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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

CLIFFORD MEEK,
COMPLAINANT

DISCRIMINATION PROCEEDING

v.

Docket No. LAKE 90-132-DM
MSHA Case No. UC MD-90-06

ESSROC CORPORATION,
RESPONDENT

DECISION

Appearances: Robert J. Tscholl, Esq., Canton, OH,
for Complainant;
John C. Ross, Esq., Canton, OH, for
Respondent.

Before: Judge Fauver

This is a discrimination complaint under section 105(c)(1)
of the Federal Mine Safety and Health Act of 1977, 30 U.S.C.
801 et seq.

Having considered the hearing evidence and the record as a
whole, I find that a preponderance of the substantial, reliable,
and probative evidence establishes the following Findings of Fact
and further findings in the Discussion below:

FINDINGS OF FACT

1. Respondent, Essroc Corporation, has a cement
division known as Essroc Materials, Inc., which owns and operates
a grinding plant in Stark County, Ohio (hereafter the
"Middlebranch Plant") where it grinds mined materials such as
limestone and clay, and stores and ships cement, for sales in or
substantially affecting interstate commerce. This plant was
purchased by Essroc from United States Cement Company on or about
February 27, 1990. Upon acquisition, with minor exceptions Essroc
used the same plant, equipment, facilities, workforce, management
personnel, line of products, etc., as U.S. Cement had used. Only
two Middlebranch Plant employees of U.S. Cement were not employed
by the Essroc Middlebranch Plant: John Bickel, an injured
employee who remained with USC, and the Complainant, Clifford
Meek, who was the only USC

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Middlebranch Plant employee whose application for employment with Essroc was denied.

2. Essroc's acquisition of the Middlebranch Plant was part of its purchase of approximately 70% of the assets of USC, including USC plants in Bessemer, Pennsylvania, Lowellville, Ohio, Toledo, Ohio, and Middlebranch, Ohio.

3. USC's Middlebranch Plant Manager, Marvin Bragg, and Plant Supervisor, Dale Lewis, became the Plant Manager and Plant Supervisor of the Essroc Middlebranch Plant.

4. In mid 1989, Coplay Cement Company (Essroc's predecessor)² began acquisition negotiations with USC. By early January, 1990, it was evident that the acquisition of selected assets of USC would take place.

5. Michael Roman, USC's Vice President of Industrial Relations, who was to become Essroc's Manager of Human Resources for the Great Lakes Division, directed USC plant managers at Bessemer, Pennsylvania, Lowellville, Ohio, Middlebranch, Ohio, and Toledo, Ohio to evaluate their hourly employees on forms provided by Essroc.

6. Marvin Bragg, Plant Manager of the USC's Middlebranch Plant, who was to become Essroc's Middlebranch Plant Manager, filled in the evaluation forms on his hourly employees and sent them to Roman. The forms are dated January 26, 1990. Bragg's evaluation form on Meek rated him "Poor" on "Attitude Toward Work & Company," with the following comments:

This employee has ability to do a lot but is unwilling, his attitude is very close to being insubordinate, also cannot get along with other employees.

7. On January 31, 1990, USC's Middlebranch Plant hourly employees were requested by management to attend a safety meeting with MSHA Inspector Richard L. Jones, around 7:00 a.m. Jones had asked management to arrange the meeting. About 10 or 11 employees attended. Jones said the purpose of the meeting was to discuss any safety or health concerns. A number of employees were nervous about raising such matters, for fear that their remarks would get back to management. The inspector assured them that their remarks would be protected by the Mine Act, and that the company could not retaliate against them. Several employees raised safety concerns, including safety defects in the crane and dust control problems.

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Meek pointed out some electrical hazards. At one point, Meek asked the inspector why the company appeared to know in advance when the inspector was coming for an inspection. As an illustration, Meek described a recent event that gave him concern about prior knowledge of inspections. The inspector became upset at Meek's question and took it as an accusation that he was violating the law. He raised his voice in anger and verbally confronted Meek. Meek decided to leave the meeting at that point. As Meek and his helper were leaving the building, Meek saw the Plant Supervisor, Dale Lewis, and stated, referring to the inspector, "That guy's nuts." Tr. 35.

8. Later that morning, Inspector Jones went to Dale Lewis' office, where he saw Lewis and the Plant Manager, Marvin Bragg. They asked him how the meeting went and he said it was fine with the exception of one employee. The inspector went on to complain about Meek, saying that he accused him of taking a bribe and that he had a bad attitude. After Meek filed a discrimination complaint for not being hired by Essroc, the inspector wrote an account of his meeting with the employees and his conversation with the supervisors. The inspector's written statement differs substantially from the testimony of a number of witnesses in this case. The inspector was subpoenaed by Complainant to testify at the hearing of this case, but MSHA, contrary to the Act, refused to comply with the subpoena. Rather than await enforcement of the subpoena in a United States District Court, Complainant offered in evidence the inspector's written "notes" about his meeting with employees and his later conversation with plant management. The inspector's statement was not contemporaneous with his inspection, was not under oath, and was not subject to questioning under oath. His statement is not convincing to me as compared to the testimony of witnesses at the hearing who were subject to examination and cross-examination.

9. I find that the inspector became angry at Meek and communicated his anger to Meek's supervisors, Lewis and Bragg, in criticizing Meek for his complaint about possible prior knowledge of MSHA inspections.

10. Bragg was concerned about the inspector's angry reaction, and called Michael Roman, USC's Vice President of Industrial Relations. Roman also became concerned, and sent Jim Clark, a USC safety director, to the Middlebranch Plant, to see if he could help assuage the inspector and see that the inspector was not retaliatory toward USC because of Meek's alleged remarks.

11. The inspector conducted an inspection and issued 15 citations. One was a "significant and substantial" citation, which resulted in the crane being shut down for repairs for about a day and a half.

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12. After the citations were issued, Dale Lewis, the Plant Supervisor, contacted James Gallentine, an hourly employee, on or about January 31, 1990. He asked him what Meek had said to Inspector Jones at the employees' meeting with the inspector. Lewis told Gallentine that Lawrence Ousky, USC's President, was upset about Meek's remarks to the inspector and wanted to have Meek fired for making the inspector angry.

13. That night, when Meek began his shift, Gallentine took him aside and warned him: "Watch your back. Larry Ousky wants you fired." Tr. 35. Meek asked him "How do you know this?" and Gallentine replied, "Dale Lewis told me. I ain't supposed to tell you so don't say anything. Just watch your back." Tr. 35.

14. Based on Gallentine's warning, Meek started carrying a concealed tape recorder to record any contacts with management. He recorded four of these. Two recordings he found irrelevant, and erased, two he found relevant and retained. They were put in evidence as Sides A and B of a tape cassette, Exhibit C-1.

15. One of Meek's recordings (Side A and the beginning of Side B of Exhibit C-1) is USC Plant Manager Bragg's meeting with hourly employees on February 27, 1990. Bragg told the employees that Essroc was purchasing the plant from USC, that they were being terminated by USC and would have to file a job application with Essroc if they wanted to work at the plant. They were told to apply for the same job they had with USC, if they wanted to work for Essroc, and to return for a meeting the next day.

16. Early the next day, Bragg telephoned Meek and told him it was not necessary for him to come to the February 28 meeting, because Essroc was not going to approve his job application.

17. Meek decided to attend, anyhow, and again carried a concealed tape recorder. When Roman and Bragg saw him in the meeting room (before the meeting), they asked him to talk with them privately, in the foyer. Meek secretly taped this conversation, on Side B of Exhibit C-1, transcribed at pages 54-59 of the transcript. I incorporate Sides A and B of Exhibit C-1 as Findings of Fact as to the statements made by the persons recorded.

18. In mid February, 1990, a team of three Essroc supervisors (David J. Coale, Director of Human Resources, David Repasz, a plant manager of a Coplay Cement plant, and Joseph Gaffney) met with two USC supervisors (Michael Roman and Marvin Bragg) to review the evaluations at the Middlebranch Plant and to select the USC employees to be hired by Essroc at that plant.

19. By the time of the above meeting, it was known by Bragg and Essroc that Bragg would be Essroc's Plant Manager of the Middlebranch Plant, and it was known by Roman and Essroc that Roman would be Essroc's Manager of Human Resources for the Great Lakes

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Division, which would include the Middlebranch Plant.

20. Marvin Bragg and Michael Roman were key figures in Essroc's selection of Middlebranch Plant hourly employees, since Bragg would be Essroc's Middlebranch Plant Manager, and Roman would be Essroc's Manager of Human Resources over a multi-plant region that would include the Middlebranch Plant.

21. The key recommendations concerning Essroc's rejection of Clifford Meek's application for employment were those of Marvin Bragg, who told the Essroc supervisors that Meek had repeatedly stated publicly that he could not work for Bragg and who, in Bragg's opinion, had a poor attitude, and of Michael Roman, who supported Bragg's negative recommendation. Bragg and Roman supported their recommendation not to hire Meek with four documents selected from Meek's personnel file and the written evaluation form Bragg had filled out for Essroc.

22. Two of the documents that Bragg and Roman presented at the mid February meeting, selected from Meek's personnel file, are Separation Notices signed by Andy Coccoli, a former USC Plant Manager of the Middlebranch Plant, dated February 13, 1987, and April 24, 1987. These documents contain the following checked items:

From the February 13, 1987, form:

TA@@@

From the April 24, 1987, form:

TA@@@

23. Andy Coccoli testified that he did not check these items on Meek's separation notices and, to the contrary, he found Meek to be an excellent employee in all areas, including skills, performance, attitude, cooperativeness, etc., and would not have marked anything "poor" concerning Meek. Each form has a printed question, "Would you re-employ? (Give reason)." The February 13 form has a typed answer, "Yes." The April 24 form has no answer. I credit Coccoli's testimony, and find that the above separation notices were check-marked "Poor" by someone other than Coccoli, in

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an effort to disparage Meek. This tampering with a supervisor's signed documents raises a serious cloud over the integrity and credibility of USC's evaluation of Meek.

24. A third document that Bragg and Roman presented at the mid February meeting, selected from Meek's personnel file, is an Employee Evaluation Report on Meek prepared by Bragg and concurred in by his subordinate Dale Lewis, Plant Supervisor, dated January 18, 1989. This report rates Meek as "Poor" on "Cooperation," "Attitude," and "Initiative" and "Good" on "Work Habits" and "Attendance." It gives him a qualified recommendation for "Continued employment," stating:

Must improve. This employee has made statements to other employees that he is not afraid to go to jail for assault referring to Dale Lewis and myself [Marvin Bragg].

25. The last document that Bragg and Roman selected from Meek's personnel file to present at the mid February meeting is a Separation Notice, September 25, 1989, signed by Bragg which rated Meek as follows:

TA@@@

The printed question on this form: "Would you re-employ? (Give reason)" was left blank by Bragg.

26. In the case of the four USC personnel documents referred to above, USC retained Meek in its employment or reemployed him after layoff after the date of each document, and did not discipline him, reprimand him, or caution him in any way because of such documents. USC did not present any of the documents to Meek while he was employed by USC, and did not advise him he was being evaluated.

DISCUSSION WITH FURTHER FINDINGS

Successor in Interest

The evidence shows continuity of the business operations of the Middlebranch Plant from USC to Essroc with Essroc's use of the same plant, equipment, and essentially the same workforce and supervisory personnel. Although 30% of USC's assets at other locations were not included in the acquisition by Essroc, the Middlebranch Plant was virtually a 100 percent takeover by Essroc. Based upon these factors, I find that Essroc, through its subsidiary Essroc Materials, Inc., is a successor in interest to USC as the owner and operator of the Middlebranch Plant. Secretary

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of Labor on Behalf of Corbin v. Sugartree Corp., 9 FMSHRC 394 (1987), aff'd, sub nom. Terco, Inc., v. FMSHRC 839 F.2d 236 (6th Cir. 1987); Munsey v. Smitty Baker Coal Co., 2 FMSHRC 3463 (1980), aff'd in relevant part sub nom. Munsey v. FMSHRC, 701 F.2d 976 (D.C. Cir. 1983), cert. denied, 464 U.S. 851 (1983).

Scope of Protected Activity

Section 105(c)(1) of the Act³ protects miners and applicants for mining employment from retaliation for exercising rights under the Act, including the right to complain to MSHA or a mine supervisor about an alleged danger or violation of the Mine Act.

The basic purpose of this protection is to encourage miners "to play an active part in the enforcement of the 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. 95-181, 95th Cong. 2d Sess. 1977, reprinted in the Legislative History of the Federal Mine Safety and Health Act of 1977 at 623 (Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess. (1978)).

This provision is a key part of remedial legislation, which is

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to be liberally construed to effectuate its purposes.

Meek's complaint to an MSHA inspector that the mine operator appeared to have advance knowledge of MSHA inspections was a protected activity under this section. Advance knowledge could be coming from an inspector or sources other than the inspector, e.g., a supervisor, clerk, or other person in the inspector's office, so that a miner's report of actions by the mine operator that appear to show advance knowledge could lead to disclosure of a violation of the Act if the complaint were properly investigated. Miners are entitled to raise such concerns with MSHA or their employer without fear of retaliation, in the plain interest of helping to assure the efficacy and integrity of mine inspections of their safety and health work conditions.
Did Essroc Discriminate Against Complainant?

Having found that Complainant was engaged in a protected activity, I turn to the question whether Essroc's denial of employment was motivated in any part by his protected activity.

To establish a prima facie case of discrimination under 105(c) of the Act, a miner or applicant for mining employment has the burden to prove that he or she was engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F. 2d 1211 (3rd Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (1981).

"Direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect. * * * "Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence." Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510 (1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983), quoting NLRB v. Melrose Processing Co., 351 F.2d 693, 698 (8th Cir. 1965). In "analyzing the evidence, circumstantial or direct, the [adjudicator] is free to draw any reasonable inference" (id.).

The reasons given by Essroc for not hiring Meek are the recommendations of Bragg and Roman at the meeting in mid February, 1990, based upon Bragg's representation that Meek had stated that he could not work for Bragg and that Meek had a poor attitude, negative evaluations from his personnel file, and Bragg's evaluation form filled out for Essroc.

At the time of that meeting, Bragg, Roman, and Essroc knew that Bragg would soon become Plant Manager of Essroc's Middlebranch Plant and that Roman would soon become Essroc's Manager of Human

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Resources for the Great Lakes Division which would include the Middlebranch Plant. Under its "team approach," Essroc relied on Bragg and Roman to pick their own team to work in the Middlebranch Plant. I find that Bragg and Roman were de facto management agents of Essroc in evaluating USC's Middlebranch Plant employees who applied for employment with Essroc and in recommending to Essroc who should be hired and not hired. Their role as de facto agents of Essroc, and Essroc's successorship to USC, found above, serve to impute to Essroc any motivation of Bragg or Roman toward Complainant in their recommendation, at the February meeting, that Essroc not hire Meek at the Middlebranch Plant.

The issue of discrimination by Essroc thus turns on the question of the motivation of Bragg and Roman.

Bragg stated in an affidavit (he did not appear a witness) that, on February 23, 1990, at a meeting with the plant employees, Meek stated that "he could not work for me [Bragg]." I credit Meek's testimony that he did not make such a statement. Bragg's subordinate Dale Lewis, Plant Supervisor, was at the meeting, and he testified that he never heard Meek say "that he didn't want to work for Marvin [Bragg]." Tr. 365.

Bragg's affidavit further stated that, on February 27, 1990, at a meeting with USC plant employees, Meek "again made the statement that if the same manager was in place for Essroc, he could not work at the Middlebranch facility because I would be in charge." This statement is contrary to fact, as demonstrated by Meek's tape recording of the meeting. At that meeting, Meek was cordial to Bragg, showed a clear desire to work for Essroc at the plant supervised by Bragg, and made no statement indicating that he could not or would not work for Bragg.

Bragg's affidavit also states that, on February 28, 1990, at a meeting among Bragg, Roman and Meek, "Mr. Roman asked Mr. Meek if he had said he would not work for me [Bragg] for Essroc. Mr. Meek replied that he had made such a statement." The tape of this meeting is contrary to Bragg's affidavit. Meek did not state that he had ever said he could not or would not work for Bragg, or any words to that effect.

I find that Bragg's affidavit is contrary to fact, and I credit Meek's testimony as to what Meek stated at the meetings on February 23, 27, and 28, 1990. I do not credit Bragg's statement in his affidavit that the MSHA incident had nothing to do with the decision not to hire Meek.

Roman testified that the MSHA incident was not discussed at the meeting with the Essroc supervisors (mid February, 1990) and was not a factor in the decision not to hire Meek. He also signed an affidavit, stating that, on February 28, 1990, at the meeting referred to in Bragg's affidavit, "I [Roman] asked Mr. Meek if he

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had stated that he would not work for Marvin Bragg and he replied that he had said this." The tape recording of this meeting is contrary to Roman's affidavit. I find that Roman's affidavit on this point is contrary to fact, and I credit Meek's testimony as to what he said at the February 27, 1990, meeting.

I do not credit the affidavits of Bragg and Roman or the testimony of Roman as to what was said by Meek at the February 23, 27, and 28, 1990, meetings. To the contrary, I find that Complainant did not state that he could not work for Marvin Bragg, or any words to that effect, and that Bragg manufactured an allegation of such statement to induce Essroc not to hire Complainant. Roman participated in this misrepresentation by supporting Bragg's recommendation to Essroc. They used this opportunity to persuade Essroc not to hire him.

I find that USC management, including Bragg, Roman and Ousky, wanted to fire Complainant because of his protected activity in complaining to Inspector Jones. Bragg and Roman carried out this intention by recommending to Essroc not to hire Complainant. They knew, at the time they heard of Meek's complaint to the MSHA inspector, that all USC employees would shortly be terminated by USC and considered by Essroc.

Bragg's and Roman's discriminatory motivation toward Meek because of his protected complaint to the MSHA inspector is imputed to Essroc. Essroc's adverse action motivated by this discriminatory motivation (rejecting his application for employment) was a violation of 105(c) of the Act. Did Essroc Establish an Affirmative Defense?

An operator may rebut a prima facie case by showing either that no protected activity occurred or that the adverse action was not motivated in any part by the protected activity. Failing that, the operator may defend affirmatively against the prima facie case by proving that it was also motivated by unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. In a "mixed motive" case, although the miner must bear the ultimate burden of persuasion, the operator, to sustain its affirmative defense, must prove by a preponderance of the evidence that the adverse action would have been taken even if the miner had not engaged in the protected activity. *Boich v. FMSHRC*, 719 F.2d 194, 195-196 (6th Cir. 1983).

Essroc has not shown that, had Marvin Bragg and Michael Roman not known of Meek's complaint to Inspector Jones, they would still have recommended that Essroc not employ him at the Middlebranch Plant. The record shows that, over the years, any negative evaluations in Meek's file at USC did not result in discipline of him, even a reprimand or caution to him, or any action not to reemploy him after layoffs. The reliable evidence does not show

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that, independent of Meek's complaint to Inspector Jones, his application for employment by Essroc would not have been accepted as were the applications from all other USC Middlebranch Plant hourly employees.

CONCLUSIONS OF LAW

1. The judge has jurisdiction in this proceeding.
2. Essroc is a successor in interest to USC in its acquisition and operation of the Middlebranch Plant.
3. Essroc violated 105(c) of the Act by refusing to employ Complainant at its Middlebranch Plant because of his activity protected by that section.
4. Complainant is entitled to employment by Essroc at its Middlebranch Plant with back pay, interest,⁴ and litigation costs, including a reasonable attorney fee.

ORDER

1. Respondent shall, within 30 days of this decision, employ Complainant at its Middlebranch Plant with the same position, pay, seniority, and all other conditions and benefits of employment that would apply had Respondent employed Complainant at such plant when the other USC Middlebranch Plant hourly employees were employed by Respondent following its acquisition of the plant from USC in February, 1990.
2. Within 15 days of this decision, the parties shall confer in an effort to stipulate the amount of Complainant's back pay, interest, and litigation costs including a reasonable attorney fee. Such stipulation shall not prejudice Respondent's right to seek review of this decision. If the parties agree on the amount of monetary relief, Complainant shall file a stipulated proposed order for monetary relief within 30 days of this decision. If they do not agree, Complainant shall file a proposed order for monetary relief within 30 days of this decision and Respondent shall have ten days to reply to it. If appropriate, a further hearing shall be held on issues of fact concerning monetary relief.

