

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
721 19th St. Suite 443
Denver, CO 80202-2500
TELEPHONE: 303-844-5266 / FAX: 303-844-5268

August 4, 2020

THEODORE OESAU,
Complainant,

v.

ROGERS GROUP, INC.,
Respondent.

DISCRIMINATION PROCEEDING

Docket No. CENT 2019-0276-DM
Case No. SC-MD-2019-07

Mine: Greenbrier Quarry
Mine ID: 03-00855

DECISION

Appearances: Chris W. Burks, WH Law, PLLC, 1 Riverfront Place, Suite 745, North Little Rock, AR 72114

Margaret S. Lopez, Ogletree, Deakins, Nash, Smoak, & Stewart, P.C., 1909 K. Street , N.W., Suite 1000, Washington, D.C. 20006

J. Carin Burford, Ogletree, Deakins, Nash, Smoak, & Stewart, P.C., 420 20th Street North, Suite 1900, Birmingham, AL 35203

Before: Judge Simonton

This case is before me upon a complaint of discrimination filed by Theodore Oesau against Rogers Group, Inc. (“Rogers Group” or “Respondent”), pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 (Mine Act), 30 U.S.C. § 815(c)(3).¹ Oesau contends that Rogers Group violated the Mine Act when it terminated his employment because he engaged in activity protected under section 105(c). Rogers Group maintains that Oesau was terminated for violating the company’s No Harassment Policy by uttering racial slurs on numerous occasions and by trying to get the mine’s plant manager fired because he is Black.

A hearing was held on February 18–21, 2020 in Little Rock, Arkansas. Based on my full consideration of the testimony and exhibits presented at hearing, the stipulations of the parties,

¹ In this decision, the joint stipulations, transcript, the Complainant’s exhibits, and Respondent’s exhibits are abbreviated as “Jt. Stip.,” “Tr.,” “Ex. C–#,” and “Ex. R–#,” respectively. References to the transcript include numerals I, II, or III to denote the volume of the transcript referenced, since each day’s transcript is independently paginated.

my observations of the demeanor of the witnesses, and the parties' post-hearing briefs, I find that Rogers Group did not violate the Mine Act when it terminated Oesau.

I. STIPULATIONS

In its February 7, 2020 prehearing submission, Respondent Rogers Group submitted the following joint stipulations² on behalf of the parties:

1. Respondent is and, at all times relevant to this proceeding, was the operator of the Greenbrier Quarry, Mine ID number 03-00855.
2. The Greenbrier Quarry is a mine as defined in Section 3(h) of the Mine Act, 30 U.S.C. § 802(h).
3. At all times relevant to this proceeding, products of the Greenbrier Quarry entered commerce, the operations of products thereof affecting commerce within the meaning and scope of Section 4 of the Mine Act, 30 U.S.C. § 803.
4. Rogers Group is an operator, as the term "operator" is defined in Section 3(d) of the Mine Act, 30 U.S.C. § 802(d).
5. The Federal Mine Safety and Health Commission properly has jurisdiction over this proceeding.
6. Complainant Theodore Oesau ("Complainant" or "Oesau") was previously employed by Rogers Group.
7. Oesau is a miner, as defined in the Mine Act at 30 U.S.C. § 802(g).
8. Rogers Group terminated Oesau's employment, effective March 14, 2019.
9. Oesau timely filed with MSHA a discrimination complaint under Section 105(c) of the Federal Mine Safety and Health Act ("Mine Act"), 30 U.S.C. § 815(c), after his employment was terminated.
10. MSHA conducted an investigation, pursuant to Section 105(c) and issued a determination letter to Oesau, dated May 23, 2019, stating that "MSHA does not believe that there is sufficient evidence to establish, by a preponderance of the evidence that a violation of Section 105(c) occurred."
11. On June 14, 2019, Oesau timely filed a Complaint with the Federal Mine Safety and Health Review Commission, under Section 105(c)(3).

² A fourteenth stipulation concerning the parties' agreement regarding admissibility of exhibits has been excluded due to a dispute regarding the admissibility of Exhibits C-11 and C-13, which arose at hearing.

12. After receiving an Order to Show Cause, Rogers Group filed an Answer to the Complaint on October 30, 2019.
13. The presiding administrative law judge has authority to hear this case and issue a decision regarding this case pursuant to Section 105 of the Mine Act, 30 U.S.C. § 815.

II. FINDINGS OF FACT

A. Background

Respondent Rogers Group, Inc. operates the Greenbrier Quarry (“Greenbrier” or “mine”), a sandstone open-pit quarry in Greenbrier, Arkansas. Jt. Stip. 1; Tr. II.12–13. The mine has approximately 9–10 employees. *See* Tr. I. 100, 190, 276.

Complainant Oesau worked for Rogers Group from March 2012 until March 2019. Respondent’s Post–Hearing Br. at 4; Jt. Stip. 8. He was employed as a light duty mechanic, and was responsible for performing preventative maintenance on equipment. Tr. I. 200–01, 278. Oesau is not a certified mechanic. Tr. I. 197. In addition to preventative maintenance, he also worked as a backup equipment operator and performed upkeep, housekeeping, and landscaping duties as needed. Tr. I. 201. Oesau worked at Greenbrier, but also rotated to three other Rogers Group locations: El Paso, Cabot, and Conway County. Tr. I. 129. Because he worked at numerous locations and was responsible for a variety of tasks, Oesau’s schedule varied each day, but he generally worked at Greenbrier a couple of days per week. Tr. I. 134, 206–07.

Prior to March 2018, Oesau’s direct supervisor was the former Greenbrier plant manager.³ Tr. I. 208; Tr. II. 111. According to Rogers Group’s western division vice president, that former manager had poor attention to detail and poor safety results, and left the company because he failed a drug screen. Tr. I. 111–12. Following the former Greenbrier manager’s departure, the Cabot location’s plant manager became Oesau’s direct supervisor. Tr. I. 206, 208.

Respondent promoted a management trainee from its El Paso location to fill the Greenbrier plant manager position in March 2018. Tr. I. 273; Tr. II. 109. Relevant to this case, he is a Black person originally from Botswana. Oesau described his relationship with this plant manager as “fine,” and said that the only issues the two of them ever had concerned safety. Tr. I. 135–36, 188. The plant manager said that Oesau came to him with safety concerns “infrequently.” Tr. I. 317. This case largely centers on the relationship between Oesau and the Greenbrier plant manager.

At various times prior to his termination, Oesau submitted a number of safety complaints to Rogers Group management, both orally and in writing. *See* Tr. I. 140–41. At one point, he began collecting safety complaints from other miners. Tr. I. 140–41. At that time, allegations

³ Other than Complainant Theodore Oesau, the names of individuals who testified at the hearing or were named in testimony, briefs, or exhibits are not disclosed in this decision pursuant to an approved Protective Order issued on January 30, 2020. Tr. II. 8.

surfaced that suggested Oesau had, on multiple occasions, used racially derogatory, offensive language to refer to the Greenbrier plant manager. Tr. III. 99–102.

As set forth in more detail below, Rogers Group investigated both Oesau’s safety concerns and the claim that he had uttered racial slurs in the workplace. Respondent determined that the employees at Greenbrier did not have any outstanding or unaddressed safety concerns and confirmed that multiple miners had heard Oesau use offensive, racist language and that Oesau was intent on getting the manager fired. Oesau was thereafter terminated for violating the company’s No Harassment Policy.

At the hearing, Oesau asserted his belief that he was in fact “terminated for filing safety issues against” the plant manager. Tr. I. 127. He claimed that he never made any sort of race-based comments about the plant manager or any other coworkers. Tr. I.185–87, 269.

B. Oesau’s Safety Complaints

At hearing, Oesau testified about a number of safety concerns he had regarding the Greenbrier Quarry. He claimed that the plant manager was always in a hurry to get the operation moving faster and was content with only partially fixing things so that equipment could keep running. *See, e.g.* Tr. 190.

Oesau testified about specific events, practices, and pieces of equipment that he felt posed safety hazards at Greenbrier.⁴ He first testified about a drop-axel water truck, which he and another mechanic had previously tagged out of operation because it was under construction and had a suspension issue. Tr. I. 127–29, 215. He claimed that the miner he found operating the truck told him that the plant manager authorized the removal of the tags from the truck. Tr. I. 127. The plant manager denied directing anyone to remove a tag. Tr. I. 303; Tr. III. 75, 81. On cross-examination, Oesau confirmed that an outside mechanic had examined the truck with the other Greenbrier mechanic while Oesau was off-site. Tr. I. 215–16. The truck operator later testified that it was the other Rogers Group mechanic who removed the tag from the water truck, and that his impression was that the other mechanic talked to Oesau on the phone before doing so. Tr. II. 253–54.

The second issue Oesau discussed at hearing concerned a “980H loader” that was “popping in and out of gear.” Tr. 131. Another former Rogers Group employee who operated the loader prior to leaving the company testified about this issue as well. Tr. I. 43–44. He said that the plant manager encouraged him to run the loader despite the issue, but then clarified on cross-examination that the plant manager did not “make” him run it. Tr. I. 44. He also testified that the plant manager had an outside mechanic come out to Greenbrier to examine the shifting issue and fix it, but it would sometimes act up again after being fixed. Tr. I. 52. Oesau too acknowledged that the plant manager had a mechanic come and look at the problem, but said initially that as far as he knew, nothing had been done to fix the problem. Tr. I. 132. He later

⁴ These safety issues are recounted here in the order in which they arose in Oesau’s testimony. The exact dates of specific events are not all well-established by witness testimony. Such dates are not necessary to determining the outcome of this case.

contradicted that position and confirmed that the outside mechanic would work on the issue, think it was solved and then it would come up again. Tr. I. 224. The plant manager testified that they had difficulty replicating the problem when outside mechanics came to troubleshoot, but that he took the machine out of service when the issue persisted. Tr. I. 295; Tr. III. 92–93.

Oesau also testified about his concerns with the way in which material was dumped off the high wall and onto a pile. Tr. 132–33. He suggested that dumping material off the side of a high wall that has never been driven on or packed posed a hazard because of its inability to support the weight of the equipment being driven on it. *See* Tr. I. 133. He further implied that operators were dumping too close to the high wall. *See* Tr. I. 133–134. Oesau was not present at the mine when this occurred. Tr. I. 228. When asked about this issue, the Greenbrier plant manager acknowledged that an operator had raised this practice as a concern and stated that they went to look at the area and came up with a solution to allow the operator to safely approach it. Tr. I. 294–95.

Another safety issue Oesau raised was an electrocution that occurred at Greenbrier. Two months after being electrocuted on the job, the affected miner mentioned the incident to Oesau. Tr. I. 138. Oesau then told his supervisor, the manager at the Cabot location, who had not previously heard about the incident. Tr. I. 138–39. The Greenbrier plant manager asserted that though he did not communicate with the Cabot manager about the incident, he did report it to upper management shortly after it happened. Tr. I. 349, 353.

Oesau also testified about a haul truck at the mine that had a broken seat. Tr. I. 139–40. He said two miners at Greenbrier came to him with the problem, and the three of them went to the Greenbrier plant manager to discuss it. Tr. I. 139. According to Oesau, the plant manager said “it’ll be alright,” and one of the miners then went on driving the truck despite the broken seat. Tr. I. 140. The plant manager testified that the seat normally allows an operator to adjust how the seat “floats” depending on work conditions and other factors, and the issue was that the seat had not been adjusting properly. Tr. III. 90. He also said that he made sure the operator was comfortable driving the truck, and that he ordered a replacement seat. Tr. III. 90. Before the replacement seat arrived, the operator came back to the plant manager and reported that he was no longer comfortable operating the truck. Tr. III. 90. The plant manager said that another miner then operated the truck until the new seat arrived since the faulty seat still performed for that miner’s weight class. Tr. III. 90.

At the hearing, Oesau further testified that he had concerns about flat struts in the 325 haul truck, the same truck that had a broken seat. Tr. I. 147–48. Oesau reported that the condition was the result of the truck being overloaded. Ex. 4, p. 1. However, the plant manager testified that this could not be the case, since a front strut was at issue, which would indicate speeding around a curve rather than overloading. Tr. III. 146. Oesau called in an outside mechanic to fill up the struts, and the plant manager did not interfere with getting that work done. Tr. I. 227–28.

Oesau complained about a parking brake issue in the haul truck, too. Tr. I. 225; Ex. 4, p. 3. The truck’s brake pads were replaced, but Oesau said the outside mechanic who replaced the pads said that the rotor was warped and also needed to be replaced. Tr. I. 226–27; Ex. 4, p. 3.

According to Oesau, the plant manager did not allow the mechanic to put in a new rotor. Tr. I. 226–27. The plant manager testified that the outside mechanic came several times to work on the brakes. Tr. III. 85–86. Over the course of multiple visits, the brake pads were adjusted, the locking mechanism was replaced, and the brake pads were replaced. Tr. III. 86. The plant manager stated that the mechanic recommended the rotors be replaced, too, since they were causing the brake pads to wear prematurely. Tr. III. 86. However, because the mechanic confirmed there were no safety implications, the plant manager decided to wait to replace the rotors. Tr. III. 86. He confirmed that the mechanic tested the brakes after each visit to ensure that they worked properly. Tr. III. 86–87.

Next, Oesau testified that a sensor repair completed on a W–600 loader’s joystick was insufficient to fix its problems and asserted that the joystick should have been fully replaced. Tr. I. 229; Ex. 4, p. 4. The plant manager testified that he had called the mechanic in to look at the issue, but since it was a few days before they could get out there, Oesau looked at the machine before the outside mechanic did. Tr. III. 83. Oesau had ordered a new joystick assembly, but once the outside mechanic came out and saw it, that mechanic did not think the entire thing had to be replaced. Tr. III. 83–84. For that reason, the plant manager returned the joystick Oesau had ordered. Tr. III. 84.

Finally, Oesau alleged that a miner had not been properly task trained to operate a piece of equipment at the mine. Tr. I. 230. He did not ask the miner in question or the plant manager about the training, but said that the two people qualified to do so told Oesau that they had not task trained the miner yet. Tr. I. 230–31. Oesau believes the Mine Safety and Health Administration (MSHA) cited Rogers Group for this. Tr. I. 231. The plant manager testified that the miner was task trained on the equipment prior to Oesau’s complaint. Tr. III. 96–97. The miner’s training records support this assertion. Ex. R–JJ.

After witnessing what he believed to be numerous safety issues at the mine and feeling that nothing was being done about them, Oesau went to his direct supervisor, the manager of the Cabot location, with his concerns. Tr. I. 140. Oesau testified that his supervisor directed him to compile a written list of his concerns and to get written statements from other miners at Greenbrier to document their concerns about the issues. Tr. I. 141. Oesau did this, and assembled a list documenting the haul truck’s flat struts, broken seat, and faulty brakes, as well as the loader’s joy stick issue. Ex. C–4, p. 1–4. His document included a statement from one other miner, who complained about the loader’s joystick, overloaded haul trucks, and the plant manager’s insistence on continuing operations when lightning is striking too close to the plant. *Id.*, p. 5–9.

Complainant’s counsel called four other former Rogers Group employees to testify about safety issues. Tr. I. 41–123. One of these employees never worked at the Greenbrier location. Tr. I. 119. All had some friction in their relationships with the Greenbrier plant manager. While some of these witnesses testified about safety concerns that Oesau also complained of, it appeared that they were essentially called to imply a pattern that shows employees who go over the plant manager’s head to report safety concerns end up getting fired, just like Oesau. However, none of the four former employees ever filed discrimination complaints against the company. In large part, they testified about issues at other mine locations or facts that are

otherwise unrelated to this matter. In the interest of clarity, I have elected not to summarize their testimony here.

C. Oesau's Harassing Remarks

Respondent maintains that Oesau was fired for racial harassment in violation of the company's No Harassment Policy. In particular, Respondent asserts that he was fired for using racial slurs when referring to the Greenbrier plant manager—which clearly constitutes racial harassment under the policy. At hearing, Rogers Group called multiple witnesses to testify about the comments.

1. Miner A

One miner ("Miner A"), who himself is Black, credibly testified that he heard Oesau make racially offensive statements on multiple occasions. The first time was in May 2018, when Miner A had only been at Greenbrier for a few weeks. Tr. II. 264. After a morning safety meeting, Miner A recalls Oesau say, in reference to the plant manager, "That black ass nigger monkey. I ain't doing nothing he tell me to do. He don't know nothing he talking about."⁵ Tr. II. 263–64. About two hours later, Oesau came up to him and apologized, and Miner A told Oesau to apologize to the plant manager, not him. Tr. II. 265.

A few weeks later, Miner A took a truck to Oesau to be fixed. Tr. II. 256, 266–68. Miner A testified that he told Oesau "[the plant manager] told me to bring the truck up here for you to fix the door," and that Oesau replied, "I'm not going to fix on that nigger's truck." Tr. II. 257, 267. Feeling bad, Miner A left and fixed the door himself. Tr. II. 257–58.

The third time, Miner A again brought a truck to Oesau, this time for an antifreeze leak. Tr. II. 268. Oesau first said he was busy, and Miner A "waited, and waited, and waited." Tr. II. 268. When Miner A then said that the plant manager had him come up there to fix the issue, Oesau said, "I'm not fixing anything for that nigger," and Miner A drove off. Tr. II. 268.

Miner A did not report the harassment at first because he did not want Oesau to lose his job. Tr. II. 268. However, by the third instance, he realized that Oesau really meant what he said, and felt that Oesau was "too comfortable" using that offensive language—Miner A "just couldn't take it" anymore. Tr. II. 263, 268, 272.

When Oesau attempted to collect a written statement from him about the plant manager allegedly putting miners in danger, Miner A told Oesau that he did not want to be involved. Tr. II. 258–59. Because he felt as if Oesau and two other miners were blindsiding the plant manager by trying to get him fired for things that were not true, Miner A went to the plant manager to tell him about Oesau's attempts to get miners to write up safety complaints. Tr. II. 260–61. At that time, he also told the plant manager about the racial slurs Oesau had used when referring to him. Tr. II. 261.

⁵ Reluctantly, I recount the racial slurs articulated at the hearing in order to provide an accurate, uncensored account of the testimony.

2. Miner B

A second miner (“Miner B”) testified he heard Oesau use racial slurs several times. The first instance was before a morning safety meeting, when Oesau used the “n” word to refer to the plant manager. Tr. II. 318. Then, in the shop on another morning, Oesau used the slur again. Tr. II. 319. Miner B told Oesau that that was not “the best thing to be saying” since they had the plant manager and Miner A, who are both Black, working at the mine, and added that it was disrespectful to say in front of anybody. Tr. II. 319. Miner B also testified that Oesau had said “monkey” on three or four separate occasions, and that he figured Oesau was referring to the plant manager each time he said it. Tr. II. 320–21.

Miner B did not report the comments right away because he thought that Oesau might stop using that language. Tr. II. 319. However, after the second time he heard Oesau use the “n” word in the shop, Miner B called the plant manager after work to tell him about the racial slurs as well as Oesau’s attempts to collect safety violations against the plant manager. Tr. II. 326–28. Regarding the safety violations, Miner B said that another miner had approached him on behalf of Oesau and told him that Oesau wanted to “get a list of safety violations to try to go against [the plant manager], to try to get him fired.” Tr. II. 328. Miner B told the other miner that he was not going to do that, and testified that he felt it was wrong because the plant manager had never done anything to put any of the miners at risk. Tr. II. 328–29. Miner B said the plant manager was “surprised that somebody was trying to go after him” and told Miner B that he would take care of it. Tr. II. 329–30.

3. Greenbrier Plant Manager

The plant manager testified that four miners told him Oesau was going around collecting safety complaints in an attempt to get him fired. Tr. I. 323–24. In addition to Miners A and B reporting to him about the slurs and collection of safety complaints, the plant manager said a third miner also called him about the safety complaints. Tr. I. 324. The plant manager then called a fourth miner to see if he knew anything about it. Tr. I. 324. After hearing from the miners, the plant manager sent an email to his supervisors in upper management with an attached document detailing the issues. Tr. I. 328. In pertinent part, the attachment reads as follows:

Information given below is as given to me by those who took the liberty to inform me in the spirit of confidence and would like to maintain anonymity:

On Thursday, March 21st 2019⁶, Ted Oesau came to Greenbrier quarry to perform some PMs on our equipment. During the course of the day he approached some of my employees individually to notify them that [the Cabot manager] had instructed him to compile all events in which I asked/forced them (my employees) to work unsafely or put them in uncomfortable/hazardous situations. It was mentioned that Ted assured those he spoke to that he was going to take the information directly to [the division vice president] to purge me. When Ted approached some individuals

⁶ This date is incorrect. The document should say February 21, 2019. The email this attachment accompanied is dated February 25, 2019, and the Thursday preceding the date of the email was February 21, 2019. The plant manager also acknowledged the typo at hearing. *See* Tr. III. 109.

they refused to be a part of his agenda, however, [“Miner C”] continued to persuade everybody to join him and Ted on this mission. Everyone on the crew except for [“Miner D”] declined [Miner C]’s attempt. [Miner D] allegedly agreed to join forces with Ted Oesau and [Miner C].

Friday morning, first employee approached me to warn me to the situation that was brewing. Throughout the day on Friday and Saturday the rest of my team called me to warn me of this. . . .

Two of my employees remarked that Ted had used hateful words against me in the past, calling me a “black monkey” and a “nigger”. These words were said in front of other employees in my absence.

Ex. R–X, p. 3.

The plant manager also recalled a conversation he had with Oesau’s supervisor, the Cabot manager,⁷ after Oesau was fired: “he told me that he personally has heard Ted call me a nigger, previously, and he coached Ted to never use that language ever again during his employment with Rogers Group.” Tr. I. 334.

D. Rogers Group Investigations

Both before and after the Greenbrier plant manager sent the email about Oesau’s apparent attempt to get him fired, Rogers Group upper management conducted investigations into Oesau’s various safety complaints. The western division vice president testified at hearing about these investigations. After initially becoming aware of issues between Oesau and the Greenbrier plant manager in December 2018, he held a meeting in his office in January 2019.⁸ Tr. II. 36, 114. In that meeting, the division vice president, the Arkansas production manager, the Greenbrier plant manager, and Oesau met to discuss safety concerns as well as communication issues between Oesau and the plant manager. Tr. II. 36–37. At hearing, the division vice president could not remember which safety issues in particular were discussed at the January meeting. Tr. II. 38.

A second meeting was held in the division vice president’s office in February 2019. Tr. II. 39. At that meeting, Oesau claimed that tags were being taken off of a water truck and it was being operated when it was tagged out. Tr. II. 119–20. After that meeting and after receiving Oesau’s list of complaints from the Cabot manager, the division vice president went to Greenbrier to look into the safety issues. Tr. II. 122–25. He talked through the complaints with the plant manager and went through and investigated each complaint himself. Tr. II. 125–26.

The division vice president believed that the issues between Oesau and the plant manager had something to do with the transition from the old Greenbrier plant manager to the new one—

⁷ Unfortunately, Oesau’s direct supervisor was not called to testify at the hearing.

⁸ According to a timeline submitted by Complainant, this meeting occurred in either late November or early December, not in January. Ex. C–6, p. 2. Though the date of the meeting is not established, this discrepancy does not impact the outcome of this case.

they had different management styles. Tr. II. 114–15. He testified that, to him, it seemed that the main problem between them was communication, and that both Oesau and the plant manager seemed willing to work together going forward after each meeting in his office. Tr. II. 115–18.

Following the Greenbrier plant manager’s February 25, 2019 email about Oesau’s offensive statements and attempts to collect safety complaints about the plant manager, the division vice president directed the Arkansas area manager⁹ and general manager of central Arkansas operations to begin an investigation. Tr. II. 131; Ex.13, p. 1. The area manager did not testify, but he did author a memo which recounts the investigation and the events leading up to it. Ex. R–Y. It explains that, on March 11, 2019, he and the general manager:

Both traveled to Greenbrier to interview all hourly employees on site. Each employee was brought into an individual interview to determine if they had been required to work in an unsafe manner, to ask how they felt the safety culture was, determine if the crew had received appropriate training, and to determine if they had been part of or witnessed anyone participating in derogatory conversation regarding supervision or coworkers. After having detailed conversations with all personnel on site it was discovered that 3 employees had witnessed Mr. Oesau calling [the plant manager] racially slanderous names. It was also found that only [“Miner E”] felt that there could be a safety issue at Greenbrier, but during conversation it was also discovered that he had never been asked to or forced to work in an unsafe manner.

Id., p. 3. The general manager’s testimony at hearing was consistent with this. He recounted that he and the area manager went to Greenbrier unannounced and interviewed employees one at a time. Tr. II. 175–76. They asked the miners whether they had any safety concerns and if they “had heard any obscene, or vulgar, or derogatory, or racial type slurs in and around the operations.” Tr. II. 176. The interviewers did not name Oesau in their questioning, but the notes they typed up later states that two of the three miners who had heard racially charged language “offered up, without coercion, Mr. Oesau’s name.” Tr. II. 176, Ex. R–Z, p. 2.

Two of the witnesses at hearing were miners that had been questioned in the March 11, 2019 interviews. Miner A recalled being asked if he had heard anything inappropriate said around the mine. Tr. II. 271. Without naming Oesau, Miner A told the investigators about the three instances in which he had heard racially offensive language at Greenbrier. Tr. II. 271, 291. Miner B testified that when he met with the investigators, they asked him about the safety culture around the plant, and he told them that they had no problems with safety. Tr. II. 331. When asked generally about racial harassment, Miner B told the investigators that Oesau had been making racial comments. Tr. II. 331.

The investigators did not interview the plant manager as part of their investigation into Oesau’s offensive remarks. Tr. I. 328–29. The two interviewers took handwritten notes and

⁹ This individual was also referred to at hearing as the production manager for Arkansas. Tr. II. 172.

later typed them into a document at the request of Rogers Group's Health and Safety director. Tr. II. 176–78.

E. Oesau's Termination

The division vice president reviewed the results of the investigation with the area manager, and they agreed that Oesau should be terminated. Tr. II. 137–38. Neither the Greenbrier plant manager nor the Cabot plant manager was involved in the decision to terminate Oesau. Tr. II. 137–38, 139–40; Tr. III. 110. Oesau was called into the division vice president's office and informed of his termination on March 19, 2019. Tr. I. 150; Jt. Stip. 8. Oesau estimated that his termination occurred approximately three weeks after turning in his list of safety issues to his supervisor. Tr. I. 150.

Oesau filed a 105(c) discrimination complaint with MSHA on March 26, 2019. Ex. C–1, p. 1. On May 23, 2019, MSHA notified Oesau that the agency had investigated his complaint and determined that there was insufficient evidence to support his allegations. *Id.* p. 6–7. Oesau then initiated this case on June 14, 2019. Jt. Stip. 11. Testimony and documentary evidence was presented at a hearing held in Little Rock, Arkansas on February 18–21, 2020, and the parties thereafter submitted briefs and replies to the court.

III. DISPOSITION

Oesau's termination is the subject of this case. He claims that he was fired because he raised concerns about various safety issues. Rogers Group argues that his safety complaints are not protected activity because Oesau had no reasonable, good faith belief that his safety allegations were true. Respondent maintains that it did not terminate Oesau because he engaged in protected activity, but rather because he violated the company's No Harassment Policy by using offensive, racist language on multiple occasions in front of other employees at work and because he attempted to lure other employees into a racially-motivated campaign to get the Greenbrier plant manager fired.

Section 105(c)(1) of the Mine Act provides that a miner shall not be discharged or otherwise discriminated against because they have made a complaint regarding an alleged safety or health violation. 30 U.S.C. § 815(c)(1). Under the traditional *Pasula-Robinette* framework, the Commission has held that a miner alleging discrimination establishes a prima facie case of prohibited discrimination by presenting evidence sufficient to support a conclusion that (1) the complainant engaged in protected activity, and (2) the adverse action complained of was motivated in any part by the protected activity. *Jayson Turner v. Nat'l Cement Co.*, 33 FMSHRC 1059, 1064 (May 2011); *Driessen v. Nev. Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 805, 817–18 (Apr. 1981).

If a miner establishes a prima facie case, the operator may rebut that case “by showing either that no protected activity occurred or that the adverse action was in no part motivated by

the protected activity.” *Turner*, 33 FMSHRC at 1064. If the operator cannot rebut the prima facie case, it may nevertheless defend affirmatively by proving by a preponderance of the evidence that, although part of its motivation was unlawful, the adverse action was also motivated by the miner’s unprotected activity *and* it would have taken the adverse action against the miner for the unprotected activity alone. *Id.*; *Pasula*, 2 FMSHRC at 2799–2800.

A. Prima Facie Case

It bears repeating that to make out a prima facie case of discrimination, a complainant need only present “evidence *sufficient to support a conclusion* that the individual engaged in protected activity and that the adverse action complained of was motivated in any part by that activity.” *Driessen*, 20 FMSHRC at 328 (emphasis added). “This burden is lower than the ultimate burden of persuasion, which the complainant must sustain as to the overall question of whether section 105(c)(1) has been violated.” *Turner*, 33 FMSHRC at 1065. For the reasons that follow, I find that Oesau has met this initial, low burden and established a prima facie case of discrimination.

1. Protected Activity

Complainants bear the burden of establishing protected activity. *Pasula*, 2 FMSHRC at 2797–2800; *Sec’y of Labor on behalf of Riordan v. Knox Creek Coal Corp.*, 38 FMSHRC 1914, 1920–21 (2016). A miner has engaged in protected activity if they (1) have “filed or made a complaint under or related to this Act, including a complaint . . . of an alleged danger or safety or health violation;” (2) are “the subject of medical evaluations and potential transfer under a standard published pursuant to section 101;” (3) have “instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding;” or (4) have “exercised on behalf of himself or others . . . any statutory right afforded by this Act.” 30 U.S.C. § 815(c)(1).

It is undisputed that Oesau raised numerous safety concerns while employed at Rogers Group. Though Respondent does not dispute the existence of Oesau’s safety complaints, it has attempted to show that Oesau’s complaints were made in bad faith and are thus unprotected by the Mine Act. *See* Respondent’s Post-Hearing Brief (Resp. Br.) at 40–62. Rogers Group argues that Oesau “ignored open and obvious information readily available to him showing that there was no hazard.” Resp. Br. at 41. Respondent has also endeavored to undermine Oesau’s safety concerns by highlighting that he is not a certified mechanic. *Id.*

Unquestionably, raising safety concerns at work constitutes “protected activity” within the ambit of section 105(c). *See, e.g., Riordan*, 38 FMSHRC at 1922 (“Raising safety concerns is paradigmatic ‘protected activity’ within the meaning of section 105(c)(2).”). For the purpose of this decision, it is immaterial whether the safety hazards Oesau feared actually existed. Oesau had no duty to avail himself of information that could have dispelled his concerns prior to submitting his complaints, and thus his failure to do so does not amount to bad faith. Oesau has provided sufficient evidence to show that he had legitimate concerns about various practices and equipment at Greenbrier and that he communicated these concerns to his superiors. Ex. C–4, p.

1–4; *see* Tr. I. 140–41, 145–49. Accordingly, I find that Oesau engaged in protected activity and has satisfied the first element of the prima facie case.

2. Adverse Action Motivated by Protected Activity

The Commission has defined “adverse action” as “an action of commission or omission by the operator subjecting the affected miner to discipline or a detriment in his employment relationship. *Sec’y on behalf of Pendley v. Highland Mining Co.*, 34 FMSHRC 1919, 1930 (Aug. 2012). The question of whether an employer’s action qualifies as “adverse” is thus decided on a case by case basis. *Sec’y of Labor ex. rel. Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842, 1848 n.2 (Aug. 1984).

Oesau alleged in his initial MSHA complaint and briefly mentioned at hearing that he was denied a raise in early February 2019. Ex. C–1, Tr. I. 268. This allegation was scarcely discussed at hearing and Oesau has failed to proffer any evidence that establishes he was ever denied a raise. There is no dispute, however, that Respondent discharged Oesau on March 14, 2019. *Jt. Stip.* 8. This indisputably constitutes adverse action, as “[d]ischarge is perhaps the clearest form of adverse action prohibited by the plain language of the Mine Act.” *Driessen*, 20 FMSHRC at 329. Having established both protected activity and an adverse action, Oesau must demonstrate that there is evidence sufficient to support an inference of a causal nexus: that his protected activity motivated Rogers Group to terminate his employment.

A miner need not provide direct evidence of an operator’s discriminatory motive, but may provide “circumstantial evidence . . . and reasonable inferences drawn therefrom may be used to sustain a prima facie case.” *Turner*, 33 FMSHRC at 1066–67 (quoting *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 992 (June 1982)). In evaluating whether a causal connection exists between the protected activity and the adverse action, the Commission looks to four factors: “(1) the mine operator's knowledge of the protected activity; (2) the mine operator's hostility or ‘animus’ toward the protected activity; (3) the timing of the adverse action in relation to the protected activity; and (4) the mine operator's disparate treatment of the miner.” *Cumberland River Coal Co.*, 712 F.3d at 318; *see also Sec’y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510–12 (Nov. 1981), *rev’d on other grounds*, 709 F.2d 86 (D.C. Cir. 1983). I will examine these factors in turn.

a. Knowledge of Protected Activity

Rogers Group does not dispute that Oesau submitted safety complaints. Multiple miners, including Oesau, testified about the way in which Oesau complained to his supervisor about various issues he had with situations and equipment at the mine. As discussed above, I do not agree with Respondent that Oesau’s allegations were all in bad faith and thus not protected activity. I find that Respondent had knowledge of Oesau’s protected activity.

b. Animus or Hostility Toward the Protected Activity

Oesau argues that an email sent by the Rogers Group Arkansas area manager to the division vice president definitively establishes Respondent’s animus toward his complaints.

Complainant's Post-Hearing Brief at 15–16. With regard to Oesau's alleged racially charged derogatory comments the email states that,

[b]y itself this conduct could be forgivable, with a last chance, if there was acknowledgement from Ted and remorse regarding the conduct. The problem with the conduct is that it is aggravated by Ted's concerted attempt to organize the labor force. Again, if this concerted activity was isolated and the only issue there could be consideration given. Given the circumstance that both acts indeed occurred, the likelihood of being able to salvage Ted's job is slim to none.

Ex. C–13, p. 2. After considering all of the evidence and testimony, I do not agree with Oesau's assertion. However, for the purpose of establishing a prima facie case, I will accept that this email is at least sufficient to support an inference that there was some animus towards Oesau's collection of safety complaints from other miners, which is related to his protected activity.

c. Timing

Oesau was terminated within a matter of weeks after he submitted a list of safety complaints to his supervisor. *See* Tr. I. 150. The Commission does not apply “hard and fast criteria in determining coincidence in time between protected activity and subsequent adverse action when assessing an illegal motive.” *Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 531 (Apr. 1991). Given the objectively short amount of time between the protected activity and the adverse action, I find that a coincidence in time exists in this case.

d. Disparate Treatment

Oesau has not provided any evidence of disparate treatment. “Typical forms of disparate treatment are encountered where employees guilty of the same, or more serious, offenses than the alleged discriminatee escape the disciplinary fate which befalls the latter.” Chacon, 3 FMSHRC at 2512. While the company has not experienced any other allegations of racial harassment, it had previously dealt with a sexual harassment allegation. Tr. I. 141–42. In that instance, as in this one, Rogers Group conducted an investigation, confirmed the allegations were true, and terminated the employee for violating the No Harassment Policy. Tr. I. 142.

Because Oesau's experience was consistent with that of the other employee who violated the policy, I find that he was not subject to disparate treatment.

e. Conclusion

Bearing in mind that the prima facie burden is minimal, I find, in light of the above factors, that Oesau has put forth evidence that “*could* support an inference” that the adverse action was motivated, at least in part, by his protected activity. *Turner*, 33 FMSHRC at 1066 (citation omitted). As discussed below, however, I find that Rogers Group has successfully rebutted Oesau's prima facie case.

B. Rebuttal

The operator may rebut the miner's 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. *Turner*, 33 FMSHRC at 1064. As discussed above, Rogers Group argues that no protected activity occurred because Oesau made his safety complaints in bad faith. Because I disagree, and find that protected activity has occurred, I turn to Respondent's additional argument that Oesau's termination was in no part motivated by his protected activity.

Respondent asserts that "the evidence firmly establishes that Oesau used racist language at work, including highly offensive words and phrases that any person would recognize as bigoted, potentially threatening, and unacceptable in any context." Resp. Br. at 65. I agree. The language Oesau used is a flagrant violation of Rogers Group's No Harassment Policy, which explicitly lists "racial comments, slurs, [and] off-color jokes" as examples of harassment. Ex. R–B, p. 1. The policy also states that, following an investigation, "[i]f harassment is found, disciplinary action, up to and including termination, will be taken against the harassing employee." *Id.*, p. 3.

Through the testimony of multiple witnesses, Rogers Group established that Oesau made race-based, offensive comments at Greenbrier when referring to the Black plant manager. The evidence also shows that Oesau endeavored to get the plant manager fired by attempting to collect safety complaints about the plant manager. Oesau's counsel points to the area manager's email referencing "Ted's concerted activity to organizer the labor force" as "smoking gun" evidence of discrimination under the Mine Act. Tr. I. 19; Ex. 13, p. 2. However, I find that the email, especially when analyzed in light of the extensive testimony on this issue, actually just shows that Rogers Group management was concerned about both Oesau's racist comments and his racist motivation likely behind the attempt to get the plant manager fired.

The evidence is clear: Rogers Group fired Complainant for racial harassment. Respondent's decision to terminate Oesau was not motivated by his protected activity, but rather by his violation of the No Harassment Policy and Rogers Group's interest in enforcing that policy and ensuring that employees have a workplace free of harassment. I find that Rogers group has successfully rebutted Oesau's prima facie case.

C. Affirmative Defense

If an employer cannot rebut the prima facie case, "it nevertheless may defend affirmatively by proving that is also was motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone." *Turner*, 33 FMSHRC at 1064. In asserting this defense, "[i]t is not sufficient for the employer to show that the miner deserved to have been fired for engaging in the unprotected activity The employer must show that [it] did in fact consider the employee deserving of discipline for engaging in the unprotected activity alone and that [it] *would* have disciplined him in any event." *Pasula*, 2 FMSHRC at 2800.

Ample evidence shows that Rogers Group was motivated to discipline Oesau for the harassing remarks he made at work. The company's harassment policy, its internal emails admitted into evidence, its past discharge of a harassing employee, and testimony of its management officials make this clear. In fact, when asked by the court about why the company elected to "go straight to termination, as opposed to some other discipline," Rogers Group's director of human resources confirmed that it was "the egregious nature of the comments that were made" that merited going straight to termination. Tr. III. 209.

As discussed above, I find that Rogers Group terminated Oesau based on unprotected activities alone. However, even assuming that Oesau's protected activity partially motivated Rogers Group's decision to terminate him, Respondent still did not violate section 105(c) of the Mine Act because it has proven that it would have terminated Oesau for his harassing conduct alone. Rogers Group has thus proven its affirmative defense.

IV. ORDER

Accordingly, it is **ORDERED** that the complaint of discrimination brought by Theodore Oesau is hereby **DISMISSED**.



David P. Simonton
Administrative Law Judge

Distribution: (Email¹⁰)

Chris W. Burks, WH Law, PLLC, chris@wh.law

Margaret S. Lopez, Ogletree, Deakins, Nash, Smoak, & Stewart, P.C.,
margaret.lopez@ogletree.com

J. Carin Burford, Ogletree, Deakins, Nash, Smoak, & Stewart, P.C., carin.burford@ogletree.com

¹⁰ For the foreseeable future, Federal Mine Safety and Health Review Commission (FMSHRC) notices, decisions, and orders will be sent only through electronic mail. Because FMSHRC will not be monitoring incoming physical mail or faxes, parties are encouraged to submit all filings through the agency's electronic filing system. If you are not able to file through our electronic filing system, please send an email copy and we will file it for you.