). He discussed his personal problems with Cooper and others at the mine during this period. He had serious conflicts with his wife over the Easter weekend and the following week. (Tr. 71, 83). Geisler tested positive for cocaine, methamphetamine, and marijuana on April 5, 2002.⁵ (Tr. 81, 84; Ex. R-34).

⁴ Oxbow sought to introduce into evidence numerous exhibits concerning criminal charges that Geisler and his wife filed against each other. I did not admit these proposed exhibits. Geisler has apparently reconciled with his wife; she sat at counsel’s table and assisted him during the hearing.

⁵ Geisler maintains that he never used cocaine but that some cocaine must have been mixed in with the methamphetamine. Methamphetamine is often taken through the nose like cocaine.

II. DISCUSSION WITH FURTHER FINDINGS AND CONCLUSIONS OF LAW

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act. The purpose of the protection is to encourage miners “to play an active part in the enforcement of the [Mine] Act” recognizing that, “if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation.” S. Rep. No. 181, 95th Cong., 1st Sess. 35 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 623 (1978). “Whenever protected activity is in any manner a contributing factor to the retaliatory conduct, a finding of discrimination should be made.” *Id.* at 624.

A miner alleging discrimination under the Mine Act establishes a *prima facie* case of prohibited discrimination by presenting evidence sufficient to support a conclusion that he engaged in protected activity and suffered adverse action motivated in any part by that activity. *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-800 (October 1980), *rev'd on other grounds*, 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); *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998). The mine 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 mine operator cannot rebut the *prima facie* case in this manner, it nevertheless may defend 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. *Pasula* at 2800; *Robinette*, 3 FMSHRC at 817-18; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

A. Summary of the Parties’ Arguments

At the end of his testimony, Geisler summarized his case by saying:

Basically, your honor, I just want to say that I am a certified, qualified foreman. I did my job. Safety came first, and as I pointed this out – and the last thing I pointed out was to an officer of the drug abuse going on there. It’s not only against their policy but it’s against the law. And when they stated – when he went there to investigate it, I feel that is the sole reason I got fired. Everything else was building up over the year, I said, but when that one came in that was it.

(Tr. 51-52). At the end of the hearing, Geisler said the following:

You know, I pointed out the drug problems at the mine. I feel I was fired for it. And I was here to state, to hope they would have a

drug policy where they don't forewarn the men that they're going to have a urinalysis, and I don't really . . . care if I win, your Honor. I was wanting somebody to keep an eye on it because the drugs are rampant through the valley. Not just in that mine, they're everywhere, but they are in that mine bad.

(Tr. 246).

Oxbow argues that Geisler did not carry his burden of proof in this case. The evidence establishes that Geisler and Officer Schweiterman told management at Oxbow about drug abuse at the mine after Geisler was terminated from his employment. Geisler had two run-ins with the police the first week of April 2002 and it was during that second run-in that the police had a detailed conversation with mine personnel about Geisler's accusations. Geisler's allegations about drug use at the mine and his earlier safety complaints played no part in Oxbow's decision to terminate him.

B. Protected Activity

A miner who complains about safety conditions at the mine engages in protected activity. In addition, a miner who complains about alcohol or drug abuse by his fellow employees engages in protected activity if he fears that these employees could injure him because of their impaired condition. *See Fletcher v. Morrill Asphalt Paving*, 24 FMSHRC 232, 239 (Feb. 2002) (ALJ). In this case, Geisler testified that he complained about safety conditions at the mine. Litwiller testified that Geisler did not complain about safety conditions to him. (Tr. 173). Cooper testified that Geisler did not raise safety issues with him any more than any other foreman raised safety and operations issues. (Tr. 205). I find that Geisler had some safety concerns at the mine. He discussed safety with management, but that was part of his job as a longwall production foreman. For example, his concerns about the flippers on the longwall supports were addressed. The fact that his crew had to do most of the work repairing them is irrelevant. Nevertheless, I give Geisler the benefit of the doubt and assume, for purposes of my analysis, that Geisler raised several safety issues during the last two years of his employment.

By the end of the hearing, Geisler had shifted his emphasis from his safety complaints to his complaints about drug abuse at the mine. The parties' evidence on this issue directly conflicts. Geisler maintains that he had discussions with management about drug abuse prior to his termination. More importantly, he believes that Officer Schweiterman told Litwiller on April 2, 2002, that he had complained about drug abuse at the mine. Geisler testified that he called Officer Schweiterman on May 2, 2003, six days before the hearing, and Officer Schweiterman told him that he "talked to the superintendent and his main investigation was the allegations I had made that the mine has a drug abuse and drug dealings going on and he let my name out and he apologized to me about it." (Tr. 12-13). Oxbow denies that Geisler complained about drug abuse at the mine and denies that Office Schweiterman discussed it with Litwiller prior to

Geisler's termination. Both Litwiller and Cooper testified that Geisler did not mention drug abuse at the mine until the meeting of April 4, 2002.

Geisler testified that it was "unsafe for people to be doing drugs underground at the mine." (Tr. 18). Geisler was one of the employees who was under the influence of illegal drugs while at work and he used methamphetamine underground on at least one occasion. The anti-discrimination provisions of the Mine Act were designed to protect a miner from having to work in the face of hazards created by his employer. By using illegal drugs, Geisler helped create the unsafe conditions. As a front line supervisor, Geisler was expected to set an example for the miners on his crew. Instead, he sanctioned the practice of working while under the influence of methamphetamine. I take official notice that miners can endanger themselves and others if they work while under the influence of illegal drugs. For purposes of my analysis of this case, I assume that Geisler was concerned about drug abuse at the mine for safety reasons. I make this assumption despite the fact that he was personally involved in drug abuse at the mine.

C. Adverse Action

In determining whether a mine operator's adverse action is motivated by the miner's protected activity, the judge must bear in mind that "direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (November 1981), *rev'd on other grounds*, 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 toward 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 resolution of this case depends entirely on an examination of the evidence and an analysis of the motivation of management. As stated above, it has not been established that Oxbow management knew about his protected activities. Neither Litwiller nor Cooper believed that he had raised any particular safety concerns while he was a longwall production foreman. In addition, Litwiller and Cooper denied that they knew that Geisler was concerned about drug abuse at the

mine. Oxbow tested employees for drugs and alcohol on at least one occasion.⁶ Cooper and Litwiller were unaware that Geisler had been using illegal drugs since at least June 2001. Litwiller testified that Officer Schweiterman did not tell him that Geisler had complained about drug abuse at the mine during his April 2, 2002, telephone call. Geisler's testimony that the police officer told him on May 2, 2003, that he informed Litwiller, prior to April 4, 2002, that Geisler complained about drug abuse at the mine is not reliable and is inconsistent with other evidence. When the police were called to Geisler's home on April 1, 2002, Geisler and others were interviewed about the reported domestic disturbance. When Geisler was taken into police custody on April 6, he was questioned more extensively. (Ex. R-23). Drug use issues were raised during the police questioning and methamphetamine was found in his garage. *Id.* I credit the testimony of Litwiller and Cooper that they were not aware on April 4, 2002, that Geisler had complained to the police about drug abuse.

There is no indication that Oxbow was hostile to any safety complaints that Geisler may have made. Oxbow repaired the flippers on the longwall supports. Most of the concerns he expressed at the hearing were that management put production before safety. It appears that these concerns were raised after the fact and he often complained that his crew bore the brunt of safety-related work. That his crew had to do more work than other crews to keep the longwall section safe does not establish that Oxbow ignored his safety concerns. I also find that there is no evidence to suggest that Oxbow was hostile to complaints made about drug abuse at the mine. It is obvious that Oxbow did not want miners abusing drugs on its property or coming to work impaired by drugs. I find that Geisler did not establish hostility or animus toward his protected activity. There is a coincidence in time between the protected activity and Geisler's termination.

Geisler attempted to establish discrimination by showing that he was treated differently than other similarly situated miners. Disparate treatment can be evidence of discrimination. Many of the comparisons Geisler tried to make were with hourly employees. He attempted to establish that another foreman, Kevin Swisher, was absent from work as frequently as he was. (Tr. 126-27; Ex. C-5). Cooper explained that Swisher had a number of mitigating circumstances including a death in the family. (Tr. 227). He further explained that Geisler took leave at inappropriate times for someone in his position as a longwall production foreman. It was Geisler's attitude toward leave and his use of it to avoid his supervisory responsibilities that concerned Cooper. Litwiller and Cooper testified that in January 2001, Geisler put in for personal leave around every holiday. They decided that Geisler would not be permitted to do that in 2002 because it would be unfair to other employees who might want to take leave at those times. Litwiller believes that Geisler called in to take personal leave over the Easter weekend in

⁶ Geisler testified that after Oxbow began testing for drugs, he and other employees switched from marijuana to methamphetamine because it stays in the body only 72 hours while marijuana can be detected for a longer period of time. (Tr. 56). Thus, Geisler was trying to thwart Oxbow's efforts to eliminate drug use among its employees. This fact contradicts his testimony that he was concerned about drug use at the mine.

2002, not because of his ear, but to get around the fact that he was denied such leave earlier in the year. (Tr. 157-59). I find that Geisler did not establish disparate treatment.

I find that Geisler failed to establish that his termination was caused, in any part, by his protected activities. In addition, Oxbow affirmatively established Geisler's protected activities played no part in its to terminate him. The evidence shows that Oxbow was genuinely concerned about Geisler's performance as a longwall production foreman. In May 2001, he took personal leave during a longwall move when it was clear that Oxbow needed him at work. The fact that he gave three hours notice each day that he called off does not eliminate Oxbow's concern. In December 2001, Geisler left the mine because his mind was not on his work. Geisler was warned that he could not bring his personal problems to work and that if he did not start working diligently, he could lose his job. Geisler was denied a request to take personal leave Easter weekend, but he took leave anyway. When an officer with the Paonia Police Department told Litwiller that Geisler's behavior concerned him, Oxbow decided that he needed professional help. At the April 4, 2002, meeting, Geisler not only denied that he needed any help, he asserted that he was the best supervisor at the mine. Unknown to Cooper and Litwiller, Geisler had been using methamphetamine since June 2001, which may help explain his erratic and paranoid behavior.

Cooper testified that he made the decision to terminate Geisler at the April 4, 2002, meeting because of his lack of management skills, his failure to follow company rules, and his unwillingness to admit that he had a problem that needed to be addressed. I credit the testimony of Cooper and Litwiller concerning the reasons for Geisler's termination. All of the arguments and evidence presented by Geisler that I have not specifically discussed in this decision have been considered and are hereby rejected.

III. ORDER

For the reasons set forth above, the discrimination complaint filed by Ronald D. Geisler against Oxbow Mining, LLC, under section 105(c) of the Mine Act is **DISMISSED**.

Richard W. Manning
Administrative Law Judge

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