

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268

January 21, 2004

MARK POLLOCK,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEST 2003-182-DM
v.	:	RM MD 02-15
	:	
KENNECOTT UTAH COPPER CORP.,	:	Mine I.D. 42-00149
Respondent	:	Bingham Canyon Mine

DECISION

Appearances: Arthur F. Sandack, Esq., Salt Lake City, Utah, for Complainant;
James M. Elegante, Esq., Kennecott Utah Copper Corporation, Magna,
Utah, for Respondent.

Before: Judge Manning

This case is before me on a complaint of discrimination brought by Mark Pollock against Kennecott Utah Copper Corporation (“Utah Copper”), 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. Pollock alleges that Utah Copper failed and refused to hire him for a position as a truck driver at the Bingham Canyon Mine because of protected activities he initiated while working for Kennecott Barney’s Canyon Mining Company (“Barney’s Canyon”). An evidentiary hearing was held in Salt Lake City, Utah, and the parties filed post-hearing briefs.

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

Utah Copper operates the Bingham Canyon Mine, a large open-pit copper mine, in Salt Lake County, Utah. Utah Copper is owned by Rio Tinto, a large, multi-national minerals company. Rio Tinto also owns Barney’s Canyon, a surface gold mine located near the Bingham Canyon Mine.¹ Barney’s Canyon halted production at the end of December 2001. An “employee rights agreement” was entered into between Utah Copper and the local unions that represented miners at both mines. (Ex. R-1). Under this agreement, employees of Barney’s Canyon who did not otherwise have recall rights at Utah Copper were given “first consideration” by Utah Copper for vacancies at the Bingham Canyon Mine. Certain procedures had to be followed by a Barney’s Canyon employee if he wanted to take advantage of this agreement. The agreement did

¹ Rio Tinto apparently owns these companies through Kennecott Holdings Company.

not guarantee a Barney's Canyon employee a job at Utah Copper, but such an employee would be considered for a vacancy before anyone from the outside and before anyone on layoff status from Utah Copper.

Mark Pollock started working at Barney's Canyon in April 1989. He was laid off at the end of December 2001 because of the shutdown of the mine. He was recalled to perform reclamation work at Barney's Canyon on March 19, 2002. Pollock was laid off from this position on December 12, 2002. On March 26, 2002, Utah Copper announced open positions for haul truck drivers. Pollock followed the proper procedures under the employee rights agreement to apply for one of these positions. (Ex. C-2). Pollock was interviewed for a haul truck driver position on May 14, 2002. The interview was conducted by Ben Stacy, who was the truck superintendent, and Vedel Welch, a senior employee relations representative at Utah Copper. After the interview, Stacy conferred with Welch and decided that Utah Copper would not offer Pollock a position as a haul truck driver. Pollock was notified of Utah Copper's decision by letter dated June 21, 2002. (Ex. C-6). Pollock filed a complaint of discrimination with the Department of Labor's Mine Safety and Health Administration ("MSHA") on August 7, 2002. By letter dated January 27, 2003, MSHA notified Pollock that it determined that the facts disclosed during its investigation of his complaint did not constitute a violation of section 105(c) of the Mine Act. On February 24, 2003, Pollock filed the complaint in this proceeding.

In his complaint, Pollock alleges that Utah Copper discriminated against him because he was an MSHA miners' representative at Barney's Canyon, he filed hazard complaints with MSHA at Barney's Canyon, and he filed discrimination complaints against Barney's Canyon. Pollock notes that Leonard Wolff, the mine superintendent at Barney's Canyon, had a management position at Utah Copper in the spring of 2002. Pollock believes that Wolff told Utah Copper management not to hire him because of his protected activities at Barney's Canyon. Pollock notes that Wolff testified in a discrimination hearing before me in a case that the Secretary brought against Barney's Canyon on Pollock's behalf. *Sec'y of Labor on behalf of Pollock v. Kennecott Barney's Canyon Mining Company*, 22 FMSHRC 419 (March 2000). Pollock states that 16 former employees of Barney's Canyon who were as qualified as he or less qualified than he were hired as truck drivers at Utah Copper.

Utah Copper denies the allegations in Pollock's complaint and contends that it decided not to hire Pollock for legitimate business reasons having nothing to do with Pollock's protected activities. Indeed, it maintains that Pollock's safety record was viewed by Mr. Stacy as one of Pollock's few strong points. As described in more detail below, Utah Copper states that Stacy decided not to hire Pollock because he had a substantial disciplinary record and he was weak in working with team members and in accepting supervision.

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) (“*Legis. Hist.*”)

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. Protected Activity

I find that Pollock engaged in protected activity when he worked at Barney’s Canyon. It is not disputed that Pollock was an MSHA walkaround representative from 1994 to shutdown, that he was on the local union safety committee, that he filed at least 30 safety complaints with MSHA following which citations were issued in many instances, that he complained about safety conditions to mine management, and that he filed several discrimination complaints with the Secretary under section 105(c)(2). At least some of his protected activities were known to Utah Copper management. Whether and to what extent Stacy knew of these protected activities when he decided not to hire Pollock as a haul truck driver is discussed later in this decision.

B. Adverse Action

As an applicant for employment, Pollock was protected from any adverse action taken by Utah Copper as a result of his protected activities. Utah Copper’s decision not to hire Pollock constitutes an adverse action for purposes of section 105(c) of the Mine Act. 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). A key issue in this case is whether Utah Copper’s decision not to hire Pollock was motivated in any part by his protected activities at Barney’s Canyon.

1. Pollock’s Position

Pollock’s protected activities were quite extensive. In trying to establish a *prima facie* case, Pollock makes a number of arguments. First, he contends that although there is no direct evidence of discrimination, it is clear that Utah Copper’s decision not to hire Pollock was motivated in large part by his protected activities. Although Mr. Stacy made the decision not to hire Pollock, he relied on the poor evaluation provided by Wolff. When Stacy asked Wolff about Pollock before the interview, Wolff replied that Stacy should look at Pollock’s record. Pollock believes that this reply was code for “do not hire this employee.” (P. Br. 24). Pollock also points to the “Internal Reference Check” provided by Wolff. (Ex. R-5). Wolff, who was aware of Pollock’s protected activities, rated him quite poorly and checked the line entitled “Do not hire.” Wolff rated Pollock “poor” or “marginal” in all categories except safety and attendance. Under “Safety,” Wolff rated Pollock “average” and wrote:

Active with safety. Was on the safety committee, attended monthly joint safety council meetings, monthly mine safety tours, and participated in mine related accident investigations.

Id. Under “Discipline” Wolff wrote:

Pollock filed an MSHA discrimination claim against Barney’s to get his record expunged. He lost and his record stands. Discipline includes suspension.

Id. Pollock testified that Wolff was hostile toward his protected activities at Barney’s Canyon and that their relationship was so tainted by this hostility that Pollock began raising safety issues with Wolff’s supervisor, Ray Gottling, after 1999.

Pollock also states that the human resources managers at Barney’s Canyon and Utah Copper often conferred and their relationship was intimate. (P. Br. 22). Indeed, some human resources employees moved from one mine to another. He believes that these human resources

departments took a “special interest” in Pollock because of his protected activities. *Id.* Greg Pollock, Mark Pollock’s brother, was the president of the local Steelworkers Union at Utah Copper. Greg Pollock was also very active in safety matters. Pollock points to the fact that Welch, who provided assistance to Stacy in making hiring decisions, was biased against Pollock because Welch believed that Greg Pollock “created problems” at Utah Copper. (Tr. 215). Welch testified that “those types of things run among . . . families.” *Id.*

Pollock also relies on the fact that Utah Copper refused to hire the other two MSHA miners’ representatives from Barney’s Canyon, Tony Lopez and Brad Vaughn. Instead, Utah Copper hired individuals from Barney’s Canyon who did not make waves. Pollock points to the fact that several of the employees hired had acted as re-rate supervisors at Barney’s Canyon.² Many of these employees had serious attendance problems or other disciplinary problems. In addition, at least one former Barney’s Canyon employee who was hired by Utah Copper had a drinking problem that made him a hazard to other employees.

Pollock believes that he was well qualified for one of the haul truck driver positions and that Utah Copper’s failure to offer him a position was directly related to his aggressive stance on safety at Barney’s Canyon. Wolff made it clear to Stacy, both in his oral statement to “look at his record” and in the written reference he provided, that Pollock should not be hired because he confronts management on safety issues.³

2. Utah Copper’s Position

Utah Copper contends that Pollock offered no evidence showing that, in failing to extend an offer of employment to him, Utah Copper was motivated by his protected activities at Barney’s Canyon. Pollock relies to a great extent on the evaluation provided by Wolff. Pollock believes that this evaluation was motivated by his protected activities and that, because of that evaluation, Utah Copper failed to offer him employment. Utah Copper argues that Pollock did not offer any evidence to support this theory. It contends Wolff did not take adverse actions against Pollock at Barney’s Canyon and that Wolff’s evaluation was based on Pollock’s unprotected conduct. Finally, it was Stacy, not Wolff, who determined that Pollock should not be offered employment at Utah Copper.

Stacy testified that, although he probably looked at Wolff’s evaluation of Pollock, he could not recall doing so. Rather, Stacy testified that he made the employment decision “independently of Mr. Wolff’s comments, either verbal or written.” (Tr. 315). Stacy testified

² A “re-rate” supervisor is an hourly employee who fills in for a front line supervisor when he or she is absent for that shift.

³ Utah Copper filed a motion to strike portions of Pollock’s brief. I find that the arguments presented are not well taken and the motion is DENIED. I have treated Utah Copper’s motion and Pollock’s response as reply briefs.

that the key factor in his decision not to extend an offer of employment was Pollock's conduct in the interview. The second factor was the fact that Pollock had "a pattern of insubordination over the years." (Tr. 307; Ex. R-4). Stacy testified that he was especially concerned because, during the interview, Pollock did not articulate how he planned to take action to correct his tendency to engage in insubordinate behavior. (Tr. 308).

Utah Copper maintains that even if Wolff was motivated by Pollock's protected activities when he wrote his evaluation, the evaluation is not adverse action because it is merely an expression of his opinion. Utah Copper did not rely on Wolff's evaluation when Stacy decided not to offer him employment so there is a "causal disjuncture" in Pollock's argument. (UC Br. 6). Utah Copper established that Stacy made his decision based on the interview and Pollock's discipline record, not because of Wolff's recommendation.

Utah Copper contends that the evidence establishes that Stacy decided not to hire Pollock because of his belief that Pollock demonstrated an "undesirable attitude toward teamwork." (UC Br. 7). Stacy testified that he did not review Pollock's personnel record prior to the interview, that he had no knowledge of Pollock's protected activities prior to the interview, and that he did not base his decision on these protected activities. (Tr. 305-06, 320). Instead, Stacy relied on the summary of Pollock's disciplinary record and Pollock's performance during the interview.

3. Analysis

a. Pollock's Interview

I credit Stacy's testimony as to the process he used in making hiring decisions. He did not review any documents prior to the interview. (Tr. 297). He was concerned about Pollock's history of insubordination and the fact that he did not appear to be someone who worked well with management. Stacy and Welch followed a set format when interviewing candidates. They alternated asking questions and they both recorded the responses on the interview sheet. (Tr. 300; Exs. R-7, R-8). Each candidate was asked the same questions. Each interview lasted about 30 to 45 minutes. After each interview, Stacy conferred with Welch and Stacy made a decision whether to offer the candidate a position at Utah Copper. He recorded his decision on an employment interview summary form. With respect to Pollock, Stacy rated him "Good" with respect to "Essential Functions" and "Safety." (Ex. R-6; Tr. 305, 310-12). Essential functions refers to a candidate's experience in performing the essential functions of the job. With respect to safety, Stacy wrote "Clean safety record, no injuries or property damage on file." *Id.* Stacy marked Pollock "Average" with respect to "Initiative" and "Independent."

Stacy rated Pollock "Poor" with respect to the other two criteria, "Team Player" and "Supervision." Under "Team Player" Stacy wrote:

Could only reference safety when probed with questions about productivity. Could not give examples regarding Ops & Maint.

(Ex. R-6). Under “Supervision” Stacy wrote, “Would not give specific answers about his ability to interact positively with supervisors.” Finally, in the section titled “Interviewer’s Thoughts,” Stacy wrote:

Mark is familiar with heavy equipment and has a good record in safety. Weak in area of cooperation and interactions with supervisors.

(Ex. R-6). Under recommended action, Stacy checked “Do not Hire.”

I credit Stacy’s testimony that, except for what Pollock told him during the interview, he was not aware of his protected activities at Barney’s Canyon. (Tr. 305-06). I also credit his concerns about Pollock’s insubordination. (Tr. 307-08). The information before Stacy listed his disciplinary record as follows:

<u>Date of Infraction</u>	<u>Description of Infraction</u>	<u>Disciplinary Action</u>
04/20/99	Insubordination, failure to perform	8 days suspension
12/08/98	Insubordination	1 day suspension
04/21/97	Smoking inside building, 2 nd offense	Written Warning
07/30/96	Insubordination & disorderly conduct	3 days suspension

(Ex. R-4). Stacy did not seek further information about these disciplinary actions from Barney’s Canyon or the Utah Copper human resources department. (Tr. 330-31). Stacy stated that he was concerned that Pollock chose not to comment on his past disciplinary actions. (Tr. 307). Although Stacy admitted that he would rate a candidate poorly if he tried to explain away his past conduct, Stacy expects potential employees with a history of disciplinary actions to “articulate some type of plan or things they’ve done different to where they would be able to not have them happen again.” (Tr. 308). Pollock merely responded that he had “no more to add” and that his record “speaks for itself.” *Id.* Stacy testified that he found Pollock’s answers to be “one sided to where he would offer a description in his comments of people who would come to him.” *Id.* Stacy was concerned that Pollock offered no examples demonstrating “any kind of team-solving skills to where in a group they solve things.” (Tr. 308-09). Pollock’s examples were “always someone coming to him . . . a one-sided affair. . . .” (Tr. 309).

Stacy testified that he discussed Pollock in a chance meeting with Wolff prior to the interview. (Tr. 312). Wolff simply told Stacy that he “should look at his records.” *Id.* Wolff appeared to not want to talk further, so Stacy did not continue the conversation. Stacy testified that Wolff’s written evaluation of Pollock was available to him at the time of the interview but that he did not remember the document. (Tr. 315). There was a folder for each candidate provided to Stacy just before the interview. Stacy testified that he probably “breezed through the folder” for Pollock and that it would have contained Wolff’s recommendation that Pollock not be hired. (Tr. 314). Stacy stated that he does not believe that Wolff’s oral or written statements

influenced his decision not to hire Pollock. (Tr. 315). Stacy stated that he made the decision independently based on Pollock's history of discipline and his responses during the interview. *Id.* Stacy made the final decision not to hire Pollock. He conferred with Welch to make sure that their opinions were consistent, but Stacy made the final decision. Stacy was unaware that Welch had concerns about Pollock because he was Greg Pollock's brother. Stacy testified that he had many dealings with Greg Pollock at Utah Copper in "grievance and hearing procedures" and in safety matters because he was a local union president, but Stacy was not concerned about hiring Mark Pollock because of Greg Pollock's protected activities. (Tr. 333).

b. Pollock's Prima Facie Case

The Mine Act protects all miners who engage in protected activities including those who do so in an aggressive manner or in a manner that mine management believes is not helpful or positive. Pollock's relationship with Wolff was strained in part because of the manner in which Pollock pursued safety issues. For example, Pollock would complain to MSHA about safety conditions without first giving Barney's Canyon the opportunity to address the alleged condition. It is clear that this behavior aggravated Wolff. 22 FMSHRC at 433. Stacy had Wolff's evaluation before him during the interview. Although Stacy was not aware of the details of the extent or nature of Pollock's protected activity, Pollock discussed his protected activities during the interview. Pollock believes that he established that Wolff's hostility toward Pollock's protected activities convinced Stacy that he should not hire Pollock.

Pollock also contends that he established a *prima facie* case by showing Utah Copper's disparate treatment of employees who engaged in protected activities at Barney's Canyon. He argues that former Barney's Canyon employees who were not active safety advocates were hired even though they were no more qualified or less qualified for the job than Pollock. Pollock presented 14 examples in his brief. (P. Br. 9-17). For example, one former Barney's Canyon employee who had been a re-rate supervisor had serious attendance problems, but these problems were not fully documented on the attendance discipline log available to Stacy. (Ex. C-7, p. 151). It is not disputed that Pollock had a perfect attendance record at Barney's Canyon. In addition, this same candidate had a number of serious accidents that were not discussed during her interview. (Ex. C-7). Wolff did not mention these accidents on his evaluation. *Id.* at 165.3. Pollock had very few accidents. This former Barney's Canyon employee was hired by Utah Copper for one of the truck driver positions.

Another former Barney's Canyon employee was suspended in 1999 for showing up for work under the influence of alcohol. (Ex C-19). The Utah Copper interview sheet for this candidate mentions this suspension but dismisses it as "No problems - 1 time 3 years ago." *Id.* at 206. All of Pollock's suspensions occurred prior to mid-1999 and, given his 13-year employment history at Barney's Canyon, they all were given in a relatively short period of time, 1996-99. This candidate also had a driving under the influence (DUI) on his record that he did not report on his Utah Copper application for employment. Pollock believes that Utah Copper's explanation that this candidate was not required to report this DUI because it was a misdemeanor

is disingenuous. In addition, this candidate had a number of disciplinary warnings for committing “unsafe acts” at Barney’s Canyon. Pollock points to the fact that both Barney’s Canyon and the Utah Copper interviewer rated him excellent for safety. (Ex. C-19 p. 201, 203). This candidate was hired by Utah Copper.

Another former employee of Barney’s Canyon, Tony Lopez, had been a miners’ representative under the Mine Act. He also filed a discrimination complaint against Barney’s Canyon in 1998. He interviewed for a position as a utility man at the Utah Copper power plant, but he was not hired. (Ex. C-10 p. 2226). Stacy did not interview or seriously consider Lopez because he had already been interviewed and rejected. Wolff did not give Lopez a very good evaluation. *Id.* at 2240. Pollock believes that Utah Copper did not hire Lopez because of his protected activities.⁴

Pollock cites other incidences where former Barney’s Canyon re-rate supervisors with employment records that are not as exemplary as he believes his record to be were hired by Utah Copper. These candidates had serious accidents in their history, extensive disciplinary records, or they only worked for Barney’s Canyon a short period of time. (See P. Br. 14-17; Exs. C-9, C-11 through C-17, C-20, C-35). Pollock contends that, taken together, these examples show that those former Barney’s Canyon employees who engaged in protected activities, including Pollock, were passed over for positions at Utah Copper while candidates who had not engaged in protected activities, whose personnel records were more problematic than his, were hired.

I conclude that Pollock established a *prima facie* case of discrimination. There is seldom a smoking gun in these cases because direct evidence of a discriminatory motive is rarely encountered. There is evidence to show that there was communication between management and the human resources departments at Utah Copper and Barney’s Canyon, Utah Copper was aware of Pollock’s protected activities at Barney’s Canyon, management at Barney’s Canyon was at times hostile to the manner in which Pollock pursued these protected activities, Utah Copper had a motive to be suspicious of Pollock as a result of Greg Pollock’s protected activities, and Utah Copper favored former Barney’s Canyon re-rate supervisors over other employees who had frequently engaged in protected activities. Taken as a whole, I find that this evidence is sufficient to establish a *prima facie* case.

c. Utah Copper’s Affirmative Defense

I find, however, that Utah Copper’s affirmative defense overcomes Pollock’s *prima facie* case. Pollock’s case was built on inferences that he asked me to draw from circumstantial evidence. Although his evidence was enough to establish a *prima facie* case, I find that Utah

⁴ In September 2002, the Secretary of Labor filed a discrimination complaint on behalf of Mr. Lopez. *Sec’y of Labor on behalf of Tony Lopez v. Kennecott Utah Copper Corp.*, WEST 2003-223-DM. By order dated January 5, 2004, I approved the parties’ settlement of that case. I draw no inferences in this case from the settlement of Lopez’s case.

Copper affirmatively established that Stacy decided not to hire Pollock because of his concerns about Pollock's unprotected conduct. Stacy made the ultimate decision for Utah Copper based on Pollock's unprotected activities. In reaching this conclusion, I am aware of the admonition of Congress that "[w]henver protected activity is in any manner a contributing factor to the retaliatory conduct, a finding of discrimination should be made." *Legis. Hist.* at 624.

I credit the testimony of Mr. Stacy with respect to the reasons he set forth for his decision not to hire Mr. Pollock. I find that Stacy was a straight-forward, honest witness. He was concerned that Pollock would be a difficult employee to supervise because of his disciplinary history and because he did not give Stacy the impression of being a team player during the interview. I credit Stacy's testimony that he reached his decision independently, based on Pollock's interview and disciplinary record, without serious consideration of Wolff's evaluation. Although some of the friction between Pollock and management at Barney's Canyon was a result of Pollock's safety activities, most of this friction was a consequence of his unprotected activities. Some of this conflict is discussed in my decision with respect to the discrimination complaints filed by the Secretary on behalf of Pollock against Barney's Canyon. 22 FMSHRC 419, 428-39. The record in that case revealed that Pollock often complained about his job duties, refused or was reluctant to perform any duties that were not part of his normal routine, resisted management directives to change the manner in which he performed his work, and sometimes refused to take responsibility for his actions. In one incident a Barney's Canyon supervisor believed that Pollock threatened to make an MSHA inspection "tough" for the company if he disciplined him for watching television at work. Barney's Canyon issued the discipline to Pollock because he refused to admit that he was watching television. In another incident litigated in that case, Pollock was suspended for eight days for refusing a reasonable work assignment. In my decision, I reached the following conclusion:

I find that most of the hostility that developed between the company and Pollock is a result of his union activities and the perception that he is frequently disrespectful and disobedient to Kennecott's managers. The record shows that he frequently argues with supervisors about work assignment.

22 FMSHRC at 432.

Stacy relied on the disciplinary actions taken against Pollock at Barney's Canyon as summarized in the attendance and discipline log. (Ex. R-4). Pollock's suspensions shown on the log were not given in retaliation for his protected activities. Although Pollock and the Secretary argued that some of this discipline was for his protected activities, I rejected these arguments in my decision in that case. 22 FMSHRC at 437-39. Of course, the fact that Pollock challenged these suspensions in a discrimination case is also protected, but I credit Stacy's testimony that he was not aware of that case at the time he decided not to hire Pollock. (Tr. 306). It was reasonable for Stacy to conclude from Pollock's previous suspensions that he might be a difficult employee to supervise and that he might not be a good team player.

Because Wolff did not testify in the present case, it is not clear how he arrived at his evaluations on the reference form. (Ex. R-5). Pollock asserts, without proof, that Wolff's negative evaluation of him was based on his protected activities. Given Pollock's history of discipline at Barney's Canyon and his rather combative style, it is just as likely if not more likely that Wolff based his evaluation on Pollock's unprotected activities alone. Wolff's notation on the form that Pollock filed a discrimination case to get his record expunged and that he lost the case most likely refers to my decision in Pollock's case against Barney's Canyon.

Stacy testified that he placed a big emphasis on his assessment of a candidate's ability to work with others on a team. Team skills and the ability to work with others is important to Utah Copper when it retains existing employees and hires new employees. *See Sec'y of Labor on behalf of Ondreako v. Kennecott Utah Copper Corp.*, 25 FMSHRC 612, 616 (Oct. 2003). Under "Team Player," the interview form indicates that Utah Copper is looking for candidates who "will pull together with others, share information and ideas, and share solutions to operating and maintenance challenges." (Ex. R-6). Although it may not be a traditional hiring criteria in the mining industry, the ability to work with others on a team is a legitimate business justification for choosing one candidate over another, so long as it is not used in a discriminatory manner.⁵ As stated above, Stacy rated Pollock poor with respect to the "Team Player" and "Supervision" criteria.

Stacy characterized Pollock's interview as "one-sided." Stacy was concerned that Pollock talked too much about himself and could not describe how well he interacts and works with others to solve work challenges. Given Pollock's history of suspensions, Stacy was particularly interested in his ability to work and share with supervisors and other employees. In Stacy's opinion, Pollock failed to explain how he had corrected his work behavior since the time of his suspensions. On the interview summary, Stacy noted that Pollock was familiar with heavy equipment and had a good record in safety but that he was "weak in the area of cooperation and interactions with supervisors." (Ex. R-6).

Pollock's evidence about disparate treatment is not convincing. Mr. Lopez was not interviewed by Stacy for a haul truck driver position because he had been rejected for another job at the Utah Copper power plant. The record does not make clear whether Stacy seriously considered Lopez for a truck driver position and why he did not consider him. (Tr. 347). I cannot draw an inference that Stacy refused to consider Lopez because of his protected activities at Barney's Canyon. There is also no evidence in the record to support the supposition that Lopez was not hired at the power plant because of his protected activities.

⁵ A mine operator cannot refuse to hire a candidate because, for example, he complains about safety to MSHA without trying to resolve the matter through his team. A miner's rights under the Mine Act supersedes any arrangement or agreement on how safety disputes should be handled at a mine.

The evidence Pollock presented with respect to other candidates interviewed for truck driver positions is too circumstantial and speculative to be persuasive. Stacy was not aware of many of the issues that Pollock raises about these candidates at the time he decided to hire them. Stacy relied on what the candidate said and the information in the attendance and discipline log. If this log presented information that was incomplete or inaccurate, Stacy was not aware of these discrepancies when he made the hiring decision. Consequently, the fact that a particular candidate had more accidents at Barney's Canyon than Pollock does not help establish disparate treatment if Stacy was not aware of these accidents. The same principle applies to a DUI or attendance problems. Although it is possible to find inconsistencies in the hiring process, I find nothing in the evidence presented by Pollock that convinces me that those candidates who engaged in protected activities while employed at Barney's Canyon were favored over candidates who had not engaged in such activities.⁶ The business justification presented by Utah Copper for its decision not to employ Pollock does not appear to be mere pretext to cover its true discriminatory motive. Its decision is consistent with the criteria it used to make these employment decisions. "The Commission and its judges have neither the statutory charter nor the specialized expertise to sit as a super grievance or arbitration board meting out industrial equity." *Chacon*, 3 FMSHRC at 2516-17. I find that the evidence presented concerning Utah Copper's employment decisions with respect to the other Barney's Canyon candidates does not help establish a discriminatory motive with respect to Pollock.

Greg Pollock, Mark's brother, was the president of the Steelworkers Local at Utah Copper. As such, he was active in safety matters and had engaged in protected activities. Stacy was aware that Greg had engaged in protected activities at the Bingham Canyon mine. Welch testified that he was concerned about Mark Pollock because Greg "created problems" at the mine. (Tr. 215). Welch further testified that he overcame his concerns about the relationship between Mark and Greg during Mark's interview so that his bias did not affect his thinking about Mark. (Tr. 216). Stacy made the decision not to hire Pollock without knowing about Welch's concerns about the relationship between Greg and Mark. At the conclusion of the interview, Welch shared Stacy's concern about Mark's history of insubordination at Barney's Canyon. *Id.* In any event, the problems Welch had with Greg Pollock appear to stem from his union activities rather than any protected activities under the Mine Act.⁷ I reject the arguments made by Pollock that Utah Copper failed to hire him because of the protected activities of his brother.

In conclusion, I find that Utah Copper decided not to extend an offer of employment to Mark Pollock for reasons that are not protected by the Mine Act. In addition, I find that even if

⁶ There is no reliable evidence concerning Brad Vaughn's employment status. (Tr. 23). He was the third miners' representative at Barney's Canyon.

⁷ Greg Pollock filed a discrimination complaint against Utah Copper in 2000. In my decision in that case, I held that Greg Pollock "was disciplined solely because of his obstructive and harassing behavior at a December 30, 1999 [labor-management] meeting" and I dismissed the case. *Greg Pollock v. Kennecott Utah Copper Corp.*, 23 FMSHRC 676, 683 (June 2001).

Utah Copper's decision not to hire Pollock was motivated in some part by Pollock's protected activities, Utah Copper was primarily motivated by his unprotected activity and would have rejected Pollock's application for employment on the basis of the unprotected activity alone.

III. ORDER

For the reasons set forth above, the discrimination complaint filed by Mark Pollock against Kennecott Utah Copper Corporation under section 105(c) of the Mine Act is **DISMISSED**.

Richard W. Manning
Administrative Law Judge

Distribution:

Arthur F. Sandack, Esq., 8 East Broadway, Suite 510, Salt Lake City, UT 84111-2291 (Certified Mail)

James Elegante, Esq., Kennecott Utah Copper Corp., P.O. Box 6001, Magna, UT 84044-6001 (Certified Mail)

RWM