

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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NOV 29 2017

THOMAS LEE KREIMIER,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEST 2017-80-DM
	:	WE-MD-2016-12
v.	:	
	:	
COEUR ALASKA, INCORPORATED,	:	Kensington Mine
Respondent	:	Mine ID: 50-01544

**DECISION**

Appearances: Thomas Lee Kreimier, P.O. Box 90, Hot Sulphur Springs, Colorado, *pro se*;

Donna Pryor, Esq., Husch Blackwell LLP, Denver, Colorado, for Respondent.

Before: Judge Bulluck

This case is before me upon a Complaint of Discrimination (“Complaint”) filed by Thomas Lee Kreimier against Coeur Alaska, Incorporated (“Coeur Alaska”), pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977 (“Act”), 30 U.S.C. § 815(c). Kreimier contends that Coeur Alaska unlawfully discharged him on May 9, 2016, in retaliation for having reported a safety breach to management. Coeur Alaska denies that it discriminated against Kreimier, and asserts that he was discharged for sleeping on the job and ignoring his job responsibilities.

On July 11, 2016, Kreimier filed the Complaint with the Department of Labor’s Mine Safety and Health Administration (“MSHA”) pursuant to section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2).<sup>1</sup> In a letter to Kreimier dated September 28, 2016, MSHA notified him that, based on its investigation of the allegations contained in his Complaint, it had concluded that a

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<sup>1</sup> 30 U.S.C. § 815(c)(2) states, in relevant part:

Any miner or applicant for employment or representative of miners who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary [of Labor] alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate.

violation of section 105(c) had not occurred, and advised him of his right to proceed on his own. Kreimier, *pro se*, initiated this proceeding before the Commission on November 2, 2016, under section 105(c)(3) of the Act, 30 U.S.C. § 815(c)(3).<sup>2</sup>

A hearing was held in Juneau, Alaska. Kreimier testified on his own behalf, Coeur Alaska called six witnesses to testify, and the parties filed post-hearing briefs. For the reasons set forth below, I conclude that Kreimier has established a *prima facie* case of discrimination, that Coeur Alaska has successfully rebutted Kreimier's *prima facie* case, and that, ultimately, Kreimier has failed to prove that he was terminated, in any part, for his protected activity.

## I. Factual Background

Coeur Alaska operates the Kensington Mine, an underground gold mine employing approximately 320 miners in 2016, operating on 12-hour shifts, 7 days a week, and accessible from Juneau, Alaska by a 45-mile commute by boat and bus. Tr. 33-34, 136, 192. The mining process at Kensington begins underground with the extraction of ore, which is hauled to the surface and processed into pyrite concentrate, then sold to other plants for gold extraction. Tr. 136-37.

With over 36 years of mining experience, Kreimier was hired by Coeur Alaska on May 17, 2010 as a mill operator, and two years later became a mill control operator/lead man, a position he held until May 9, 2016. Tr. 9, 24-28; Ex. C-4 at 5. He worked as an hourly employee according to a five-week cycle: two weeks on the 12-hour day shift, followed by one week off, then two weeks on the 12-hour night shift. Tr. 33. Kreimier's office, the control room of the mill building, overlooked the entire pyrite concentration process. Tr. 29-30. His core duties included monitoring two radios tuned to several frequencies and seven computers displaying equipment and processes that he was able to manipulate, as needed; he also had oversight responsibility for five to six mill workers in the absence of management on duty. Tr. 30-33, 140-41, 205, 231. More broadly, Kreimier served as the communications hub for the mine, a capacity which included responsibilities during emergencies such as coordinating medical care and notifying underground miners to evacuate. Tr. 141, 199.

Kreimier's immediate supervisors alternated between Dennis Sullivan, Scott Fisher, and Adam Finkbonner, depending upon the shift; his second-line supervisor was senior supervisor of operations Jody Karasch; his third-line supervisor was process superintendent Roy Lee; and, at the top of the hierarchy was vice-president and general manager Wayne Zigarlick, who oversaw the maintenance, safety, environmental, human resources, and process management departments. Tr. 35-37, 43, 135, 192; Ex. C-4 at 5.

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<sup>2</sup> 30 U.S.C. § 815(c)(3) states, in relevant part:

If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission. . . ."

The circumstances underpinning Kreimier's Complaint emanated from an event occurring during the day shift on March 23, 2016, when Karasch and Kreimier were on duty and the ball crusher could not be started. Tr. 38-39; Ex. C-4 at 13. Karasch verbally instructed Coeur Alaska employee James Fortune to jump over a locked, three-foot-high gate to retrieve a key that, when inserted in the main circuit breaker, would start the crusher. Tr. 39-42. Fortune complied, and the crusher soon resumed normal operation. Tr. 42. The next day, Fortune reported the ball-crusher incident to Roy Lee, and quit the job for reasons unclear from the record, but, by reasonable inference, reasons that involved some degree of animosity between Fortune and Karasch. Tr. 144, 184-85. Lee suspended Karasch with pay and, pending a three-week internal investigation that concluded in a finding that no safety breach had occurred, Karasch was returned to duty. Tr. 70, 144-45, 185. A few days after Fortune had reported the ball-crusher incident, Kreimier also reported it to Lee, and learned of Karasch's suspension and the investigation at that time. Tr. 44-45, 47, 184; Ex. C-4 at 8.

At some point during Karasch's suspension, Kreimier and process trainer Dustin Peltier got into a verbal altercation concerning a work-related matter unrelated to the ball-crusher incident, in the presence of maintenance supervisor Mike Hegna and the chief lab chemist. Tr. 56-60, 66, 234-35. On March 26, Peltier reported the incident by email to Lee, complaining that Kreimier had been disrespectful to him and Hegna. Tr. 235; Ex. R-2 at 6. Subsequently, on March 27, geologist Theresa Jeske lodged another complaint against Kreimier, also alleging coworker disrespect. Tr. 146-47; Ex. R-2 at 5. Based on these allegations and prior incidents of disrespectful conduct in his personnel file, Kreimier was issued a Final Written Warning, which put him on notice that any further offenses might result in his termination. Tr. 146-48; Ex. R-2 at 4.

During the day shift on May 8, Coeur Alaska's blasting contractor, Redpath, in the process of developing a new portal, made several routine, but unsuccessful, attempts by radio to contact Kreimier so that he could give the "all clear" for an imminent blast. Tr. 141-43; Ex. R-2 at 2. Peltier, who was also monitoring the radio station when Redpath was attempting to contact Kreimier, walked over to the mill control room and, as a result of observing Kreimier apparently sleeping at the computer monitors, photographed him with his mobile phone. Tr. 150, 237-40; Ex. R-1; Ex. R-2 at 2. On the following shift, May 9, Wayne Zigarlick, enroute to a meeting in the mill building and passing by the control room, also observed Kreimier apparently asleep, and reported the incident to Lee. Tr. 154-55, 194-95. Later that day, Zigarlick, Lee, and human resources manager Christina Gilbert met to discuss the matter of Kreimier sleeping at his desk and, in accord with Lee and Gilbert's recommendations, Zigarlick decided to terminate Kreimier, effective immediately. Tr. 83-85, 155-56, 193, 196, 216-19; Ex. R-2 at 1.

## **II. Findings of Fact and Conclusions of Law**

In order to establish a *prima facie* case of discrimination under section 105(c) of the Act, a complainant must prove by a preponderance of the evidence "(1) that he engaged in a protected

activity, and (2) that the adverse action was motivated in any part by the protected activity.”<sup>3</sup> *Sec’y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799-2800 (Oct. 1980), *rev’d on other grounds sum nom Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981). The Commission has noted 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 (Nov. 1981), *rev’d on other grounds sub nom Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983). Circumstantial evidence may include: 1) coincidence in time between the protected activity and the adverse action; 2) knowledge of the protected activity; 3) hostility or animus toward the protected activity; and 4) disparate treatment. The more that hostility or animus is specifically directed toward the protected activity, the more probative it is of discriminatory intent. *Id.* at 2510. The Commission has also held that an “operator’s knowledge of the miner’s protected activity is probably the single most important aspect of a circumstantial case” and that “knowledge . . . [may] be proved by circumstantial evidence and reasonable inferences.” *Sec’y of Labor on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (Sept. 1999).

Once the complainant has established a *prima facie* case, “[t]he operator may attempt to rebut [it] by showing either that the complainant did not engage in protected activity or that the adverse action was in no part motivated by protected activity.” *Sec’y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 818 n.20 (Apr. 1981). The operator may also affirmatively defend its actions by proving, by a preponderance of the evidence, that it was motivated by both the miner’s protected and unprotected activities, and would have taken the adverse action for the unprotected activity alone. *Id.* at 818. The Commission has explained that an affirmative defense should not be “examined superficially or be approved automatically once offered.” *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1938 (Nov. 1982). In reviewing affirmative defenses, the judge must “determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed.” *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 993 (June 1982). Indicia of legitimate non-discriminatory reasons for an employer’s adverse action include evidence of the miner’s unsatisfactory work record, prior warnings to the miner, past discipline consistent with that meted out to the complainant, and personnel rules or practices forbidding the conduct in question. *Id.*

At this stage, the complainant has the opportunity to demonstrate that the operator’s non-discriminatory reason for its actions is a mere pretext for discrimination. *Sec’y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1534 (Aug. 1990). The Commission has explained that “pretext may be found, for example, where the asserted justification is weak, implausible, or out of line with the operator’s normal business practices.” *Id.* However, the Commission has also stated that “[its] judges should not substitute for the operator’s business

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<sup>3</sup> 30 U.S.C. § 815(c)(1) states, in relevant part:

No person shall discharge or in any manner discriminate . . . against . . . any miner . . . because such miner . . . has filed or made a complaint under or related to this chapter, including a complaint notifying the operator or the operator’s agent . . . of an alleged danger or safety or health violation in a coal or other mine . . . or because of the exercise by such miner . . . on behalf of himself or others of any statutory right afforded by this chapter.

judgement [their] views on ‘good’ business practice.” *Chacon*, 3 FMSHRC at 2516. Finally, the Commission has noted that the ultimate burden of proving discrimination always remains with the complainant. *Robinette*, 3 FMSHRC at 818 n.20.

#### A. Prima Facie Case

Kreimier contends that he engaged in protected activity when he reported the ball-crusher incident to Roy Lee.<sup>4</sup> Tr. 69. Coeur Alaska counters that Kreimier’s report is not protected because he reported the incident only after Lee initiated a conversation with him, Lee already knew of the incident from Fortune’s report, and the investigation had already begun. Resp’t Br. at 11-13. Regardless of who initiated the dialogue between Kreimier and Lee, or who first reported the incident to Lee triggering the investigation, it is uncontested that Kreimier did report the incident and, while his report may be redundant, it is, nonetheless, protected by the Act. *Sec’y of Labor on behalf of Riordan v. Knox Creek Coal Corp.*, 38 FMSHRC 1914, 1922 (Aug. 2016) (citing *Sec’y of Labor on behalf of Jones v. Kingston Mining, Inc.*, 37 FMSHRC 2519, 2523 n.3 (Nov. 2015)) (“[a]lthough other miners and foremen may have raised similar concerns, [a miner’s] safety complaints are no less protected as a result.”). Therefore, Kreimier has established that he engaged in protected activity when he reported Karasch to Lee.

It is clear that Kreimier’s termination constitutes an adverse action and, as is most often the case, the circumstantial evidence involved in Kreimier’s discharge must be examined in order to determine whether Coeur Alaska was motivated, in any part, by his protected activity.

The Commission has found that a discharge occurring four months after protected activity is sufficiently coincidental in time to support a finding of discriminatory motive. *Riordan*, 38 FMSHRC at 1924; *Pero v. Cyprus Plateau Mining Corp.*, 22 FMSHRC 1361, 1365 (Dec. 2000) (finding that a four-month gap between protected activity and termination was probative of a discriminatory nexus). In this case, the temporal nexus is even stronger, since Coeur Alaska discharged Kreimier less than seven weeks after he had reported Karasch and the ball-mill incident.

Zigarlick’s decision to terminate Kreimier was the result of consultation with Lee and Gilbert. By Lee’s own account, Kreimier reported Karasch’s alleged safety breach directly to him, and Lee recommended Kreimier’s termination to Zigarlick. Tr. 155-56, 196. Since Lee’s input obviously influenced Zigarlick, I find it reasonable to impute Lee’s knowledge of Kreimier’s protected activity to Zigarlick. See *Turner v. Nat’l Cement Co. of California*, 33 FMSHRC 1059, 1068 (May 2011) (finding that a supervisor’s knowledge of an employee’s protected activity can be imputed to an upper-level decision-maker if the supervisor influenced the decision-maker’s termination decision); *Metric Constructors, Inc.*, 6 FMSHRC 226 (Feb. 1984). Accordingly, I find that Kreimier has established a *prima facie* case based on the temporal nexus between his safety complaint and termination, and Coeur Alaska’s knowledge of his protected activity.

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<sup>4</sup> At hearing, Kreimier hinted that he considered the heated discussion in Peltier’s office to be protected also, but ultimately retreated from this contention. Tr. 67, 69.

## **B. Coeur Alaska's Rebuttal of Kreimier's Prima Facie Case**

Coeur Alaska contends that it terminated Kreimier for violating its policy prohibiting sleeping on the job, an action that it would have taken even if Kreimier had no prior disciplinary record, as demonstrated by its termination of other employees who had clean disciplinary records, for sleeping on duty. Resp't Br. at 13-14, 17. In the alternative, it argues, even if it has failed to establish that it was in no way motivated by Kreimier's protected activity, it would have terminated Kreimier solely for sleeping on the job. Resp't. Br. at 22.

Zigarlick, Lee, and Gilbert all testified that Kreimier was fired because he had been found sleeping on the job. Tr. 156, 196, 219-20. Lee testified that as a result of Peltier informing him that he had observed Kreimier asleep in the control room and showing him a photograph of Kreimier appearing to be asleep, he immediately initiated an investigation and solicited statements from Redpath and Dennis Sullivan. Tr. 152, 167. It was during the next shift, Lee explained, in the midst of his investigation, that Zigarlick reported to him that, while walking past the control room, he had also witnessed Kreimier sleeping. Tr. 154, 194. Shortly thereafter, Lee testified, he received the written statements of Redpath and Sullivan, which corroborated Peltier's account that Kreimier had been unresponsive to Redpath's radio calls. Tr. 155-56; Ex. R-2 at 2. Consequently, Lee stated, he recommended that Zigarlick terminate Kreimier. Tr. 156.

Zigarlick, Lee, and Gilbert also testified to Coeur Alaska's long-standing policy prohibiting "[s]leeping or lying down on duty or otherwise neglecting the job," and Gilbert stated that it was in effect in May of 2016 and is included in the Employee Handbook. Tr. 156, 193, 208; Ex. R-8. Gilbert noted that Kreimier had certified, by his signature in 2010 and 2016, that he had received and read the Handbook. Tr. 210-11; Ex. R-4 at 1, 4. She further testified that Coeur Alaska follows a progressive discipline policy, i.e., disciplining miners according to a sliding scale of severity ranging from verbal coaching to termination and that, for sufficiently egregious misconduct, management may elect to skip intermediate steps to terminate a miner lacking prior discipline. Tr. 208-09; Ex. R-8 at 4-5.

Lee recalled that he and former human resources manager Terry Lloyd had spoken to Kreimier in 2014 about Kreimier's disrespectful treatment of his coworkers, and noted that Kreimier's personnel file had contained two instances of verbal coaching. Tr. 146-47, 156; Ex. R-2 at 7-8; Ex. R-6. In his opinion, Kreimier's behavior had improved after he had been disciplined, but only until he received emails from Peltier and Theresa Jeske on March 26 and 27 of 2016, respectively, complaining about unrelated instances in which Kreimier had treated them disrespectfully. Tr. 146-47; Ex. R-2 at 5-6. These accounts of inappropriate conduct, Lee stated, formed the basis of the Final Written Warning issued to Kreimier on March 28. Tr. 147-48; Ex. R-2 at 4.

Lee testified that Coeur Alaska terminated Cody Cowart for sleeping on the job, Shawn Trulove for sleeping on the job and defacing company property, and Dennis Lorange for failing to report Cowart, whom he knew to be sleeping on duty. Tr. 158-60. Gilbert testified that Coeur Alaska fired Nathan Lipski and Corey Piper, also for sleeping on duty. Tr. 211-13. According to Gilbert, when asked about Trulove, Lipski, and Piper, all had clean disciplinary records.

Tr. 213-14; R-7. In Kreimier's case, Gilbert testified credibly, while she considered Kreimier's prior disciplines, she would have recommended his termination had his record been clean because sleeping on the job is a terminable offense. Tr. 219-20.

Based on the strength of the credible evidence of Kreimier sleeping on the job, as well as Coeur Alaska's prohibition against sleeping on duty and evidence of its uniform enforcement of that policy, I find that Coeur Alaska has successfully rebutted Kreimier's *prima facie* case.

### C. Pretext

Kreimier argues, in essence, that Coeur Alaska's stated justification for terminating him is pretextual based on a conspiracy between Peltier, Karasch, and Lee. In advancing this theory, Kreimier argues that the operator lacks actual proof that he was sleeping, and that he was subjected to disparate treatment. Comp. Br. at 1-2.

Kreimier contends that Lee, Karasch, and Peltier were friends, and that they colluded to terminate him because he had reported Karasch's safety breach. Tr. 84; Comp. Br. at 2. Lee and Peltier, the two who testified, confirmed their friendship outside of the job. Tr. 174, 245. Kreimier's contention includes the suggestion that Peltier falsely accused him of sleeping on duty, and that the false accusation that he had been disrespectful during their heated discussion is responsible for the trumped-up Final Written Warning. Peltier's motivation in reporting Kreimier for sleeping or being disrespectful, or his animus toward Kreimier, is inconsequential to this analysis because Peltier is not a supervisor, had no authority to affect Kreimier's employment, and had no involvement in the decision to terminate him. Also, it is noteworthy that Kreimier's contention that Peltier was out to get him fails to account for the overwhelming evidence of Kreimier sleeping, or the fact that Jeske's similar complaint formed the basis, in equal part, of the Final Written Warning. There is also no indication that Karasch was involved in reporting Kreimier for sleeping on either shift, or in the circumstances giving rise to the Final Written Warning, or in the decision to fire Kreimier. Finally, the record is simply bereft of any evidence that Karasch's friendship with Lee motivated Lee to recommend Kreimier's discharge, or otherwise conspire to get rid of Kreimier in retaliation for reporting the ball-crusher incident.

Kreimier points out that Peltier's photograph does not show that his eyes are closed, and that no one entered the mill control room to check whether he was sleeping or whether the radio was tuned to channel 7, the frequency on which Redpath communicates with mill control. Comp. Br. at 2. The photograph depicts Kreimier seated at his work station, facing away from the computers with his head lowered and resting in the palm of his hand; indeed, it does not show his eyes or the radio. Ex. R-1 at 2. However, Peltier testified credibly that he saw Kreimier's eyes closed when he took the photograph from his view through the window, and that when he entered the control room thereafter, Kreimier "came about." Tr. 238-39. In addition, according to Peltier and health and safety manager Jeff Murray, Kreimier is required to monitor channel 7. Tr. 205, 231. It is notable that Peltier's eyewitness account is consistent with Redpath's and Sullivan's independent reports of Kreimier's unresponsiveness, and also Zigarlick's observation of Kreimier sleeping on the next shift. Even Kreimier acknowledged that he may have "appeared" to be asleep in the photograph. Tr. 120. Accordingly, based on eyewitness accounts, the photograph, and the internal investigation, I find that Kreimier was

sleeping and, therefore, that it was reasonable for Coeur Alaska to believe that he had violated its policy, which, incidentally, also prohibits “neglecting the job.”

Finally, Kreimier asserts that he was treated more harshly than similarly situated employees under similar circumstances, by referencing employees who were not disciplined for sleeping on the job. Comp. Br. at 2. For example, he testified that he had seen Karasch and Lucas Johnson asleep, that Karasch had told him that he had awakened Trevor Sutcliffe multiple times, that James Fortune had been caught sleeping, that he had heard the crew tease Sunia Klapi for falling asleep, and that these employees were not disciplined. Tr. 114-18, 164. However, Kreimier’s self-serving testimony is deeply flawed because it lacks corroborative evidence, either documentary or testimonial, considering that he called no witnesses to testify and introduced no probative exhibits. In fact, Kreimier only referenced these comparison employees as an afterthought at the end of his testimony, pursuant to questioning from the bench about the bare allegations in his Complaint. He even conceded that he did not report the alleged sleeping incidents to management, nor was he able to establish that they had been reported by anyone else. Tr. 114-18. The evidence, on the other hand, makes clear that where Coeur Alaska has found employees asleep at the switch, it has terminated them.

Having reviewed all the evidence, the record in its entirety shows that Kreimier was sleeping while on duty during two consecutive shifts, conduct that the operator has repeatedly found sufficiently egregious to merit immediate termination, notwithstanding its progressive discipline policy. It is clear that Coeur Alaska was motivated by Kreimier’s sleeping on the job, alone, and that Kreimier has failed to show that its reasons were pretextual, or that his reporting of Karasch’s alleged safety breach in any way motivated his termination.

### ORDER

**ACCORDINGLY**, it is **ORDERED** that the Complaint of Discrimination of Thomas Lee Kreimier against Coeur Alaska, Incorporated, is, hereby, **DISMISSED**.



Jacqueline R. Bulluck  
Administrative Law Judge

Distribution:

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