FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVE., N.W., SUITE 520N

WASHINGTON, DC 20004-1710

March 17, 2025

WESLEY MALLERY v. EL SEGUNDO COAL COMPANY, LLC	Docket No. CENT 2024-0106

BEFORE: Jordan, Chair; Baker and Marvit, Commissioners

DECISION

BY: Commissioners Baker and Marvit:

On January 12, 2023, Miner Wesley Mallery brought three type-written pages of workplace and safety concerns into a meeting with mine management at El Segundo Coal Company, LLC ("El Segundo"). He walked out of the meeting on administrative leave.

These assertions are undisputed and alone are sufficient to support a claim of discrimination under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act" or "Act"). Specifically, Mallery engaged in protected activity, he suffered an adverse employment action, and circumstantial indicia showed a causal nexus between the protected activity and adverse action (the operator was aware of his protected activity and the timing was almost immediate).[1]

On January 19, 2024, Mallery filed a complaint with the Federal Mine Safety and Health Review Commission, alleging discrimination under Section 105(c), 30 U.S.C. § 815(c)(1), of the Mine Act.[2] Following two Show Cause orders from the assigned Commission Administrative

[1] That Mallery made a cognizable claim is not the same as proving that he suffered discrimination. There are, strictly speaking, no facts in this case at this time and any determination on the merits would be premature. Whether Mallery suffered discrimination can only be determined after a record is created.

[2] Section 105(c)(1) of the Mine Act states in pertinent part that:

> No person shall discharge or in any manner discriminate against . . . any miner . . . because such miner . . . filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent . . . of an alleged

Law Judge ("ALJ") demanding that Mallery clarify his claims, the Judge dismissed Mallery's claim, stating that he failed "to state a claim upon which relief may be granted under section 105(c) of the Mine Act[.]" 46 FMSHRC 416, 420 (June 2024) (ALJ).

For the reasons that follow, we find that that the Judge's dismissal order was in error. We vacate the order and remand for further proceedings.

I.

Factual and Procedural Background

On May 30, 2023, Mallery filed a discrimination complaint with the Mine Safety and Health Administration ("MSHA"). On August 3, 2023, MSHA notified Mallery that it declined to pursue his case and advised him of his right to file a petition for discretionary review with the Commission. On January 19, 2024, Mallery filed a pro se petition with the Commission pursuant to section 105(c)(3) of the Mine Act, 30 U.S.C. § 815(c)(3).[3]

In his complaint to MSHA, Mallery alleged protected activities and adverse actions beginning in 2019 and leading up to his placement on administrative leave in January 2023 and subsequently short-term disability in February 2023. MSHA Compl. at 2-3; Mallery Rebut. at 4-8. However, the bulk of Mallery's protected activity occur in the six-month period leading up to El Segundo placing him on administrative leave. MSHA Compl. at 2-3.

In his MSHA complaint, Mallery alleged that on August 30, 2022, a supervisor "rushed" Mallery to complete loading logs of explosive product and Mallery refused to complete the logs inaccurately, and within a week he had a conversation with a manager who stated that "100% accountability" was not possible. MSHA Compl. at 3. Then, in October 2022, El Segundo allegedly failed to offer him a more desirable position. On December 28, 2022, Mallery complained at a morning safety meeting of harassment from a supervisor and how it affected the safety of the crew. In December 2022 and January 2023, Mallery requested and did not receive

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> danger or safety or health violation in a coal or other mine, . . . or because such miner . . . has instituted or caused to be instituted any proceeding under or related to this Act . . . .

30 U.S.C. § 815(c)(1).

[3] Section 105(c)(3) provides a miner with the right to file an action on his or her own behalf before the Commission. 30 U.S.C. § 815(c)(3) states:

> Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner . . . of his determination whether a violation has occurred. 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, charging discrimination or interference in violation of paragraph (1).

the "Peabody Employee Guidebook." MSHA Compl. at 2. On January 5, 2023, he raised safety concerns regarding the blast crews and a supervisor "berated" him. *Id*. at 3. In addition, throughout Mallery's complaint and filings, he describes his supervisor reprimanding him in front of other employees for his complaints about safety at the mine. *Id*. at 2-3; Mallery's Rebut. at 4-7.

Most recently, on January 12, 2023, El Segundo placed Mallery on fully paid administrative leave immediately after two meetings in which Mallery discussed "safety and pay issues" with mine human resources representatives and the mine manager, the first on January 11 and the second the next day on January 12. ALJ Order of Dismissal ("ALJ Order") at 2-3; Resp.'s Brief at 8. Mallery alleges that on January 11, 2023, mine manager Seth Puls told Mallery that he had arranged a meeting for Mallery with human resources representative Kischa Jackson to discuss Mallery's concerns. M.'s Reb at 8. Mallery met with Jackson on January 11, and she raised their shared background as veterans, which the two discussed, but Mallery remained focused on raising workplace issues. *Id.* Jackson arranged a meeting for the next day and Mallery typed up three pages of workplace and safety concerns to raise. *Id.* On January 12, 2023, Mallery informed management that he wanted to discuss these written concerns and Jackson refused to discuss them. Mallery's Rebut. at 8, Ex. E, Mallery's Rebut. Mallery alleges that during the meeting, Jackson turned the conversation towards his family and his veteran status, refusing to address workplace issues.[4] Resp.'s Brief at 3. El Segundo alleged that it placed Mallery on leave due to his "emotionally distraught demeanor" at the meeting in which he raised safety issues. ALJ Order at 4.

Mallery alleges that he was asked to undergo a medical evaluation, and that he agreed because he "strongly [felt he] had no other options." M.'s Brief at 2. On January 26, 2023, Joanna Sparks from corporate human resources called Mallery to ask that he undergo a fitness for duty assessment. Mallery's Rebut. at 8. On February 3, 2023, Mallery underwent a medical assessment for fitness for duty that resulted in a report dated February 7, 2023, where the doctor recommended he take leave from work. M.'s Brief, Ex. 6. El Segundo states multiple times that it "played no role in Dr. Sadek's ultimate determination that Mallery was not fit for duty." Resp.'s Rsp. Brief at 8-9. However, the doctor's assessment states that the managers present at the January 11 and 12 meetings were interviewed as "collateral informants." M.'s Brief, Ex. 6 at 3. Mallery applied for and qualified for short-term disability at one hundred percent pay until April 10, 2023 when he exhausted his leave. ALJ Order at 4. Subsequently, he applied and received long-term disability, receiving sixty percent of his pay. *Id*. According to El Segundo, he remains employed and eligible to return upon medical clearance. *Id.*

[4] The operator alleges that it was Mallery who turned the conversation towards his family, Resp.'s Brief at 3, and the Judge inexplicably does not accept Mallery's allegations as true at this stage of the proceedings. The ALJ does not credit, for purposes of the dispositive order, that he attempted multiple times to discuss safety issues and instead she simply uses the passive voice. ALJ Order at 3. It is material to Mallery's allegations if the operator's representatives shifted the conversation to non-work matters that would upset Mallery, thereby possibly provoking him. By using the passive voice, the Judge is not accepting the non-moving party's allegations as true at this stage of the proceedings. This is simply one example of the Judge not applying the appropriate standard and may be relevant if the Complainant argues that he was provoked in this meeting.

Following the Operator's Answer, on March 5, 2024, the Judge issued an Order to Show Cause stating that "[i]t is not clear whether [Mallery] is alleging any adverse action, resulting from his engagement in any protected activity, that may entitle him to relief under the Mine Act." First Order to Show Cause ("First OSC") at 1. Citing Commission Procedural Rule 42,[5] the Judge ordered that he "submit a *clear and concise* statement of the alleged protected activity(s) [sic] giving rise to the adverse action(s), including applicable dates, that may entitle him to relief under the Mine Act." *Id.* at 2 (emphasis added). The Judge asked Mallery to explain the lack of timeliness in his filings. *Id.* In addition, the Judge accepted as true El Segundo's Answer, wherein it described that "the determination to place [Mallery] in [disability] status was made by medical professionals and a third-party insurance company." *Id.* On March 11, 2024, Mallery responded to the Judge's show cause order reciting his original allegations and explaining why he delayed in filing.

On March 14, 2024, the Judge issued a second Order to Show Cause excusing Mallery's late filings and providing him with a "final opportunity to set forth a *clear and concise* statement of a cognizable claim under section 105(c)," which she said he should do "very briefly." Second Order to Show Cause ("Second OSC") at 2 (emphasis added). Mallery responded with a list of allegations from his original MSHA complaint on March 22, 2024. On appeal, Mallery explained that he did not feel able to disagree with management's recommended course of action: "I felt I had no choice but to agree with what Seth Puls and Human Resources suggested to me." M.'s Brief at 2.

On June 12, 2024, the Judge dismissed Mallery's case based on the reasoning made in her two Orders to Show Cause, stating that Mallery failed to state a claim upon which relief could be granted, citing Rule 12(b)(6) of the Federal Rules of Civil Procedure.[6] ALJ Order at 2, 4. The Judge found that "short-term disability…does not constitute an employer-generated adverse action." *Id.* at 4.[7] In addition, the Judge noted that his "allegations far exceed the time limit applicable to initiating a complaint with MSHA." *Id*. The same day Mallery filed his petition for discretionary review with the Commission, challenging the Judge's finding that short-term disability was not an adverse action. On July 5, 2024, Mallery filed additional materials in support of his claim.

On July 12, 2024, the Commission granted review of Mallery's petition for discretionary review. In addition, pursuant to Commission Procedural Rule 71, 29 C.F.R. § 2700.71, and section 113(d)(2)(B) of the Mine Act, 30 U.S.C. § 823(d)(2)(B), the Commission granted review on the Judge's Orders to Show Cause, issued on March 5, 2024 and March 14, 2024, and subsequent dismissal to determine whether they are contrary to law. 46 FMSHRC 445 (July 12,

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[5] Commission Procedural Rule 42 requires a discrimination complaint to "include a short and plain statement of the facts, setting forth the alleged discharge, discrimination or interference, and a statement of the relief requested." 29 C.F.R. § 2700.42.

[6] *See* 29 C.F.R. § 2700.1(b) ("On any procedural question not regulated by the Act, these Procedural Rules, or the Administrative Procedure Act . . . , the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure . . . ").

[7] We note that the Judge cited no authority for the proposition that, as a matter of law, a miner's placement on short-term disability does not constitute an employer generated adverse action. See our discussion infra at FNs 8 & 10, regarding what constitutes an adverse action.

2024). The Commission also voted to determine whether Mallery's July 5, 2024 filings should be part of the record on appeal.

II.

Disposition

A. The Judge's Order of Dismissal

As we have previously held, the Commission disfavors dismissing cases for failure to state a claim, which the Judge correctly restated in her dismissal. ALJ Order at 3. In *Perry v. Phelps Dodge Morenci, Incorporated*, the Commission stated that "[i]t is well settled that "[t]he motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted." 18 FMSHRC 1918, 1920 (Nov. 1996) (citing 5A Wright & Miller, Federal Practice & Procedure: Civil § 1357 (2d ed. 1990)); *see also KenAmerican Res., Inc.,* 38 FMSHRC 1943, 1947 (Aug. 2016) (summary decisions should not be granted "unless the entire record shows a right to judgment with such clarity as to leave no room for controversy and establishes affirmatively that the adverse party cannot prevail under any circumstances.") (quoting *Campbell v. Hewitt, Coleman* & *Assocs., Inc.,* 21 F.3d 52, 55 (4th Cir. 1994)).

As the Judge noted, under the requirements of section 105(c), Mallery was only obligated to plead that he "engaged in protected activity, and that he suffered an adverse action that was, at least, partially motivated by the protected activity." ALJ Order at 3 (citing *Sec'y of Labor on behalf of Smitherman, v. Warrior Met Coal Mining, LLC,* 45 FMSHRC 446, 451 (June 2023); *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (Apr. 1981)). In short, at this stage Mallery was only required to plead sufficiently that he engaged in protected activity, suffered an adverse action, and that the latter may have been motivated by the former.

The Commission has defined an 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 of Labor on behalf of Pendley v. Highland Mining Co.*, 34 FMSHRC 1919, 1930 (Aug. 2012) (citing *Sec'y of Labor on behalf of Pendley v. Fed. Mine Safety & Health Rev. Comm'n*, 601 F.3d 417, 428 (6th Cir. 2010)). The Commission has also held that "discrimination may manifest itself in subtle or indirect forms of adverse action." *Sec'y of Labor on behalf of Jenkins v. Hecla-day Mines Corp.*, 6 FMSHRC 1842, 1852 n.2 (Aug. 1984).

Furthermore, in considering a dismissal order, the ALJ is required, pursuant to Rule 12(b)(6), to construe Mallery's complaint in the light most favorable to him and assume his allegations are true. Fed. R. Civ. P. 12: *Ribble v. T & M Develop. Co*., 22 FMSHRC 593, 596 n.3 (May 2000) ("Under Rule 12(b)(6), we must construe the complaint in the light most favorable to [complainant], and must assume that his allegations are true. . . . We must also liberally construe the complaint, which was filed pro se.") (internal citation omitted); s*ee also* 5A Wright & Miller, Federal Practice & Procedure: Civil § 1357 (2d ed. 1990). The Commission has consistently followed this approach. *See Ribble*, 22 FMSHRC at 596 n.3; *Marin v. Asarco, Inc*., 14 FMSHRC 1269, 1273 (Aug. 1992) (citing *Maduakolam v. Columbia University*, 866 F.2d 53, 56 (2d Cir. 1989) ("In general, courts take into account the "special circumstances of litigants who are untutored in the law."); *Goff v. Youghiogheny & Ohio Coal Co.*, 7 FMSHRC

1776, 1777 (Nov. 1985) (*citing Hughes v. Rowe*, 449 U.S. 5, 9-10 (1980) ("For purposes of reviewing the judge's grant of a motion to dismiss for failure to state a claim, we will treat the allegations as true.").

The facts asserted by Mallery in his Complaint and submissions are as follows: On January 12, 2024, El Segundo placed Mallery on administrative leave because of his workplace safety concerns. At that time, he felt he had "no choice" but to apply for disability, which resulted in a forty-percent reduction in his pay. M.'s Brief at 2. Asking Mallery to file for disability was clearly an action taken by the operator and there is no assertion by any party in this case that Mallery was thinking about filing for disability before his employer asked him to do so during a meeting in which he raised his workplace concerns. In Mallery's rebuttal brief before the Judge, he stated: "My goal was to see workplace issues get addressed and to return as a valuable employee. I was financially hurt prior to this situation and most definitely am hurting with 60% of my wages while receiving short term disability and long-term disability." M's Reb. at 9.

Taking Mallery's allegations as true, the only reasonable conclusion is that he met the minimal burden required under section 105(c). Here, Mallery walked into a meeting with a list of workplace complaints and walked out having been placed on administrative leave, leading soon after to long-term disability at sixty percent of his pay. *See Pamela Bridge Pero v. Cyprus Plateau Mining Corporation*, 22 FMSHRC 1361, 1365 (Dec. 2000) (the operator's knowledge of the protected activity and temporal proximity between the protected activity and the adverse action are sufficient to show a motivational nexus). *See also Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2511 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983) (coincidence in time between protected activity and adverse action may be circumstantial indicia of discriminatory intent).

Mallery's description of the meeting on January 12 and its events constitutes a proper assertion of protected activity and an adverse action: he prepared a three-page document of safety complaints, raised workplace safety complaints in the meeting with management, and El Segundo immediately placed him on administrative leave and referred him to a fitness for duty assessment leading to his long-term removal from work.[8] In sum, Mallery properly pled a prima facie case.

The ALJ's Order does not consider Mr. Mallery's complaint and allegations in the light most favorable to him. Though the Judge correctly stated the law under section 105(c) and relied upon *Perry* for the Commission's view on dismissals for failure to state a claim, she failed to follow these rules and committed a procedural error in dismissing the case at this early stage. Specifically, the Judge impermissibly raised the bar the Commission has set for such dismissals, especially involving *pro se* litigants such as Mallery, and erred in not recognizing that Mallery asserted at least one adverse action. As in *Ribble*, the Judge here required a *pro se* litigant to prove his "prima facie case at a stage in the proceedings when [the complainant is] simply

[8] While we do not reach the merits of Mallery's case, we note that Commission precedent does not require an adverse action to result in direct or permanent pecuniary loss, as cases involving transfers and assignments to less desirable tasks demonstrate. *See Pendley*, 34 FMSHRC at 1930. As to the voluntariness of applying for short-term disability after the paid administrative leave, Mallery stated on appeal he did not feel he had a choice but to accept management's recommendation. M.'s Brief at 2.

obligated to meet the Commission's minimal pleading requirements." 22 FMSHRC at 595 (citing *Perry*).

The Judge erred in her show cause orders and dismissal by repeatedly crediting as true the operator's version of the facts. In particular, the Judge treated as true El Segundo's allegation that the "the determination to place him in [disability] status was made by medical professionals and a third-party insurance company." First OSC at 2. We believe this impermissibly credited El Segundo's allegations as true.

Throughout the dismissal, the Judge interwove El Segundo's version of the facts into her analysis and selectively quoted Mallery's allegations, creating the appearance that all parties agreed that Mallery required a leave from work due to medical issues. The Judge wrote, "According to El Segundo, based on Mallery's emotionally distraught demeanor, Puls placed him on fully-paid administrative leave, pending a voluntary fit for work evaluation." Order at 4. Despite Mallery's stated and repeated position that El Segundo placed him on short-term disability because he sought to address workplace issues, the Judge concluded that "the record is devoid of any indication that Mallery was coerced into applying for the contractual benefit."[9] *Id.* We disagree.

In support of this position, the Judge selectively picked from Mallery's submissions. For example, the Judge cited Mallery's rebuttal brief for the proposition that he "acknowledges that he has legitimate medical issues, and the determination was made by third-party medical and insurance providers." *Id.* at 4. What in fact Mallery wrote is that the doctor "identified that [Mallery has] medical issues that needed to be addressed, however he stated that [Mallery has] linear thought." Mallery's Rebut. at 9. In other words, Mallery did not simply accept the doctor's conclusion and the result that Mallery should be removed from work at a reduced rate of pay. Mallery cited the doctor's report to show his ability to be cogent.

The Judge relied almost entirely on El Segundo's version of the facts in support of an unsupported legal conclusion that placement on short-term disability could not constitute an adverse action, including by ignoring that El Segundo placed Mallery on administrative leave before he applied for short-term disability. The facts as Mallery pled them are clearly sufficient under section 105(c).

We are unable to uphold an analysis that contains faulty assumptions and that misreads the record. Upholding the Judge's decision here would amount to a finding that, as a matter of law, placing a miner on administrative leave is not an adverse action. We make no determination as to whether placing Mr. Mallery on administrative leave, in the particular facts of this case,

[9] In addition, we note that it is not at all clear that the assessment to place Mallery on disability was independent or that El Segundo was not motivated by retaliatory animus. El Segundo stated that it played no role in the doctor's determination that Mallery should take leave, but the doctor's report indicates that El Segundo's human resources representatives Sparks and Jackson, and mine manager Puls, played a role in the doctor's evaluation as "collateral informants." The exact nature of their role in the doctor's determination is something that would have to be determined at hearing.

constitutes an adverse action.[10] However, we find that he has pled his case sufficiently to support, at this stage of the proceeding, an allegation of adverse action. Both parties are entitled to engage in discovery and in a hearing to prove their facts.

The Judge's legal conclusion at this early stage that there was no adverse action was also problematic for a separate reason, which is that interference under section 105(c) requires no adverse action and Mallery may have argued an interference claim (as well as a traditional discrimination claim). It is well-established that the statutory language in section 105(c)(1) also protects miners against interference with the exercise of protected rights.

The Commission has held that interference that would dissuade a reasonable miner from engaging in protected activity may constitute on its own an adverse action. *See McNary v. Alcoa World Alumina, LLC*, 39 FMSHRC 433, 439 (Mar. 2017). Mallery raised in his complaint several instances of potential interference against his exercise of protected rights that need not necessarily be tied to an adverse action such as discharge, suspension, or retaliatory leave. This statutory protection extends to protection against coercive conversations and harassment. *Moses v. Whitely Development Corp.*, 4 FMSHRC 1475, 1478-79 (Aug. 1982), *aff'd*, 770 F.2d 168 (6th Cir. 1985). *See also United Mine Workers of America on behalf of Franks et al. v. Emerald Coal Res., LP*, 36 FMSHRC 2088, 2105 (Aug. 2014) (separate opinion of Chair Jordan and Commissioner Nakamura) (coercive interrogation "alone…[can] constitute a violation of that statutory section.").

The most prominent example that Mallery alleged of his protected activity occurred on August 30, 2022, when a supervisor rushed him in completing a loading log for explosives. MSHA Compl. at 3. Mallery also alleged that during morning safety meetings on December 28, 2022, and January 5, 2023, he raised safety and discrimination issues, being met with verbal ridicule and reprimand from a supervisor. *Id.* The January 11 and 12, 2023, meetings may also be analyzed as potential interference in the form of "coercive interrogation" and retaliatory harassment for both Mallery's earlier protected activity at the jobsite and his protected activity during the meetings with human resources as he sought to raise workplace issues. *See Moses*, 4 FMSHRC at 1478-79.

As the Commission wrote in *Moses* regarding the "coercive interrogation and harassment over the exercise of protected rights":

> A natural result of such practices may be to instill in the minds of employees fear of reprisal or discrimination. Such actions may not only chill the exercise of protected rights by the directly affected miners, but may also cause other miners, who wish to avoid similar treatment, to refrain from asserting their rights. This result is at odds with the goal of encouraging miner participation in enforcement of the Mine Act.

Id.

[10] *See Sec'y on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842, 1848 n. 2 (Aug. 1984) ("Determinations as to whether an adverse action was taken must be made on a case-by-case basis.").

According to the Judge's Order, Mallery properly alleged that he engaged in various protected activities, which was alone sufficient for the case to proceed on an interference claim. That is not to say that Mallery has proven that interference has occurred, only that he *could* prove a violation under section 105(c) even in the face of a well-reasoned finding that an adverse action did not take place.

Taking his allegations as true at this early stage, once more, Mallery adequately pled interference with his statutory rights. Whether these allegations occurred as pled is a question necessarily left for discovery and a hearing. *See Sec'y of Labor on behalf of Gray v. North Star Mining, Inc.*, 27 FMSHRC 1, 8 (Jan. 2005) (whether a management official's conduct constitutes interference proscribed by the Act "must be determined by what is said and done, and by the circumstances surrounding the words and actions") (quoting *Moses*, 4 FMSHRC at 1479 n.8).

In conclusion, Mallery pled a *prima facie* case as required by law. While El Segundo was free to rebut the *prima facie* case, the Judge was not entitled to credit the operator's alleged facts as true in dismissing Mallery's case for the failure to state a claim. As such, we find that the Judge's dismissal of Mallery's complaint was premature. Mallery must be given an opportunity to prove his case through discovery and a hearing, to engage in settlement discussions, and "to avail himself of all the other rights afforded under our Procedural Rules." *Ribble*, 22 FMSHRC at 595. If the parties agree on all factual matters, they may also submit summary judgment motions.

B. The Judge's Show Cause Orders

Our finding that Mallery pled a prima facie case at the outset is sufficient to remand the case for further proceedings. However, we separately address the two Orders to Show Cause the Judge issued because, while the Judge's orders were not contrary to law per se, the Judge misinterpreted Commission Procedural Rule 42 in issuing them.

It is undisputed that Commission Judges have the authority to issue orders to show cause under Commission Procedural Rule 66, even without a dispositive motion filed by the parties.[11] 29 C.F.R. § 2700.66. The Judge cited Rule 42, which requires that a discrimination complaint "shall include a short and plain statement of the facts, setting forth the alleged discharge, discrimination or interference." 29 C.F.R. § 2700.42 (cited in First OSC).

The Commission warned in *Perry* that *pro se* cases "demonstrate[] the difficulty of establishing all the relevant facts strictly on the basis of a pro se complainant's pleadings." 18 FMSHRC at 1921. Here, we encounter just such a case. The Judge ordered Mallery twice to provide a "clear and concise statement" of his case, finding that his filings were "confusing." First OSC at 2; Second OSC at 1, 2. However, no requirement exists under Rule 42 or section 105(c) of the Act that a miner provide a "clear and concise statement" of their discrimination claim.

[11] Though the Judge did not cite Rule 66, in essence she invoked this rule governing the summary disposition of proceedings and the procedure for judges to issue orders to show cause. The Commission has noted that "Rule 66(a) generally requires a Judge to issue an order to show cause before dismissing a case as a result of a party's procedural errors." *Armstrong Coal Co., Inc.*, 36 FMSHRC 1947, 1948 n. 2 (Aug. 2014); *also id.* at 1949 n.3 (noting that the "rule does not limit in any way the Judge's discretion to excuse a party's procedural errors").

The requirement in Rule 42 is a "minimal" standard that does not require Mallery to "substantiate a *prima facie* case." *Hopkins Cty. Coal, LLC v. Acosta*, 875 F.3d 279, 290 (6th Cir. 2017). The Judge did exactly that by demanding that Mallery conform to a "clear and concise statement[.]" First OSC at 2; Second OSC at 2. The Commission has also stated time and again that the party pleading discrimination carries a "minimal" burden in pleading. *E.g.*, *Ribble*, 22 FMSHRC at 595; *Perry,* 18 FMSHRC at 1921. As such, nothing in the Act or Rule 42 prevented Mallery from providing more than what was required or arranging his pleading in a particular manner.

Mallery's filings were undoubtedly voluminous and muddled at times. However, it is the duty of the factfinder to discern, especially when a *pro se* litigant is involved, whether a discrimination case was properly pled. And here it was. As such, the Judge erred in issuing the two Orders to Show Cause in this instance.

C. The July 5, 2024 Filings

Because we remand this case for further proceedings, we find that the question of whether Mallery's July 5, 2024, filings should be part of the record on appeal is moot. The parties may submit additional evidence in those proceedings if appropriate.

III.

Conclusion

For all the foregoing reasons, we vacate the Judge's dismissal order and remand this matter for further evidentiary proceedings and, if necessary, a full hearing consistent with this order.

Timothy J. Baker, Commissioner

Moshe Z. Marvit, Commissioner

Chair Jordan, dissenting:

I would affirm the Judge's order dismissing the complaint as neither the complaint nor the supplemental filings articulate a cognizable claim that El Segundo Coal Company violated section 105(c) of the Mine Act, 30 U.S.C. § 815(c), in retaliation for Wesley Mallery's asserted safety-related protected activities.

A cognizable claim of unlawful discrimination in violation of section 105(c) requires that the complainant articulate: (1) that he engaged in protected activity, and (2) that he suffered an adverse action that was, at least, partially motivated by the protected activity.[1] *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co*., 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds*, 663 F.2d 1211 (3rd Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Co*., 3 FMSHRC 803 (Apr. 1981).

As the Judge found, Mallery sufficiently alleged that he engaged in various activities protected by the Mine Act, including raising safety complaints with his supervisors on January 5, 2023, and complaining about safety again at a January 12, 2023, meeting with the mine manager and representatives of the mine's human resources department. El Segundo placed Mallery on administrative leave following the January 12th meeting.[2]

In his complaint and supplemental filings Mallery alleges that his decision to apply for and receive short-term disability benefits and later long-term disability benefits has caused a reduction in his pay and benefits.[3] The Judge concluded that his disability status was not an adverse action. Accordingly, the Judge granted El Segundo's motion to dismiss the complaint.

A. The Judge did not err in dismissing the complaint.

An adverse action is "*an action of commission or omission by the operator* subjecting the affected miner to discipline or a detriment in his employment relationship." *Sec'y of Labor on behalf of Pendley v. Highland Mining Co.*, 34 FMSHRC 1919, 1930 (Aug. 2012) (quoting *Sec'y of Labor on behalf of Pendley v. Fed. Mine Safety & Health Rev. Comm'n*, 601 F.3d 417, 428 (6th Cir. 2010)) (emphasis added). An adverse action must be "materially adverse to a

[1] Commission Procedural Rule 42, 29 C.F.R. § 2700.42, requires that a miner file "a short and plain statements of facts, setting forth the alleged discharge, discrimination or interference, and a statement of the relief requested."

[2] According to El Segundo, Mallery exhibited an emotionally distraught demeanor at the January 12, 2023, meeting, and as a result management placed Mallery on administrative leave pending a fitness-for-duty evaluation. The evaluation occurred on February 3, 2023. Mallery then applied for disability benefits and began receiving the benefits on or around February 14, 2023.

[3] Mallery had previously filed a complaint with the Mine Safety and Health Administration, which investigated his complaint and determined that there was no "sufficient evidence to establish" that a violation of section 105(c) of the Mine Act had occurred. Letter (Aug. 3, 2023). Mallery thereafter filed a *pro se* complaint on his own behalf with the Commission pursuant to section 105(c)(3) of the Mine Act, 30 U.S.C. § 815(c)(3).

reasonable employee," in that "the employer's actions must be harmful to the point that they could well dissuade a reasonable worker" from engaging in protected activity. *Pendley*, 34 FMSHRC at 1931-32, *citing Burlington Northern & Sante Fe Railway Co. v. White*, 548 U.S. 53, 57 (2006).

I agree with the Judge's finding that the complaint lacked an adverse action. The miner's act of voluntarily applying for and receiving disability benefits is not an act or omission *taken by the operator*. The fact that Mallery may have received a lesser salary and benefits under either short or long-term disability does not change the analysis here.

Notably, Mallery does not allege that the operator unlawfully coerced him into filing for disability or otherwise unlawfully influenced the process.[4] In fact, according to El Segundo, Mallery is currently employed by the operator and eligible to return to work upon appropriate medical clearance. Mallery, however, is not seeking reinstatement. Statement of Relief (Feb. 14, 2024) ("I do not wish to return to work for [the mine operator].").

B. Mallery's complaint does not allege that he was unlawfully placed on administrative leave.

The majority finds that the Judge erred in failing to consider that prior to Mallery's decision to apply for disability, El Segundo placed him on paid administrative leave pending a fitness-for-duty evaluation. At least for the purpose of pleading a *prima facie* case, my colleagues find that the administrative leave which preceded Mallery's receipt of disability benefits was an adverse action and the Judge erred in omitting it from her analysis. I disagree.

First and foremost, Mallery does *not* claim that El Segundo retaliated against him by placing him on administrative leave. Furthermore, it is at least an open question as to whether "administrative leave" requires an allegation of some corresponding adverse impact to constitute as an adverse action. *See Hornsby v. Watt*, No. 17-5001, 2017 WL 11687516, at *1 (D.C. Cir. Nov. 14, 2017) ("leaving open" the question of whether "being placed on administrative leave could constitute the type of adverse action that would support a retaliation claim"); *cf. Richardson v. Petasis*, 160 F.Supp.3d 88, 118 (D.D.C. 2015) (in which the District Court concluded that 39 days of paid administrative leave was an adverse action because the plaintiff pled an objectively tangible harm resulting from the duration and conditions of the suspension).

[4] In his petition for discretionary review to the Commission, Mallery states he "voluntarily agreed to a fit for duty assessment . . . as well as voluntarily appl[ied] for short-and long-term disability benefits under Peabody's disability plan" but alleges there was "in fact an adverse action" because "I strongly feel I had no other options." PDR at 1.

My colleagues interpret Mallery's statement that he felt he "had no other options" as a possible allegation that El Segundo took some action to remove Mallery from his regular duties in retaliation for his exercise of protected activities. Slip op. at 5-6. After review of the complaint and responses to the orders to show cause, I find that Mallery made no such allegation to the Judge. The first time this ambiguous statement appears in the record is in Mallery's petition to the Commission. *See* Order of Dismissal at 4 (June 12, 2024) (finding that there is no "indication that Mallery was coerced into applying for the contractual benefit.").

Second, Mallery does not claim that he suffered any adverse impact as a result of his administrative leave. As the Fifth Circuit has stated:

> [D]epending on the circumstances, [administrative leave] may range from a completely benign measure to one that stigmatizes an employee and causes significant emotional distress. Forced leave may even affect an employee's opportunities for future advancement. But "the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters." *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 69, 126 S.Ct. 2405, 2415, 165 L.Ed.2d 345 (2006).

Stewart v. Miss. Transp. Comm'n, 586 F.3d 321, 332 (5th Cir. 2009).

In *Stewart v. Mississippi Transportation Commission,* the Court found that under the circumstances of the case the plaintiff's administrative leave was not an adverse action, relying on Stewart's receipt of full salary without forced use of accumulated leave time and her reinstatement with full-pay three weeks later. Furthermore, the plaintiff did not suggest that her administrative leave created a negative stigma. *Id*.

In the case before us, Mallery did not allege that his administrative leave was an adverse action. Nor does he allege that he suffered any harm during the approximately one-month period he was on administrative leave, prior to his receipt of disability benefits.[5] Accordingly, for these reasons, I would find that the Judge did not err in excluding Mallery's administrative leave from her consideration of whether an adverse action was alleged in the complaint.[6]

Mary Lu Jordan, Chair

[5] My colleagues claim that affirming the Judge's decision would amount to a finding that administrative leave is not an adverse action. Slip op. at 7. I make no such conclusion; my decision is limited to the Judge's dismissal order as well as the allegations and relief sought in the miner's filings.

[6] I further conclude that the Judge did not err in issuing the Orders to Show Cause.

Distribution:

Wesley Wayne Mallery
P.O. Box 666
7120 Zuni Canyon Rd.
Grants, NM 87020
wesleywmallery@yahoo.com

Christopher G. Peterson, Esq.
Fisher & Phillips, LLP
1125 17th Street Suite 2400
Denver, CO 80202
cpeterson@fisherphillips.com

Thomas A. Paige, Esq.
Office of the Solicitor
U.S. Department of Labor
Division of Mine Safety and Health
200 Constitution Avenue NW, Suite N4420-N4430
Washington, DC 20210
Paige.Thomas.a@dol.gov

Emily O. Roberts, Esq.
Division of Mine Safety and Health
Office of the Solicitor
200 Constitution Avenue NW Suite N4420 – N4430
Washington, DC 20210
roberts.emily.o@dol.gov

Chief Administrative Law Judge Glynn F. Voisin
Office of the Chief Administrative Law Judge
Federal Mine Safety & Health Review Commission,
1331 Pennsylvania Avenue, NW, Suite 520 N,
Washington, DC 20004-1710
GVoisin@fmshrc.gov

Administrative Law Judge Jacqueline Bulluck,
Office of the Chief Administrative Law Judge
Federal Mine Safety and Health Review Commission,
1331 Pennsylvania Avenue, NW, Suite 520 N,
Washington, DC 20004-1710
jbulluck@fmshrc.gov