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LLOYD BRAZELL V. ISLAND CREEK COAL
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
August 12, 1982
LLOYD BRAZELL

v.

Docket No. KENT 81-46-D

ISLAND CREEK COAL COMPANY

DECISION

This discrimination case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1976 & Supp. IV 1980). The administrative law judge concluded that Island Creek Coal Company had not discriminatorily terminated Lloyd Brazell. 3 FMSHRC 1773 (July 1981) (ALJ). We affirm.

Brazell began working for Island Creek in June 1970 and was promoted to a management position in 1974. On May 30, 1980, the date of his termination, he was serving as a belt foreman. At the time that Brazell was laid off the mine was reducing its work force, and several other managerial employees, and numerous rank-and-file miners, were also laid off in connection with this cutback.

Brazell filed a discrimination complaint with the Secretary of Labor pursuant to section 105(c)(2) of the Act. 30 U.S.C. § 815(c)(2). The Secretary concluded that no discrimination had taken place. Brazell then instituted this proceeding before the Commission pursuant to section 105(c)(3) of the Act. 30 U.S.C. § 815 (c)(3). Brazell describes numerous incidents in which he was involved during the course of his employment by Island Creek. The administrative law judge thoroughly reviewed these incidents and concluded that Brazell had failed to establish a prima facie case of discrimination in every instance. We have reviewed the record in light of the arguments presented by Brazell on review and conclude that the judge's factual findings are supported by substantial evidence. 30 U.S.C. § 823(d)(2)(A)(ii)(I). We also conclude that based on the evidence the judge correctly found that Brazell failed to establish a prima facie case of discrimination under section 105(c). In order to establish a prima facie case a miner must prove by a preponderance of the evidence that: (1) he engaged in protected activity, and (2) the adverse action was motivated in any part by the protected activity. Secretary of Labor on behalf of David Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980), rev'd on other

grounds sub nom., Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981). Many of the incidents described by Brazell were not the subject of safety

~1456

complaints, nor did he otherwise bring them to the attention of management or MSHA. Several of the incidents clearly fall outside the scope of section 105(c) of the Act, e.g., complainant's failure to cash small bonus checks and his efforts to prevent pornographic materials from being brought into the mine. As to these and similar incidents Brazell failed to establish the first element of a prima facie case of discrimination, i.e., that he engaged in protected activity.

Several other incidents related by Brazell could be viewed as involving protected activity, particularly his complaints about an improper splice, unsafe conduct by miners, and inadequate firebossing. However, Brazell has failed to establish by a preponderance of the evidence the second element of a prima facie case, i.e. that his lay off was motivated in any part by these happenings. Although "direct evidence of motivation is rarely encountered" and, therefore, oftentimes "the only available evidence is indirect", 1/ sufficient indicia of discriminatory intent have not been presented in this case for us to draw inferences from the evidence different from those drawn by the judge. To the extent that the judge's decision weighed the sometimes conflicting testimony on the facts in dispute, we find no persuasive reason to disturb the judge's findings. 2/

1/ Secretary of Labor on behalf of Johnny N. Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510 (Nov. 1981), reconsideration den., 3 FMSHRC 2765 (Dec. 1981), pet. for review filed No. 81-2300, D.C. Cir., Dec. 11, 1981.

2/ Brazell alternatively requests a remand to the administrative law judge for further evidence directed towards disproving the credibility of the mine superintendent who testified at the hearing in this case. The sole basis for this request is the fact that on July 6, 1981, a multi-count indictment was filed in federal district court charging a former MSHA official with several instances of criminal misconduct. One of the counts alleges that the official impeded an MSHA investigation concerning the mine herein involved "by approving a Ventilation and Methane and Dust Control Plan submitted by Island Creek Coal Company when he well knew that citations for excessive dust levels were in effect." United States v. Craft, No. CR 81-00009-0(G), W.D. Ky.

We simply have no basis for inferring from this allegation against a former government official that the mine superintendent testified untruthfully before the administrative law judge concerning the events

herein at issue. No connection between the events at issue in this proceeding and the criminal charges has been demonstrated or a connection between the individuals involved. In our view a sufficient showing has not been made that a remand for additional evidence is warranted.

~1457

In sum, we agree with the judge that as to each of the incidents described by Brazell, in his complaint and during the hearing, a prima facie case of prohibited discrimination was not established.

Accordingly, the judge's decision is affirmed.

A. E. Lawson,
Commissioner

3/ In light of our conclusion that Brazell failed to prove that his lay off was in any part motivated by protected activity, we reject his argument that Island Creek's failure to rehire him constitutes illegal discrimination.

~1458

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