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PATRICK MOONEY V. SOHIO WESTERN MINING  
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION  
WASHINGTON, D.C.  
March 7, 1984  
PATRICK J. MOONEY

v. Docket No. CENT 81-157-DM

SOHIO WESTERN MINING  
COMPANY

#### DECISION

This case involves a discrimination complaint brought by Patrick J. Mooney against Sohio Western Mining Company (Sohio) pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1976 & Supp. V 1981). At issue is whether Sohio's discharge of Mooney on September 9, 1980, violated section 105(c)(1) of the Mine Act, 30 U.S.C. § 815(c)(1)(Supp V 1981). Following a hearing on the merits, the Commission's administrative law judge determined that Sohio did not violate section 105(c)(1) and dismissed Mooney's complaint. 4 FMSHRC 440 (March 1982)(ALJ). For the reasons that follow, we affirm the judge's decision.

Mooney was employed as an underground laborer by Sohio at its J.J. No. 1 uranium mine from February 5, 1980, until September 9, 1980, when he was discharged. During most of this period, however, Mooney was disabled and received worker's compensation as a result of a workplace injury that occurred on April 10, 1980. On that date Mooney was injured while he and his partner, Donald Benton, were standing in the elevated bucket of a front-end loader installing ground support. Mooney's left foot was broken when a slab of rock fell from the crown, that part of the drift where the rib meets the back. The rock fall and injury occurred in a large area that Sohio was excavating to serve as an underground maintenance shop. Earlier in the shift Mooney had refused an assignment requiring him to climb a ladder underneath a shale bulge in this area.

Mooney was unable to work as a result of his injury from April 10 until September 2, 1980, when he reported for duty. Mooney brought to the mine a statement from his doctor that he was ready for regular duty. In accordance with normal company practice, Mooney met with Sohio's safety director, Rudolph Siegmann, when he returned to duty. Mooney complained to Siegmann that accident reports filed concerning his injury

omitted the name of, or any information from, the other miner in the bucket when the injury occurred and failed to state that the area had not been properly supported. These omissions, in Mooney's view, denied him a 10 percent increase in worker's compensation benefits allegedly payable under the applicable state worker's compensation statute if an employer's failure to use safety equipment results in injury to an employee. Mooney informed Siegmann that he would pursue the matter further.

After this meeting Mooney was assigned to a surface job digging ditches, because he did not have safety glasses and could not go underground. The next morning Mooney called the mine to report that he would not be reporting for work because his foot hurt.

Mooney made an unsuccessful attempt to see his doctor that day. The following day, September 4, 1980, Mooney returned to work and, because he did not have a note from his doctor, was given a warning and 3-day suspension. On two earlier occasions, February 28 and March 7, 1980, Mooney had presented a doctor's note after being absent from work for one day. He had also received a warning slip on April 3, 1980, for failing to furnish a doctor's note after being absent April 2nd. The warning Mooney received September 4th stated that a third warning would result in termination. Mooney's suspension period included a weekend, so that he next reported to work on September 9th. Mooney arrived 10 to 15 minutes late on that date, was given a third warning and was terminated.

On October 15, 1980, Mooney filed a written complaint of discrimination with the Department of Labor's Mine Safety and Health Administration (MSHA). See 30 U.S.C. § 815(c)(2). MSHA investigated the complaint but determined that Mooney had not been discriminated against in violation of the Mine Act. Proceeding pro se Mooney thereafter filed a complaint with this independent Commission. 30 U.S.C. § 815(c)(3).

In his decision the Commission administrative law judge concluded that Sohio's discharge of Mooney did not violate section 105(c). The judge began his analysis by considering whether Mooney established his participation in protected activity. With regard to Mooney's allegation that on April 10, 1980, he had refused to climb a ladder under a shale bulge, the judge stated that this action "would be protected under the Act if it were shown that such refusal to work prompted his firing." 4 FMSHRC at 443. Concerning Mooney's complaints to the operator in September 1980 regarding the alleged filing of inaccurate accident reports, the judge stated: "If these complaints were motivated by a sincere belief by Mooney that such matters were related to safety and health conditions in the mine, it would constitute protected activity." 4 FMSHRC at 444. The judge found, however, that Mooney was concerned because he had not received an

additional amount in workers' compensation payments that he believed he was due under state law, purportedly as a result of the operator's alleged filing of erroneous accident reports. According to the judge, because Mooney's complaints were "motivated by monetary reasons rather than safety and health", these complaints were not protected under the Mine Act. *Id.* The judge further found that Sohio had established that it had legitimate reasons for terminating Mooney based on violations of company policy concerning time and attendance.

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On review, Mooney contends that the judge erred in concluding that illegal discrimination had not occurred. He argues first that the judge erred in determining that his complaints to the operator concerning the alleged filing of false accident reports were not protected because Mooney's motive for complaining was monetary. He maintains that he was injured in an accident occurring at Sohio's mine; the Act requires accurate reporting of such accidents; in his view Sohio did not accurately describe the accident in its reports; this alleged inaccurate reporting constitutes a violation of the Act; and, therefore, his complaints concerning this alleged violation were protected regardless of his personal motivation for making the complaints. Mooney's second argument is that the operator improperly determined that he had violated the company's time and attendance requirements, and, therefore, that he was "unjustly terminated." Mooney submits that under proper application of company attendance policies no cause for termination was present.

Although we agree with the administrative law judge's ultimate conclusion, we find it necessary to modify in certain aspects the rationale he utilized to support his conclusion.

In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complainant bears the burden of production and proof to show (1) that he engaged in protected activity and (2) that an adverse action against him was motivated in any part by the protected activity. *Secretary on behalf of 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), and *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981). In order to rebut a prima facie case, an operator must show either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. If an operator cannot rebut the prima facie case in this manner, it may nevertheless affirmatively defend by proving that (1) it was also motivated by the miner's unprotected activities, and (2) that it would have taken the adverse action in any event for the unprotected activities alone. The operator bears a burden of proof with regard to the affirmative defense. *Haro v. Magma Copper Co.*,

4 FMSHRC 1935, 1937 (November 1982). The ultimate burden of persuasion that illegal discrimination has occurred does not shift from the complainant. Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC at 818 n. 20. The Supreme Court recently approved the National Labor Relations Board's virtually identical analysis for discrimination cases arising under the National Labor Relations Act. NLRB v. Transportation Management Corp., 76 L.Ed. 2d 667 (1983). See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983)(approving the Commission's Pasula-Robinette test). The judge's decision is unclear as to whether he concluded that Mooney established a prima facie case of unlawful discrimination. At the hearing, at the close of Mooney's presentation of his case-in-chief, the judge denied Sohio's motion to dismiss stating: "I feel that the complainant has made a prima facie case and that its [sic] up to respondent to rebut this." Tr. 107. In his final written decision, however, he found that Mooney had not established a prima facie case (4 FMSHRC at 446) while also concluding that Sohio had "successfully defended." 4 FMSHRC at 445.

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Despite these conflicting findings, viewing them in context we are satisfied that the judge intended the following: As to Mooney's refusal to work under the shale bulge on April 10, 1980, the judge believed that Mooney had established the first element of a prima facie case, but not the second, i.e., the work refusal was protected but Mooney's discharge was not motivated by this incident. As to Mooney's complaints upon his return to work in September 1980 regarding Sohio's alleged filing of false accident reports, the judge believed that the first element of a prima facie case had not been established, i.e., he believed that Mooney's complaints did not constitute protected activity because they were motivated by monetary rather than safety and health concerns.

On review Mooney does not take issue with the judge's finding that the shale bulge incident did not motivate the operator in its discharge of Mooney. Therefore, we need not review this aspect of the judge's decision. 30 U.S.C. § 823(d)(2)(A)(iii). However, the judge inappropriately hinged his determination of whether Mooney engaged in any protected activity on whether an adverse action resulted. Protected activity under the Act does not gain or lose protected status dependent upon whether an adverse action resulted. We believe, however, that the judge was simply trying to state with regard to the incident in April 1980, that Mooney's work refusal did not motivate the operator to discharge him in September 1980. To this effect the judge stated that Mooney's "concerns in this matter were apparently accepted as valid and another employee was assigned to perform the task," and the "firing occurred approximately five months

later and the ladder incident alone would seem rather remote." Id. 4 FMSHRC at 443.

We also find it unnecessary to address whether the judge erred in determining that Mooney's complaints upon his return to work were not protected simply because of their monetary basis. Even if we assume *arguendo* that Mooney's complaints were protected by the Mine Act, we conclude that the record amply supports the judge's conclusion that Sohio, whether in rebuttal or defense, successfully overcame Mooney's case and established that it terminated Mooney for legitimate business reasons. In this regard, the judge made the following relevant findings of fact. On two occasions shortly after the start of his employment and prior to his injury, Mooney was absent from work for one day for medical reasons and upon his return to work on each occasion he provided a doctor's note. (Findings of Fact Nos. 3 and 4; 4 FMSHRC at 441). On a third occasion prior to his injury, Mooney was absent for one day due to illness, but failed to provide a doctor's note upon his return. Mooney was given a written warning for this failure. (Finding of Fact No. 5; Id). The day after his return to work from disability Mooney was absent for one day for medical reasons, returned to work without a doctor's note, was given a second written warning and 3 day suspension, and was notified in writing that a third warning would result in termination. (Finding of Fact No. 13; 4 FMSHRC at 442). On the next day that he was scheduled to work, Mooney arrived late, was given a third warning and thus was terminated. (Finding of Fact No. 14; Id.).

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Under the Mine Act, an administrative law judge's findings of fact are supported by substantial evidence. 30 U.S.C. § 823(d)(2)(A)(ii)(I). The evidence supporting the above findings is not only substantial, it is largely uncontroverted. The judge further found that Sohio had established that it terminated Mooney for legitimate business reasons pertaining to Mooney's repeated violations of the operator's time and attendance policies; that Mooney was aware of these policies; and that the policies had been applied to Mooney consistently from the beginning of his employment and prior to his engaging in any protected activity. 4 FMSHRC at 444-45. Although Mooney argues for a different result and requests that contrary inferences be drawn from the circumstances surrounding his termination, on this record progressive discipline was established and we cannot say that the finding of the judge concerning the operator's motivation is not supported by substantial evidence or is otherwise contrary to law. 1/

Accordingly, the judge's decision finding that Sohio's discharge of Mooney did not violate section 105(c) of the Mine Act is affirmed insofar as it is consistent with this decision.

Richard V. Backley, Commissioner

A. E. Lawson, Commissioner

L. Clair Nelson, Commissioner

1/ Our affirmance of the judge's conclusion that Mooney was discharged in conformity with company policy is not, as Mooney argues, inconsistent with a decision of an appeals referee of the State of New Mexico's Employment Security Department. Exh. C-4. In that decision, the appeals referee found that the written policy at the mine required a doctor's note after an absence of two days. That decision also indicated, however, that a different policy requiring a note for one day's absence pertained in Mooney's section. For purposes of awarding state unemployment compensation, the referee held that Sohio's written policy controlled, and, therefore, that Mooney had not been discharged for "misconduct" and was entitled to state unemployment benefits. The question presented under the Mine Act is not the same. Because the administrative law judge's conclusion that Mooney legitimately was discharged for violation of the mine operator's time and attendance policies, rather than for reasons protected by the Mine Act, is supported by substantial evidence, it must be affirmed.

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