FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9933 / FAX: 202-434-9949

October 19, 2017

HEATHER MULFORD, Complainant, v. ROBINSON NEVADA MINING COMPANY, Respondent.	DISCRIMINATION PROCEEDING Docket No. WEST 2017-0135-DM MSHA Case No. WE-MD-2016-16 Mine: Robinson Operation Mine ID: 26-01916

DECISION AND ORDER

Appearances: Heather Mulford, Ely, Nevada, pro se for the Complainant

Robert Delong, Esq., Reno, Nevada, for the Respondent

Before: Judge Moran

This case is before the Court upon a complaint of discrimination under Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(3) ("the Act"). A hearing was held July 25-26, 2017, in Elko, Nevada. To establish a prima facie case of discrimination under section 105(c)(1), a complainant must show that he/she engaged in a protected activity and that the adverse action complained of was motivated, at least in part, by that activity. For the reasons which follow, the Court finds that, while Heather Mulford engaged in protected activity by asserting certain safety and health concerns in her MSHA complaint, those claims were without any substance whatsoever and that the decision to terminate her employment was not attributable to her making those claims. Thus, while Robinson terminated Mulford, that adverse action was not motivated in any part by her protected activity.

A Preliminary Matter

At the outset of the hearing, the Court revisited its July 10, 2017 Order, precluding the introduction of Respondent's proposed exhibits, Nos. 4 through 15. Tr. 8-20. The Court then announced at the hearing that it was reaffirming its earlier determination precluding those exhibits. See July 25, 2017 Order Regarding Robinson's Response to Order Precluding Introduction, Reference, and Use of Respondent's Proposed Exhibits Nos. 4 through 15. In essence, the Order found that the Report amounted to trying Ms. Mulford based on conclusions

and actions taken by a state court prior to Mulford's employment by Robinson, which had no relevance at all to this discrimination action.

Ms. Heather Mulford's MSHA Discrimination Complaint

Mulford's discrimination complaint before MSHA alleges two cognizable grounds of protected activity.[1] First, she alleged that Robinson Mine's safety manager, Mark Langston, may have been drunk on the job several times. She claimed that Langston would come to work smelling like booze, walking unsteadily, and acting erratically. Mulford reported Langston's possible intoxication to Respondent's Human Resources Manager, Mr. Kim Kammerer. Second, she alleged that Robinson employee Patrice Dunn may have been covering up positive drug test results of an employee. This allegation arose from Mulford's claim that Dunn's daughter had failed two drug tests.

Mulford gave a statement to MSHA special investigator Cory Owens on October 4, 2016 concerning her discrimination complaint. She was asked by MSHA on that date "[w]hat was your protected activity?" Mulford Statement to MSHA at 3. Her response, in full, informed:

> I still believe that it is an outside influence on Mark Langston and then a secondary issue that happened towards the end of August. The issue in August was positive drug test that came along with a workers comp claim. He really came after me after I turned in the positive drug test to the state. This employee had two positive drug tests in four months and filed two workers comp claims. The drug test was about a week before the hearing aid issue came up. Then I wanted to discuss it with HR who is Kim Kammerer. I told him about the drug tests, then told him about Langston coming unglued on me about the hearing aids and I also told him that Langston comes in the morning smelling like fresh booze. Langston also sways down the hallway and in office.

Id.

In her October 4, 2016 statement, Mulford was also asked, in effect, what was the adverse action against her. The first question on this issue was "[w]hy do you feel that the company is retaliating against you?" Statement at 3-4.

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[1] Mulford's discrimination complaint, reflected in her "Discrimination Report" before MSHA, and her statement and interview with MSHA included claims outside of protected activity. These involved allegations that Mark Langston was upset with her hearing deficit and the amount of time it was taking for her to obtain hearing aids, and that Langston was "disrespectful" to her from the start of her employment with Robinson Mine. Mulford's complaint also asserted that "the discrimination & disrespectful behavior from Langston cold be from outside source from Reno, NV. In Reno [I] had been harassed & my employment discriminated for 2 years. Please question Langston because it is not usual to mistreat total strangers without outside influences." Mulford Discrimination Report at 3. The Respondent's mine is in Ruth, Nevada. Tr. 271. The Court takes judicial notice that Reno, Nevada is more than 305 miles from Ruth.

Mulford answered,

> *I don't feel that it is the company*; I feel that it is Langston and Patrice Dunn. Patrice used to take care of the workers comp claims but I took it over because I'm a licensed nurse. Her daughter is the worker with the two failed drug tests and workers comp claims, I feel that she was defrauding the State of Nevada by covering up the positive drug test on the last comp claim.

Id. (italics added).

The second question on the issue inquired, "[h]ow did Mark Langston retaliate against you?" Mulford October 4, 2016 Statement to MSHA at page 4. Mulford's response was,

> [b]esides the constant bull with the hearing and communication. My job description was never realized[;] he switched me over to industrial hygienist which I don't have a degree in and have never done in my life. He ignored me like [I] was invisible, I could not add suggestions to the safety team. He was a bully, he micromanaged everybody's job description and I was not allowed any autonomy. He would talk to me like you would talk to your dog, he would give orders rather than talking to [a] human being. Then the final was the letter that I received from HR forcing [me] to take time off.

Id.

Before receiving testimony, as Ms. Mulford is a pro se complainant, the Court briefly reviewed the necessary elements to establish discrimination under section 105(c) of the Mine Act. It noted that "to prevail in such a case the complainant is required to show that he or she engaged in protected activity, and that the adverse action taken was motivated at least in part by that activity." Tr. 23. The Court also spoke to the Respondent's ability to rebut a Complainant's prima facie case, "by showing that there was no protected activity which occurred, or that the adverse action was not motivated in any part by that protected activity." Tr. 24. It added that a Respondent can also still defend "affirmatively . . . by proving that even if they were motivated by the miner's activity, they were also motivated by the miner's unprotected activity and they would have fired or taken the adverse action against that individual in any event." Tr. 24-25.

The importance of *Hatfield v. Colquest Energy, Inc.*, 13 FMSHRC 544 (Apr. 1991) ("*Hatfield*").

In *Hatfield*, the Commission recognized that a miner cannot expand his pro se claim by alleging matters not within the scope of the initial complaint and never investigated by MSHA. 13 FMSHRC at 546. In *Sec. v. Hopkins County Coal, LLC*, 38 FMSHRC 1317, June 24, 2016, the Commission expounded upon its *Hatfield* decision, stating that "the miner's complaint establishes the contours for subsequent action." *Hopkins* at 1340. It noted in *Hopkins* that "Hatfield's original complaint was general in nature and contained no indication of the new matters apparently alleged for the first time in the amended complaint." *Id.* at 1341 (citing *Hatfield at 546)*. The Commission held that the initial complaint formed the basis of MSHA's

investigation. *Id.* After MSHA refused to act on that initial complaint, the miner *could not expand his pro se claim by alleging matters not within the scope of the initial complaint and never investigated by MSHA. Hopkins* at 1342 (emphasis added). The key element in these matters is that the determination of the scope of the complaint is not constrained entirely by the four corners of the miner's complaint, but is also informed by MSHA's ensuing investigation:

> The Commission has previously held that 'the Secretary's decision to proceed with a complaint to the Commission, as well as the content of that complaint, is based on the Secretary's investigation of the initiating complaint to [him], and not merely on the initiating complaint itself.' *Sec'y o/b/o Callahan v. Hubb Corp.*, 20 FMSHRC 832, 837 (Aug. 1998); see *Sec'y o/b/o Dixon v. Pontiki Coal Corp*, 19 FMSHRC 1009, 1017 (June 1997); *Hatfield*, 13 FMSHRC at 546. If the content of a discrimination complaint filed with the Commission is based on that which is uncovered during the Secretary's investigation, then it follows that the Secretary's authority to investigate in the first instance cannot be circumscribed by the early and often uninformed statements made by a miner in his charging complaint.

Id. at 1326, n.15.

Accordingly, this Court considered the text of Mulford's discrimination complaint before MSHA as well as MSHA's investigation interview of October 4, 2016.

At the outset of the hearing the Court spoke to the particulars of the Complainant's case. The purpose of this was to explain that some aspects of Ms. Mulford's complaint were not cognizable under the Mine Act. The Court had explained this before the hearing during conference calls with the parties, but thought it would be useful to revisit the matter again. Therefore, the Court noted that the Complainant could testify "about [her] experiences with Mr. Langston, the safety manager regarding [her] claim that he showed evidence of being intoxicated or having alcohol issues on the job." Tr. 25. The Court noted that she "need not prove that he was, in fact, intoxicated, however, but only that [she] raised this concern to management at Robinson mining." Tr. 25. The Court also noted that there is a safety standard pertaining to alcohol at a mine site: 30 CFR § 56.20001. Tr. 26. The Court explained further that Mulford could testify about "any bullying, hostility or micromanaging carried out by Mr. Langston or others after [she] raised [her] safety concern about Mr. Langston." *Id.*

The Court also noted that the Complainant could testify about her "experience with Patrice Dunn regarding whether she was covering up positive drug tests for certain employees and the basis for [her] claim in that regard." Tr. 26-27. Last, the Court took note that Mulford's complaint includes two adverse actions allegedly taken against her. One was being reclassified as an industrial hygienist, and the other her employment termination. Tr. 28. In this regard, the Court emphasized that if the Complainant's testimony strayed beyond things that she presented to MSHA in her complaint, and in the investigation and the interview that she had with the MSHA special investigator, then she would have gone outside of the four corners of her complaint and that such matters could not be considered because that is prohibited by the Commission's *Hatfield* decision. The Court explained that the reason for that limitation is that MSHA "has to have an opportunity to investigate complaints of discrimination in the first

instance. So it's only what [a complainant brings] to [MSHA's] attention for them to investigate that can be brought up in the subsequent hearing unless you brought another discrimination complaint and filed new charges." Tr. 29.

Findings of Fact

Testimony began with the Complainant, Heather Ann Mulford. Ms. Mulford is a registered nurse. Tr. 42. She became a nurse in 1985 and is presently licensed as such. *Id.* She applied for employment as an occupational health nurse at Robinson Nevada's mine in Ely, Nevada, in the spring of 2016. Tr. 44. Complainant's Exhibit 1C, is the job announcement for the position for which Mulford was hired. Tr. 46-47. Respondent's Ex. R 18-2, is the same document. Mulford learned of the job opening on the internet. Tr. 47. Mulford stated she was hired as an occupational health nurse. Tr. 49. Also introduced was Respondent's letter, dated May 12, 2016, offering her the job. Ex. C 2; Tr. 51. Respondent's Ex. R 23, is the same document. The Court noted that exhibit C 2, describes the job offered as "Occupational Health Nurse." Tr. 52. Mulford accepted the job immediately and began work on June 6, 2016. However, she stated that when she appeared for her first day on the job, her job was listed as industrial hygienist and occupational nurse, with the hygienist position listed first. Tr. 54. Complainant's Ex. 17 C. That exhibit lists the position title as "industrial hygienist/nurse." *Id.*

Mulford agreed that on her first day at work with the Respondent, June 6, 2016, she was informed that her job was as an industrial hygienist/occupational nurse.[2] Tr. 60. She viewed the description as different from the position for which she was hired. That is to say, in her view, the title, "industrial hygienist and occupational nurse," is not the same as "occupational health nurse." *Id.* Mulford expressed her view that the industrial hygienist job usually requires at least certification, and often a separate degree, and that she possessed neither. Tr. 60-61. She was qualified only to be an occupational nurse. However, she did not immediately voice her concern about this issue to Robinson. Instead, around mid-June, when her office email was being set up, and her title was again listed as "industrial health/occupational health nurse," she informed Shane Anderson that could not work, as she lacked the degree or certification for that title. Tr. 62 and C's Ex. C 3. According to Mulford, Anderson told her that Mark Langston wanted

[2] The Court notes that, while for the sake of completeness, it has recounted Mulford's testimony regarding the occupational nurse and hygienist issue, this was not protected activity. In addition, Respondent's Exhibit R 18, a two page exhibit which pertained to the job announcement and the job description, was admitted into the record. Tr.299-301. Respondent's Counsel noted and Mulford agreed that the exhibit included, under the responsibilities/ job description, "[p]erform health risk assessments, industrial sampling, ergonomic surveys throughout the mine site." Tr. 302. However, Mulford added that it was "not the job *title*." Tr. 302 (emphasis added). She acknowledged that those tasks were "discussed [ ] in our interviews that I would help and learn how to do this [,adding] [b]ut it wasn't a change job [*sic*]." Tr. 302. Further, Mulford's objection to the industrial hygienist tasks was "[b]ecause it wasn't [her] degree or [her] certification." Tr. 304. In the Court's estimation, Mulford erroneously conflated the non-existent requirement for a degree or certification to perform hygienist duties with her objection to including those duties in her job or more particularly, in her job *title*. Regardless, this was not one of the grounds advanced in her claim of protected activity.

her to do that hygienist work. Tr. 64. Although Anderson informed Mulford that the mine would be teaching her how to perform that work, she responded that was insufficient, as it was not equivalent to possessing a degree. *Id.*

Returning to her testimony regarding the events associated with her being hired by Robinson Mining, Mulford stated that she first had a telephone interview conducted by Mr. Kim Kammerer, Shane Anderson, Mark Langston, and Tyler Wright. That was followed about a month later by an in-person interview which occurred in Ely, Nevada. The same individuals interviewed her as in her telephone interview, with Kammerer and Anderson leading the interview team. Tr. 69. At the time of the second interview, the Complainant had no hearing aids or other hearing assistance devices, nor did she possess any such devices. Tr. 70. It was not until September 2016, that the Complainant acquired hearing aids. Tr. 71. During her in-person interview, Mulford stated that she did not have significant hearing problems, although at times she asked an individual to repeat himself. Tr. 72. No issue of her hearing ability was raised by Respondent at the in-person interview. *Id.*

Robinson hired Mulford and, after about two weeks on the job, she was working as a regular employee in her occupational health nurse role. Tr. 73. She stated that her work was going well and there were no issues with her performance. Tr. 75. Her work involved workers' compensation and HIPAA[3] issues among other duties.

Mulford's employment with Robinson ended on October 13, 2016, when she was terminated. Tr. 79. While her employment began on about June 15, 2016 and ended as noted above, she was laid off with full pay for all of September 2016 because she was directed to obtain hearing aids before returning to work. Tr. 80-81. Effectively then, Mulford did not perform work as an occupational nurse for Robinson after August 31st. Tr. 81.

It should be noted that there is no dispute that Ms. Mulford has some hearing loss, and that the loss is of a degree requiring the use of hearing aids. Tr. 87. However, more importantly, Mulford's use of hearing aids and her hearing deficit, requiring their use, forms no part of her discrimination claims and therefore it is not part of this case.

During the period of her work as an occupational nurse, that is, from June through the end of August, Mulford maintained that she got along and interacted well with employees and supervisors at the Robinson mine, except for one person, Mr. Mark Langston, the safety manager. Tr. 90-91. As noted, Langston participated in both of Mulford's interviews with Robinson. Tr. 91. Mulford contended that her difficulties with Langston began with her *first day* on the job, claiming that Langston did not want to establish an office for her right away. Tr. 92.

[3] "HIPAA," is the acronym for the Health Insurance Portability and Accountability Act of 1996 and it pertains to patient privacy rights.

Regarding her claim that Langston had alcohol abuse issues, Mulford stated that in late July she began to smell alcohol when around him. Tr. 92-93. Mulford also asserted that she observed other indications that Langston was using alcohol at work, alleging that there were times late "in the afternoon in his office, [when] he kind of swayed across the office. And also sometimes down the hallway." Tr. 94. She could not be sure if the swaying was due to a physical issue. Rather, her conclusion ultimately rested upon the odor of alcohol about him. *Id.* She stated that she made these observations on more than one occasion, estimating that it was "[p]robably two or three times." Tr. 95. It was also her view that Langston displayed "extreme forgetfulness," an opinion resting upon his use of a notebook to jot down things that "most people can remember if it's important. I mean, we might forget small details, but if -- it was like he was lost without his notes all the time." *Id.* Upon questioning by the Court, Mulford conceded that the notebook use could be attributable to reasons other than alcohol use. Tr. 95-96. She also admitted that she never observed any slurring of speech on Langston's part. Tr. 96.

When asked if she ever expressed her concerns about Langston and alcohol use to others, Mulford stated that she raised the issue to Kammerer in the latter part of August, talking with him privately in his office. Tr. 97. This was done after she had observed those indicia of alcohol use on two or three occasions. *Id.* Kammerer inquired whether the odor could simply be from alcohol use the night before, but Mulford rejected that suggestion, as she claimed that it smelled fresh. Tr. 99. She maintained that nothing ensued from her raising the issue with Kammerer, stating that "it was pretty much just dropped" and she did not raise the issue again. *Id.* Further, she never filed any official remark to Kammerer or anyone else at Robinson about her contention. The assertion was made on paper only at the time Mulford filed her discrimination complaint. Tr. 98.

The Court then inquired about the second cognizable discrimination claim raised by the Complaint, involving Patrice Dunn, Ms. Dunn's daughter, Kaci Nardi, and a workers' compensation claim brought by Ms. Nardi. This was Mulford's assertion of a drug abuse cover up associated with a positive drug test result for Nardi. Tr. 100. Mulford believed that her becoming involved with this issue was within her responsibilities as an occupational health nurse, expressing that it was part of her job description, which included workers' compensation matters. Tr. 101. She stated that her responsibilities included all the documentation and that she "was to go to follow-up appointments to doctors and hospitals with the injured people." Tr. 101. Mulford gave as an example of her duties that, if someone got hurt at work, she would go to the mine and then to the hospital with the person. Tr. 102.

Telling her story about this issue, Mulford stated that Ms. Dunn used to be on the safety team, then stopped performing that role for several weeks. Beyond that, Mulford asserted that Dunn's primary job is as a secretary at the mine. Tr. 103. Later, around August 16th, Dunn returned to the safety team and became the on-call person again. Tr. 104. Around August 16th Dunn was called, as there has been an injury at the mine involving her daughter. Apparently, Ms. Nardi twisted her knee. Tr. 105. Nardi filed for workers' compensation and Dunn then gave then the paperwork relating to the incident to Mulford. Tr. 106.

It is a critical element of Mulford's claim on this issue that within that paperwork was a finding that Nardi tested positive for drugs. Tr. 108. Mulford alleged that the paperwork revealed that Nardi tested positive for "Benzos."[4] Tr. 109. Such drugs, Mulford stated, are used for anxiety or to help one sleep. *Id.*

When the Court expressed concern about Mulford's positive benzos claim regarding Nardi, expressing that the use of medication, such as tranquilizers, is not inherently a problem, Mulford acknowledged that is true, but responded, "*if* she didn't have a prescription for it, which I didn't have -- I don't know. That's not a safe -- that's an unsafe factor." Tr. 110 (italics added). Upon further questioning by the Court, Mulford agreed that if one needed a drug for anxiety that is very different from a positive drug result showing the presence of cocaine, marijuana or PCP. Tr. 111. Again, Mulford expressed that her concern was only *if* the employee did not have a prescription and she had no information on that score. She added, "But I didn't raise any concerns. I did not express anything. I sent the paperwork to workers' comp." *Id.*

Mulford tried to bolster her position on this issue by asserting "there was a prior problem[, as the employee] had had a positive incident in March or April." Tr. 112. The Court noted, and Mulford acknowledged, that this prior incident was *before* she was employed by Robinson. *Id.* The Court, dismayed at the grounds Mulford presented for this claim, summed up that it "hear[d] nothing from [Mulford] that justifie[d] [her] being concerned about either positive result at least through August of 2016." *Ms. Mulford agreed with the Court's characterization.* Tr. 113.

However, Mulford persisted that her concern was still present because the employee tried to elude Mulford's efforts to join her follow-up medical appointments. When Mulford eventually learned of an appointment, she was a half-hour late and *the hospital nurse*, who was not an employee of Robinson, at the employee's request, did not allow Mulford to join the patient when she was being evaluated by the hospital. Tr. 114; 121. Nor did Mulford ever learn about lab test results from that visit, nor did she request those results, apparently because Mulford's termination was underway. Tr. 114-15. In fact, the Court expressed that it was

> having a hard time understanding that there was any legitimate concern on [her] part, because [its] impression was that there was [an effort to try] to hide some drug abuse, but that doesn't seem to be the case at all. You have nothing to support the idea that there was drug abuse on the part of Ms. Nardi.

Tr. 118.

Mulford conceded her only support was "just because there was a prior positive." *Id.*

The Court advised that it failed to see the merits of Mulford's claim on this subject. Tr. 115. After cross-examination on the subject of the positive benzos test for Ms. Nardi, and Ms.

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[4] Here, Mulford used an abbreviation of the word "benzodiazepines," which refers to a category of drugs commonly used as tranquilizers. "Benzodiazepine," Merriam-Webster Dictionary (2017).

Mulford's inability to explain the significance of that test result, the Court advised Counsel for the Respondent that it "will tell you, counsel, if it helps you that [it is the Court's] view that Ms. Mulford did not advance her case on the subject of the workman's comp and the drug-related issues. [The Court] listened closely to what she had to say, [and] asked her some questions if you recall, and it's [the Court's] view that [on] that issue, at least, she did not advance her claim of discrimination on that topic." Tr. 306-08.

Following up on that comment, the Court, speaking to Ms. Mulford, added, "Benzos, that you [Ms. Mulford] told me that you could legitimately legally have benzo in your system and it's of no moment because you might have -- it might have been prescribed for you." Tr. 309. Mulford responded, "Yes." Tr. 309. This remains the Court's conclusion; Mulford's drug test claim is without any validity.

Turning to the issue of Mulford's hearing deficit which, it should be kept in mind, was not part of her discrimination complaint, and is recounted here only for the sake of completeness, Mulford agreed that the first time Langston voiced a problem about that was during August. Tr. 116. However, she maintained that the complaints about her hearing ability intensified at the same time she was pursuing her workers' compensation/ positive drug test issue with Nardi. Tr. 122.

At that point in her testimony, Mulford agreed that she had presented the "safety-related issues that [she had] vis-à-vis Robinson that [she] also raised to the MSHA investigator when [she] made [her] complaint." Tr. 123. The Court inquired, "[h]ave we covered the issues?" *Id.* Mulford responded, "It was just alcohol [and she acknowledged] Yes, we have covered them." *Id.*

Mulford then agreed that she was on paid leave for five weeks, following Robinson's direction that she was to obtain hearing aids. After that, her employment ended, as Robinson decided to terminate their employment relationship. Tr. 123-25. She was then advised to vacate her company-provided housing and Kammerer informed her by letter that he was authorized to offer her $3,000.00, upon her leaving the mine provided housing within four days. Tr. 125.

Upon cross-examination,[5] Mulford contended that, after she complained, expressing her view that Langston had alcohol on his breath while at work, and informed Kammerer about it, "that's when everything blew up. Along with the Nardi situation, with mentioning that she had a positive test." Tr. 154. Mulford alleged that the ensuing "harassment and angry behavior" constituted discrimination against her. Tr. 155. She asserted that it was present during August and that it also spiked during August, after her assertion about detecting alcohol on Langston's breath, behavior which prompted her to raise the issues with human resources. Tr. 155-56.

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[5] Just as, in the exercise of the Court's discretion, this decision's recounting of the direct testimony from Ms. Mulford avoids discussion of testimony deemed by the Court as irrelevant or immaterial, and at times involving outlandish claims, the recounting of her testimony upon the cross-examination takes the same approach. Transcript pages 253 through 259 provide one example of the outlandish assertions that Mulford made which the Court has elected to avoid including in this decision.

The harassment took the form, she stated, in the way Langston spoke to her, essentially ignoring her, behavior which she described as "very traumatizing to a person, especially a professional person." Tr. 155. Mulford conceded that she never documented the days when she smelled alcohol on Langston breath, and could not give exact dates, but that it "was always at safety meetings." Tr. 157. She characterized it as after three events of such alleged detection by her, "that's when I – three strikes, and I had to attack. I had to at least say something, make a point." Tr. 158.

Mulford also agreed that the harassment escalated following the "Patrice Dunn incident in mid-August." Tr. 159. The latter event, of course, refers to Mulford's Dunn/Nardi positive drug test claim, discussed above. Ultimately, it was Mulford's view that both events, the alcohol and the Patrice Dunn matters, coincided with the harassment escalation. Tr. 160.

Mulford was then questioned about an August 27, 2016 voicemail, in which voicemail it was represented that she made a complaint regarding Ms. Nardi to Mr. Langston. Tr. 166. Mulford agreed that she did leave a voicemail for Kammerer on the morning of August 27th and that it was about the local sheriff and her assertion that she was being harassed. Tr. 169. Mulford acknowledged that she complained about Langston to Kammerer at that time but that it involved a bill that had not been paid by the Respondent. Tr. 170. She then stated that she could not determine if that issue was harassment or whether it was attributable to Langston having "memory loss" about paying the bill. *Id.*

The cross-examination then turned to Mulford's claim that one aspect of her alleged discrimination was the change in her job title to industrial hygienist. Tr. 171. As the Court has noted, *under the circumstances here*, this is not a cognizable basis for a discrimination complaint.

It was Mulford's contention that there was also harassment which escalated after the Nardi incident and her complaint that she had to use great efforts to get Langston's attention on subjects of her concern, a problem she described as constant. Tr. 171-72. She believed Langston was intentionally ignoring her. Tr. 173. When she finally would get his attention, he would have a gruff demeanor towards her. Tr. 174. Directed to Respondent's Exhibit R 9, at page 13, Mulford agreed that she wrote the document at that page, identifying it as her complaint to MSHA. Tr. 176. That document identifies her various complaints but she conceded they were never triggered by any report she gave to anybody at Robinson. Tr. 177.

Continuing with Respondent's review of Mulford's written complaint to MSHA, per R's Exhibit 9, Mulford agreed that on August 25, 2016, she was complaining about Langston asking about her hearing aids, which she did not have yet, and her contention that Langston became upset about that. Tr. 178. She also had an issue with a matter on September 6th, involving Langston being "disrespectful" to her in that she did not yet have hearing aids. Tr. 179.

Turning to an issue within Exhibit 9, dated September 19th, Mulford described this as "[m]ore discrimination." Tr. 179. However, the Court intervened to clarify the nature of Mulford's complaint regarding the September 19th claim, noting that it reflects that "[Mulford] then told Kammerer that Langston is unsafe and comes to work smelling like booze and is

forgetful." Tr. 179. Of concern to the Court, and revealing that Mulford's claim was clouded with unsubstantiated suspicions about motivations behind her claims, she acknowledged that it was "a possible issue" that "*the discrimination and disrespectful behavior from Langston could be from outside sources from Reno, Nevada.*" Tr. 180 (emphasis added). She also acknowledged her view that it was possible that "*the entire time that Mark Langston was harassing [her] because other people were causing him to do it*[.]" Tr. 180 (emphasis added).

Mulford admitted that she didn't know whether Langston *was being paid to discriminate against her*, but she considered it to be a possibility, stating she "assumed that it possibly could be gratuitous sabotage." Tr. 181. Mulford further agreed that she alleged,

> [o]utside sources of influence provided Mark Langston's harassment and discrimination to me, illegally. The outside sources are biased and paid Langston to deliberately destroy my job from the start.

Tr. 182; Ex. R 9.

To make it clear, it was Mulford's view that Langston was paid to destroy her job from the start. Tr. 182. Mulford's claims regarding Langston are without any merit and may fairly be described as outlandish suspicions. Mulford acknowledged that not a single other person at Robinson was treating her poorly. Tr. 182. Respondent's attorney aptly noted that when Mulford made her complaint she did not describe it merely possible or highly possible, but rather she wrote in her complaint that *was* what happened. Tr.183. *Mulford also wrote that she believed MSHA's determination not to refer her case to the Secretary for representation was "coerced" and that she believed someone was influencing the MSHA investigation.* Tr. 184.

Mulford also believed that when she was put on leave, initially for three weeks and as later extended to five weeks, this was discrimination because it was "a major hours and scheduling change." Tr. 185. The reader should recall that this was no part of Mulford's discrimination claim before MSHA and therefore was not part of its investigation of her claim.

On a separate note, Mulford conceded that Respondent's Ex. R 26 is a letter stating that Mulford was to receive three weeks paid leave so that she could obtain hearing aids. Tr. 186. The same letter also stated that the Respondent would be investigating her discrimination complaints. Tr. 187.

Mulford was directed to Exhibit R 14 which, she acknowledged, was an email she sent to Respondent's Counsel on June 30, 2017 and which reflects her responses to Respondent's interrogatories. Tr. 249-50. Mulford conceded that, per her responses, she believed that *Langston was paid to discriminate against her.* Tr. 250. Counsel pointed out that at the hearing Mulford stepped back from her interrogatory response, by then describing it as "very possible [that Langston was paid] because it's unusual behavior." Tr. 250. Mulford also contended that Langston did not treat her as a professional from the first day of her employment at Robinson. Tr. 251. She based this view upon contrasting the welcoming attitude of everyone else at Robinson, except for Langston. Tr. 252. It was her view that Langston didn't want to get her an office and matters further deteriorated when her job title changed. Tr. 252.

Mulford's testimony became more bizarre when she asserted that there were connections between the Church of Scientology cult, asserting that "[t]he discriminating situation is from outside sources of influence from the Scientology cult. I have been attacked and discriminated against them for years." Tr. 260. In response to the Court's question, Mulford agreed that her opinions were based just on her suspicions. Tr. 261.

Perhaps most revealing to Ms. Mulford's discrimination complaint was the following exchange, when Respondent's Counsel asked, "what made you have suspicions about connections between Scientology and the Robinson mine in late July or August?" Tr. 261. Mulford responded, "It isn't Robinson mine. It's Mark Langston. *Robinson mine has nothing to do with my discrimination or anything else*. There is one individual." Tr. 261 (emphasis added). Appropriately, Respondent's Counsel then asked, "This is a case against Robinson mine, you understand that; right?" *Id.* Mulford replied, "I do." *Id.* When pressed further, that the case was not against Langston, Mulford answered, "Well, it should have been Mark Langston, but I understand the situation. It has to be with the corporation." Tr. 261-62. Of significance, Mulford agreed that her suspicions about Langford and the Church of Scientology all arose *prior* to her claims that Langston was using alcohol while on the job and the "Ms. Nardi situation regarding drug tests." Tr. 263.

As Mulford expressed it, per R's Ex. 9, "[t]he outside sources are biased and paid Langston to deliberately destroy my job from the start." Tr. 270. Perplexed by her assertions, the Court inquired of Mulford, "[w]hen you say, 'the outside sources are biased and paid Langston to deliberately destroy [your] job,'" Mulford interjected, "[c]orrect." Tr. 271. When informed by Mulford that the outside sources were from Reno, which the Court noted, is a significant distance from Ely, Nevada, the Court informed her that it was "at a loss to appreciate the basis for [her] concluding that these people in Reno would even find, let alone pay Mr. Langston to harass you. I mean, let's say I am living in Reno. Why wouldn't I pick . . . Mr. Kammerer to do the harassing? What is your thinking as to why they would single out Mr. Langston?" Mulford responded, "I have no idea."[6] Tr. 271-72.

The Court tried to summarize the grounds for Mulford's view, asking, "[s]o you just figured, if I understand your thinking . . . Your thinking was well, I am being mistreated, I did have this trouble in Reno, there must be a connection between the two; is that fair?" Tr. 273. Mulford answered, "[i]t -- it's fair, yes." Tr. 273.

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[6] The Court concludes that Mulford's theory behind her claim of harassment was beyond speculative and is completely groundless. As another example, Mulford informed that her claim was connected with a temporary protective order ("TPO") issued against her, out of Reno. A local sheriff, near the Robinson mine, served the TPO on Mulford at the apartment that Robinson Mine had provided her. Mulford admitted the TPO service was not done by Robinson Mine, nor by Mark Langston. Tr. 267. The only thing Mulford could point to in support of her suspicion that Langston and the sheriff's office were collaborating was that she was served the TPO on the same or next day after she was urged by Langston not to go into work on a Sunday. Tr. 268. Mulford believed that Langston wanted her to be at home so that she would be served with the TPO. Tr. 269.

Mulford filed her MSHA discrimination complaint on September 19th, but it was date stamped September 23rd. Tr. 277. Her interview with Ms. Jepson was after that, on September 26th. *Id.* It was her testimony that, at the conclusion of the Jepson interview, she told them she had filed a complaint with MSHA. Tr. 278. It is fair to say that Mulford had a number of people whom she believed could be outside influences on the Robinson Mine. Tr. 278-87. Suffice it to say that she never established credible evidence to support her beliefs and that they remained pure speculation on her part.

Counsel for the Respondent also called to Mulford's attention an email she sent to Julie Whiffen-Peters on October 15, 2016.[7] Tr. 253; R's Ex. R-4. Respondent's Counsel noted that in that email the Complainant asserted, "'[t]he cult deliberately infiltrates businesses and corporations all over the world to destroy individuals who seek their arrests and prosecution for their crimes. I know — ' not guess, not suspect, 'I know who my real attackers are and the mining employees involved were just their tools of discrimination/harassment for money.'" Tr. 289. Mulford responded, "That's correct." Tr. 289.

Mulford then concluded her case and in response to the Court's inquiry if she believed that the Court listened to her and gave her a fair opportunity to present her side of the story, she responded, "I agree." Tr. 315.

Shane Anderson testified for the Respondent. Anderson is the Senior Safety Coordinator at the Robinson Mine. Tr. 191. He has known Mark Langston for a considerable period of time. Tr. 192-94. Anderson is also familiar with the Complainant, as he participated in the interviews for the position Mulford ultimately was offered. Tr. 194. Anderson maintained that the interview described the job as applying to both the "IH" (industrial hygienist) job and as an occupational nurse. Tr. 177; 195. However, he admitted being unable to recall if the job description included both roles. Tr. 195.[8] Per Respondent's Ex. 18-2, industrial hygienist duties were included in the description as it provided: "Perform health risk assessments. [ ] Industrial hygiene sampling and ergonomic surveys throughout the mine site." Tr. 196. More significantly, Anderson asserted that one does not need certification to perform industrial hygienist duties. Tr. 198. However, certification is available for that job. Tr. 199.

Anderson was asked about the Respondent's practice regarding hearing tests, advising that all new employees are so tested. This gives the mine a baseline and he asserted that MSHA requires such testing within six months of employment. Tr. 199. Shown Ex 5 C, Mulford's hearing test results, Anderson stated that the test revealed moderate to severe hearing loss on both sides. Tr. 203-04. This test served as a baseline for Mulford's hearing at the time she began her employment for Robinson. Tr. 208. However, he conceded that there was no

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[7] Asked why Mulford sent an email to Whiffen-Peters in the first place, as she had no prior contact with her, she simply advised that she looked up the name at the website for the mine, selecting her as one of the corporate people. Tr. 291.

[8] Again, it is reminded that this testimony is recounted only for the sake of completeness. The modification of Mulford's job duties was never claimed as part of her protected activity, nor in context could it be so claimed.

determination that Mulford needed hearing aids following those test results. Tr. 209. Anderson claimed that in subsequent work interactions with Mulford, he noticed that she seemed to have some difficulty hearing during conversations, but he admitted this was surmise and that it could've reflected not understanding tasks for which he was providing training. Tr. 212.

Again, the Court takes note that Robinson's practice of conducting hearing tests for new employees was not part of Mulford's claimed protected activity.

Anderson stated that he attended numerous safety meetings with Langston and Mulford being present. Tr. 212. He asserted that, at times, he sat next to Langston but never smelled or perceived alcohol use by Langston. Tr. 213. He maintained that he never had any reason to believe that Langston was using alcohol during work hours or immediately prior to work. Tr. 213. All employees at the Robinson Mine are subject to its drug and alcohol policy and there is random testing. Tr. 213. Langston, Anderson stated, has been tested, per the policy and his test result was negative. Tr. 214. Nor, Anderson maintained, do any employees, other than HR employees, know when the random testing will be done. Tr. 216. Upon questioning by the Court, Anderson stated that he would have from four to eight hours of contact with Langston during the course of a week. Tr. 217-18.

Anderson also maintained that he never observed Langston raise his voice to Mulford, nor treat her any differently from other employees. Tr. 227. He asserted that Langston treated all employees in a respectful manner. Tr. 227.

Speaking to the Complainant's issue regarding a lack of access to the employee at the hospital, he stated that there was a meeting at a hospital in Ely, Nevada, which the Complainant also attended, along with Anderson and Langston. Tr. 229. The meeting occurred in the third or fourth month of Mulford's employment with Robinson. The issue was to determine an efficient manner to decide if an injured employee should be placed on lost time or restricted duty. Tr. 229. According to Anderson, later in that meeting Mulford brought up a topic which had already been addressed, which surprised the other participants. Tr. 232. Anderson concluded that the reason could've been attributable to Mulford not hearing the earlier discussion about the issue. Tr. 233. However, Anderson never discussed the need for Mulford to obtain hearing aids with any Robinson employees, nor to Mulford herself. Tr. 233-38.

On cross-examination by Mulford, Anderson agreed that, per Exhibit 2 C, her job at Robinson was described as on that May 12, 2016 document as "full time occupational nurse." Tr. 240. Per Exhibit 17 C, the position was described as "Industrial hygienist nurse." *Id.* Exhibit 3 C lists the job as "Industrial Hygienist/Occupational Nurse." *Id.*

The Court considered Anderson and his testimony to have been a credible.

The Respondent called Mark Langston. Tr. 332. Langston has been a safety manager for about 13 years. *Id.* Prior to that occupation, he had 22 years of service with the U.S. Navy. *Id.* Langston was involved in the creation of the job description for the position Mulford was hired. Initially the position was posted as an industrial hygienist, and then amended to include an occupational nurse, a modification that he and others considered to be an enhancement for

Robinson employees. Tr. 334. He stated that neither Nevada nor the federal government require one to have a degree or certification to be an industrial hygienist. Tr. 335. It was Langston's understanding that Mulford was hired to perform work as an industrial hygienist *and* as an occupational nurse. *Id.* During the relevant time, Langston had three people that reported to him: Shane Anderson, Tyler Wright and Heather Mulford.

As the mine did not complete the necessary steps for Mulford to fully perform her occupational nurse duties, steps which require her to work under medical direction, in order for her to treat employees and provide vaccinations, the initial focus was to have her learn the industrial hygiene duties. Tr. 336- 41. To that end, Langston had Anderson mentor and coach her in the performance of those hygienist duties. Tr. 341. He denied that, in his interactions with Mulford, that he treated her differently from others. *Id.* He was aware that Mulford might have hearing issues during her interview and, following her pre-employment physical, this was identified as a concern and he and Kammerer discussed the issue. Tr. 342. Langston also explained that there was no nefarious reason for the Complainant having her hearing capabilities tested twice in a short period of time, stating,

> [b]ecause sometimes when you do the hearing tests at the clinic with the medical facility they don't always follow the best practices on administering the test. So there is a potential for there to be an error in the test. So we like to run our own to confirm that we have a good baseline.

Tr. 343.

He affirmed this was a standard procedure for the mine. *Id.*

Langston also stated that it became apparent that Mulford was not hearing all of the discussion during meetings. Tr. 343-44. Thus, there were communication problems and he discussed the matter with Kammerer and others. Tr. 344. Several months after the second hearing test,[9] Mulford was referred to see an audiologist and it was learned that hearing aids would be in the offing. Tr. 344-46. Langston agreed that, while Mulford's hearing was an issue, it was not deemed an urgent problem and for that reason the appointment with an audiologist was scheduled some months later. Tr. 347. However, he added that the problem became progressive and he concluded that his expectations of her were not being met, a problem he attributed to her hearing issue. *Id.* Still, he could not recall if he ever sent an email to others at Robinson about this issue. Tr. 348. Langston agreed that Mulford was hired on June 6, 2016. Tr. 349; R's Ex. 1 C.

Langston acknowledged that, through Kammerer, he became aware that Mulford had made complaints about him. The complaints involved two issues: that she believed he had

[9] The Court determined that Anderson's explanation for Robinson conducting two hearing tests for Mulford within a short period of time, was plausible, and therefore not nefarious. Tr. 243. Again, it needs to be noted that this was not part of Mulford's discrimination claim; she did not assert that her hearing deficit was part of her discrimination claim.

discriminated against her because he felt she needed hearing aids and she also accused him of coming to work under the influence of alcohol. Tr. 350. Langston was offended by Mulford's claims. *Id.*

Langston stated that supervisors and management were also subject to random drug testing. Tr. 351. He has been randomly tested and his results were negative. Tr. 352-53. Further undercutting Mulford's suspicions, Langston informed that he has never had a DUI, never had a field sobriety test, and never been disciplined for alcohol or drug abuse at any time during his mining career. When asked if he drinks before going to work, he responded, "No. In my profession as a safety manager that kind of conduct is career ending. It is. I mean, I would never get another job as a safety manager." Tr. 353.

The Court considered Langston and his testimony to have been credible in all regards.

Mr. Kim Kammerer testified for the Respondent.[10] He was the company representative at the hearing. He is presently the Human Resources Manager at Robinson. Tr. 392. Kammerer confirmed that, consistent with the testimony of prior witnesses during the hearing, that he believed hiring an occupational nurse would be a good addition for the mine. Tr. 393. It was his intention that the person filling that position would also perform industrial hygienist duties. Tr. 393, 395 and Exhibit 18-1 and 18-2 (the job posting and job announcement). Kammerer confirmed that one did not need a certificate or a degree to work as an industrial hygienist. Tr. 395-396.

Kammerer conducted the job interviews for Mulford and he noticed early on that Mulford had hearing problems. Tr. 397. Despite awareness of the Complainant's hearing issue, Kammerer believed they would be able to accommodate the difficulty and therefore did not consider it as a barrier to hiring her. Tr. 398. He also confirmed that the decision to conduct a second hearing test came about because they wanted to be sure they had a good baseline for her. Tr. 399. The practice of a second baseline test is done for all new employees. Tr. 400. After she had been on the job for a few weeks or so, he asked her to be seen "by a medical professional to see if there is something that could be done to help her with her hearing, possibl[y] hearing aids." Tr. 401. Kammerer stated that Mulford was receptive to his suggestion. Tr. 402. Subsequently Langston told Kammerer that Mulford's hearing continued to be an issue and he asked Kammerer to follow-up with her. He advised Mulford that the mine would give her time off

[10] Prior to Kammerer's testimony, Amanda Hilton was called as witness for the Respondent. Ms. Hilton has been an employee at Robinson for nearly 13 years. Tr. 380. Her jobs during that time included accounting and the manager of administration. Presently she is the manager of mine maintenance and supply chain. *Id.* Hilton agreed that her contact with Mulford during the time Mulford worked at Robinson was infrequent, brief and not substantive. Tr. 382. Her involvement with Mulford pertained to her participation with the committee regarding Mulford's continued employment. Tr. 382. Hilton's testimony was of no value to the matter before the Court, as she agreed that 99 percent of her participation rested upon the recommendations of the Jepson Report. Hilton conceded that the committee adopted the Jepson Report with no reservations about any of it. Tr. 386. Her testimony is noted here only for the sake of completeness.

from work to obtain hearing aids. Tr. 403. Following that, in late August, Mulford advised Kammerer that, upon seeing an audiologist, it was recommended that she obtain hearing aids. Tr. 403-04. Unsure whether money was an issue for her, Robinson, acting through Kammerer, provided unrequired additional funding so that Mulford could afford to purchase hearing aids. Tr. 405.

Kammerer related that, around the 29th of August, Mulford met with him and at that time alleged that she was being harassed and discriminated against by Langston. Tr. 408. As he recalled, Mulford had not raised any charges about Langston using alcohol on the job until that meeting. Tr. 409. Regarding Mulford's claim of Langston being under the influence of alcohol at work, Kammerer placed this allegation as having been made around August 29th. Tr. 420. This was made at the same time she alleged discrimination and harassment by Langston towards her. Tr. 420. This was based, Kammerer stated, on Mulford's assertions about the manner in which Langston spoke to her. Tr. 421.

Based in part on the credible testimony of Kammerer regarding Mulford's claim that Patrice Dunn was covering up a "positive" drug test, the Court finds that there is no evidence to support that claim. See, Tr. 421-26. It should be particularly noted that, in the first instance, before any witness for the Respondent testified, Mulford herself did not establish any credible evidence for her cover-up claim. Thus, Respondent would have prevailed on this issue, even if it had not offered any rebuttal evidence at all.

On the separate allegation of Langston using alcohol on the job, Kammerer confirmed that, apart from Mulford, there have been no other such claims against Langston. Tr. 429. Kammerer added that when Mulford raised the issue with him, she informed that the alleged alcohol use occurred "on previous days, other times. Not that day." Tr. 429-30. He informed Mulford that "unless [she] can tell [him] the day it happens there is not a whole lot [the mine] can do to go for testing." Tr. 431. Further, though her complaint about Langston was untimely, Kammerer still inquired of Wright and Anderson as to whether they ever had ever observed Langston "staggering around like he had been drinking or smelled alcohol on him or any of that?" Tr. 430. Both informed Kammerer that they had never seen Langston exhibiting such symptoms. *Id.*

Kammerer was asked about Mulford's allegation of harassment. From his point of view, this amounted to her complaint about "the way [Langston] talked to her" and that claim only referred to one instance raised by Mulford. Tr. 436. There was some substance to this claim of Mulford, that Langston could be blunt, but Kammerer stated it was born out of Langston's frustration about the length of time it was taking for her to obtain hearing aids. *Id.* Further, as it regarded his specific interactions with Mulford, Kammerer stated that she never made any claim to him that Langston was harassing her the entire time of her employment at Robinson, nor that it had escalated. Tr. 437. Kammerer also related an instance when Mulford left him a voicemail, advising that the local sheriff's department was coming to her house and her belief that Langston had instigated that. Tr. 437-41. Even when later developments demonstrated that Langston had nothing to do with the sheriff's department visiting Mulford, she was unable to concede that her suspicions were not confirmed. Tr. 449.

In terms of appreciating the context of Robinson's treatment of Mulford, it is noted that the Respondent went to some lengths to help Mulford with her hearing deficit issues. It did this, through Kammerer, by Robinson providing her with paid time off so that she could obtain the hearing aids and, as mentioned before, by providing some funds to help pay for the hearing aids. Tr.452-56. Mulford misinterpreted the additional funds for hearing aids as an indication that she was being fired. Tr. 458. However, Kammerer stated that, as of September 8th, there had not been a decision to terminate Mulford. Tr. 457. Thinking that she was to be fired, Mulford then accused the mine of discrimination. Tr. 459; Ex. 20.

The Court concludes that Kammerer was a credible witness.

Christina Jepson testified for the Respondent.[11] Jepson is an attorney in the same firm as Respondent's Counsel, Mr. DeLong. Tr. 491. Her specialty is employment law. Tr. 492. Jepson's initial involvement in this matter arose when Kammerer contacted her regarding Mulford's discrimination complaint. Tr. 492-93. It was not long after September 8th that Jepson began an investigation on Robinson's behalf into the suitability of Mulford's employment at the mine. Tr. 461-62. Jepson came to the mine around September 21st and conducted interviews with various employees, including Mulford. Mulford accused Robinson Mine, during her interview with Jepson, of the mine discriminating against her. Tr. 463. Following Jepson's interviews, she prepared a report and presented it to a committee for the mine. Tr. 465. The Committee then determined that Mulford's employment at Robinson should be terminated. Tr. 466; R's Ex. 2. The termination letter, dated October 13th, advised that the mine had "determined that [Mulford was] not able to carry out the necessary required functions of [her] job." Tr. 472. This conclusion rested upon the information contained in the Jepson report. Tr. 474.

The Court had previously ruled that most of Jepson's report, resulting from her investigation of Mulford's issues, was not admissible. Her testimony was not useful to the Court because nearly all of it involved a recounting of the scope of her investigation of Mulford's complaints and a retelling of what individuals told her about those matters during the one day Jepson spent at the mine. The "report" which resulted from Jepson's investigation was seriously flawed by its lack of impartiality and objectivity and by its consideration of extraneous matters. In short, the obvious purpose of the "report" was to support Mulford's termination.

In contrast to Jepson's retelling of what she learned, the Court had the direct testimony of the individuals themselves. Essentially, Jepson's "report" was the Respondent's attempt to have its own findings of fact about Mulford's complaint. That role, at least for Mulford's Mine Act discrimination complaint is reserved to the Court. Accordingly, and for a host of other reasons

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[11] In the spirit of completeness, it is briefly noted that Sara Wright testified for the Respondent. She is an employee with Robinson, working in human resources with the title of "coordinator," working under Kammerer. Tr. 482-83. Wright stated that she had contact with Langston "[d]aily, multiple times a day." Tr. 483. She stated that, while she never saw Langston get upset with anyone and never witnessed him raising his voice at people, he was naturally a loud person. Tr. 484. Nor did she ever observe him treat Mulford differently. *Id.* She never observed any indication that he had been abusing alcohol while working. Tr. 486.

articulated by the Court during the course of this litigation, Respondent's Exhibit R 1 was not allowed into the record. Tr. 508.

While the Court rejected the "report," it has determined, based on the exhibits entered into the record, and the testimony of witnesses, that Mulford's claim has no merit and that Robinson was fully justified in terminating her employment.

Mine Act Discrimination Claims

This discrimination complaint was brought under section 105(c)(3) of the Mine Act, alleging a violation of section 105(c)(1), which states, in relevant part:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner [or] representative of miners . . . because such miner [or] representative of miners . . . has filed or made a complaint under or related to this chapter, including a complaint notifying the operator or the operator's agent at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine.

30 U.S.C. § 815(c).

Where, as in this case, the Secretary has decided not to bring case on behalf of the miner, Section 105(c)(3) of the Mine Act provides that if the Secretary of Labor determines that a violation of section 105(c)(1) has not occurred, "the complainant shall have the right . . . to file an action in his own behalf before the Commission, charging discrimination." 30 U.S.C. § 815(c)(3).

As the Commission stated in *Jaxun v. Asarco*, "[t]he Mine Act, the Administrative Procedure Act ('APA'), and the Commission's Procedural Rules permit a Complainant to proceed with an action under section 105(c)(3) of the Mine Act without representation." *Jaxun v. Asarco, LLC*, 20 FMSHRC 616, 620 (Aug. 2007).

The legal framework for assessing discrimination claims brought under the Act is well-established and clear. A complainant may establish a prima facie case by showing "(1) that he engaged in protected activity, and (2) that he thereafter suffered adverse employment action that was motivated in any part by that protected activity." *Pendley v. FMSHRC*, 601 F.3d 416, 423 (6th Cir. 2010). The complainant bears the ultimate burden of proving these elements by a preponderance of the evidence. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (Apr. 1981).

Protected activity often takes the form of complaints made to the operator or its agent of an "alleged danger or safety or health violation. 30 USC § 815(c)(1). Often, the Court will be called upon to consider indirect evidence of a discriminatory motivation for the adverse action.

The Commission has stated that "[d]irect 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*, 709 F.2d 86 (D.C. Cir. 1983). Where direct evidence of motivation is unavailable, the Commission has identified several indicia of discriminatory intent, including, but not limited to: "(1) knowledge of the protected activity; (2) hostility towards the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant." *Turner v. Nat'l Cement Co. of Cal.*, 33 FMSHRC 1059, 1066 (May 2011) (citing *Chacon*, 3 FMSHRC at 2510). When considering indirect evidence, the Court may draw reasonable inferences from the facts. *Id.*

An adverse action is any "act 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 Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842, 1847-48 (Aug. 1984). An adverse action must be material, meaning that the harm is significant rather than trivial. In determining whether adverse action has occurred, the Commission applies the test articulated in *Burlington North v. White. Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006); *see also Sec'y of Labor on behalf of Pendley v. Highland Mining Co.*, 34 FMSHRC 1919, 1931 (Aug. 2012).

If a complainant establishes the required elements, the burden shifts to the operator to rebut the prima facie case by showing "either that no protected activity occurred or that the adverse action was in no part motived by protected activity." *Driessen v. Nev. Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998).

An operator who cannot rebut the prima facie case may still raise an affirmative "mixed motive" defense by proving that the adverse action was motivated only in part by protected activity, and it "would have taken the adverse action for the unprotected activity alone. *Haro v. Magma Copper Co.*, 4 FMSHRC 1935 (Nov. 1982). The operator must prove this defense by a preponderance of the evidence. *Id.*, *see also Pasula*, 2 FMSHRC at 2799-800. When evaluating an affirmative defense, the Court follows the two-step analysis outlined by the Commission in *Chacon v. Phelps Dodge. Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508 (Nov. 1981). The first step of the *Chacon* analysis directs the Court to determine whether "the justification is so weak, so implausible, or so out of line with normal practice that it was a mere pretext seized upon to cloak discriminatory motive." 3 FMSHRC at 2516. If the Court finds that the justification is *not* pretextual, it then moves to the second step, which is a "*limited* examination" of the justification's substantiality, and assesses the narrow question of "whether the reason was enough to have legitimately moved that operator" to engage in the adverse action." *Id.* at 2516-17.

Discussion

In evaluating the evidence of record, the Court fully considered the parties' post-hearing briefs. Ms. Mulford's brief contends she established a prima facie case by "showing: (1) her job title was changed after hiring and relocation. (2) her hours of work were changed due to the job title change. (3) she was retaliated against for filing a discrimination complaint and that Robinson Mining Company then proceeded to use false mental health disability against her." Mulford Br. at 1.

With the findings of fact in mind, the Court notes that items (1) and (2) were not part of her discrimination complaint. As to item (3), the Court finds that the evidence does not support Mulford's claim that Robinson retaliated against her for filing a discrimination complaint. Indeed, the credible evidence establishes that Robinson went out of its way to help Mulford with her hearing deficit issue by providing financial assistance towards the purchase of the hearing aids, something it was under no obligation to do.

In contrast, the Court agrees with Robinson's remark in its post-hearing brief that "the evidence before the Court demonstrated that Robinson's determination to terminate Ms. Mulford was in no way motivated by discriminatory intent." Respondent's Br. at 2-3. Robinson goes on to contend that Mulford's,

> claims [were] entirely unsupported by the record before this Court, and demonstrate that Mulford is willing to make outlandish allegations without any factual support for the claims. The credible evidence before this Court—offered by Robinson employees—establishes that Robinson attempted to assist Mulford with her hearing issues (Hearing Ex. R26), treated her fairly during her employment, and did not take any action based upon Mulford's unfounded claims that Mr. Langston was allegedly abusing alcohol while working at the mine.

Respondent's Br. at 3.

"In addition, Mulford cannot establish a prima facie violation because her testimony was not credible and could not be corroborated by any evidence that was presented to this Court." *Id.* at 4.

The Court strongly agrees with Robinson's view, finding that the evidence supports its contentions.

Conclusions of Law

In conclusion, Ms. Mulford failed to establish a prima facie case of discrimination under section 105(c)(3) of the Mine Act. Robinson's reasons for discharging her were valid, and were based upon a fundamental incompatibility of her continued employment with the Respondent. Further, as there was no merit whatsoever to Mulford's claims, Robinson could have elected to terminate her employment without the need to provide a reason, at least as far as this Mine Act discrimination proceeding is concerned. Accordingly, the Court finds that Mulford utterly failed to prove, by a preponderance of the evidence, that Robinson discriminatorily terminated her in

violation of section 105(c) of the Act. Further, the Court finds that the adverse action, Mulford's termination, was in no part motived by protected activity.

ORDER

Ms. Heather Mulford's complaint and this proceeding are **DIMISSED.**

Within the Commission's procedural rules, 29 CFR § 2700.70, titled "Petitions for discretionary review," provides, in relevant part, "(a) Procedure. **Any person adversely affected or aggrieved by a Judge's decision or order may file with the Commission a petition for discretionary review within 30 days after issuance of the decision or order.** Filing of a petition for discretionary review is effective upon receipt." Subsection (c), within the same section, informs the grounds upon which such petitions may be filed as follows:

> Petitions for discretionary review shall be filed only upon one or more of the following grounds: (1) A finding or conclusion of material fact is not supported by substantial evidence; (2) A necessary legal conclusion is erroneous; (3) The decision is contrary to law or to the duly promulgated rules or decisions of the Commission; (4) A substantial question of law, policy, or discretion is involved; or (5) A prejudicial error of procedure was committed.

29 CFR § 2700.70 (emphasis added).

Accordingly, the Complainant is advised that she may appeal this matter to the Commission within 30 days of the date of this order.

William B. Moran
Administrative Law Judge

Distribution:

Heather Mulford, 975 Mill Street, Ely, NV 89301

Michael Zody, Parsons Behle & Latimer, 201 South Main Street, Suite 1800, Salt Lake City, NV 84111

Robert W. Delong, Esq., 50 West Liberty Street, Suite 750, Reno, NV 89501