**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**
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December 13, 2022

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| SECRETARY OF LABOR, MSHA on behalf of **MOSES ORTIZ**, Complainant<br><br>v.<br><br>MARIO SINACOLA & SONS EXCAVATING INC. AND ITS SUCCESSORS, Respondent | DISCRIMINATION PROCEEDING<br><br>Docket No. CENT 2022-0028-DM<br>MSHA Case No. SC-MD-2021-06<br><br><br><br>Mine: Midlothian Quarry & Plant<br>Mine ID: 41-00071 J348 |

# DECISION

Appearances: Lacee Caitlyn Eakins, Esq. and Jennifer Johnson, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas for Complainant, Harold Jones, Esq., Polsinelli PC, Dallas, Texas for Respondent.

Before: Judge Manning

This case is before me upon a complaint of discrimination brought by the Secretary of Labor on behalf of Moses Ortiz under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c) (the "Mine Act") against Mario Sinacola & Sons Excavating Inc. and its successors ("Sinacola") pursuant to sections 105 and 110 of the Mine Act. 30 U.S.C. §§ 815 and 820. A hearing was held in Fort Worth, Texas. The parties presented testimony and documentary evidence and filed post-hearing briefs. For reasons set forth below, the complaint of discrimination brought by the Secretary of Labor on behalf of Moses Ortiz is **DENIED** and this proceeding is **DISMISSED**. Although I have not included a detailed summary of all the evidence or each argument raised, I have fully considered all the evidence and arguments.

## I. STATEMENT OF THE CASE

On April 20, 2021, Ortiz filed a complaint of discrimination under section 105(c) of the Mine Act. Following an investigation, the Department of Labor's Mine Safety and Health Administration ("MSHA") filed a complaint with the Commission on Ortiz's behalf. This case was assigned to me after Sinacola filed its answer to the complaint.[1]

[1] On July 20, 2021, the Secretary filed an application for temporary reinstatement in Docket No. CENT 2021-0184-DM. On August 24, 2021, I granted the parties' joint motion to approve the settlement in that case and ordered Sinacola to provide temporary economic reinstatement. As of this date, my order of temporary reinstatement is still in effect.

Ortiz, in his complaint, alleges Sinacola discriminated against him when he was terminated in retaliation for making safety complaints and asserting his right to contact MSHA with safety concerns.

## II. SUMMARY OF THE EVIDENCE

A. Background

Sinacola is a construction company that conducted mining operations at the Midlothian Quarry and Plant. Ex. C5 p. 40. [2] In May 2010 Sinacola hired Ortiz as a laborer at its Frisco construction site.[3] Tr. 18, 28. In 2012, at Ortiz's request, Sinacola transferred Ortiz to the Midlothian Quarry and Plant (the "mine).[4] Tr. 28. Harry Bonds supervised Ortiz at the mine.[5] Tr. 18-19, 28, 160.

Ortiz and Bonds had a contentious relationship at times. Ortiz testified he did not like the way Bonds spoke to him and felt Bonds assigned him unfavorable tasks and harbored ill will

[2] For purposes of this decision, the page numbers referenced in exhibits C3, C4 and C5 correspond to the page number included on the bottom right-hand side of each page in the format "SINACOLA_00000[page number]".

[3] At hearing, much was made about the veracity of an answer to a question on Ortiz's job application to work for Sinacola. Ortiz testified he applied for the job at Sinacola over the phone and never filled out or reviewed an application document. Tr. 34, 36, 71-72. The written Application for Employment asks, "[h]ave you ever been convicted of a felony?" Ex. C4 p. 21. "NO" is selected on Ortiz's application. *Id*. There is no dispute Ortiz had a criminal history that included three felonies. Tr. 77-79. Sinacola asks the court to infer that Ortiz was untruthful on his application and that this untruthfulness is indicative of Ortiz's general lack of credibility. I decline to make this inference. Rather, I find Ortiz's testimony on this particular issue to be credible. Ortiz did not recall being asked during the call if he had been convicted of a felony. Tr. 71, 81. Moreover, he denied that the signature at the bottom of page two of the application form was his. Ex. C4 p. 22, 25; Tr. 39, 70-73. Although expert witnesses are often needed to properly compare signatures, in the court's opinion the signature at the bottom of page two of the application form is entirely different from the signature Ortiz identified as his own on other Sinacola documents. *Id*.

[4] Ortiz initially drove a truck at the mine but became a loader operator in 2018. Tr. 18, 161.

[5] Bonds had a reputation with mine management as a safety minded individual with a good leadership style and history of avoiding injuries and lost workdays. Tr. 97-98, 104, 106-107, 152. Bonds has over 53 years' experience in the construction industry and testified he was tough on safety because he had seen people hurt and killed. Tr. 162.

toward him because of Ortiz's criminal past.[6] Tr. 24, 41-42. According to Ortiz, there were times Bonds yelled and saliva would end up on Ortiz's face. Tr. 42.

Bonds testified that, although he tried to work with Ortiz[7], Ortiz did not like the way Bonds supervised him. Tr. 163. According to Bonds, Ortiz did not respect Bonds' supervisory authority and instead thought Bonds "was just another hand." Tr. 163. Bonds described Ortiz as a "decent" loader operator who was hard on the equipment and struggled to follow proper procedure. Tr. 167-168. Bonds testified it was difficult to know what Ortiz wanted and noted that although Ortiz initially wanted to operate a loader, Ortiz later complained and expressed his desire to be "off the loader." Tr. 165.

Ortiz testified that in approximately 2016 Bonds refused to look at a doctor's note that placed work restrictions on Ortiz because of a hernia he suffered. Tr. 21, 27, 44. According to Ortiz, when presented with the doctor's note, Bonds instructed Ortiz to talk to a member of Sinacola's safety department, which he did, and was then "made" to do labor despite the note. Tr. 21.

Ortiz described another incident in 2020 where Bonds allegedly berated Ortiz for not picking up his phone when Bonds attempted to call him. Tr. 21-22, 27. According to Ortiz, although Sinacola had a policy that employees were not to use their phones when operating machinery, Bonds stated that he did not care if it was company policy and ordered Ortiz to have his phone accessible. Tr. 21-22. Ortiz testified that he complained to one of the mine's superintendents about the conduct. Tr. 22.

Both Ortiz and Bonds testified about an incident in which Ortiz struck a rock with a loader he was operating, causing damage to the loader. Tr. 24, 58, 59, 168. Their accounts of the incident differ, with Ortiz alleging that Bonds purposefully placed the rock in such a way as to cause the damage, and Bonds denying as much and blaming Ortiz for not keeping the area around the loader clear.

During his time at the mine, Ortiz was formally disciplined two times. First, in 2014 Ortiz was involved in a physical fight at the mine. Tr. 50. Bonds, who had the power to terminate Ortiz and intended to do so following the fight, ended up only suspending Ortiz for a week and issuing a written disciplinary warning after speaking with the mine superintendent and human resources personnel. Tr. 164-165. Bonds testified that the fight was the only incident that caused him to consider terminating Ortiz. Tr. 164. Second, in approximately 2020 Ortiz was issued a disciplinary warning after he struck Bonds' truck with a loader. Tr. 74. Ortiz testified that at the time of the incident he was not sure he hit the truck, but acknowledged the

[6] Bonds testified he knew Ortiz had been "locked up" but did not know any specifics. Tr. 168-170. At the hearing, Ortiz admitted that he was convicted of three serious, violent felonies between 1992 and 1995 for which he was incarcerated. Tr. 78-79.

[7] Bonds testified he talked to Ortiz about his family, gave Ortiz time off and extended breaks when needed, and allowed Ortiz and other loader operators the opportunity to reassign work duties among themselves. 166-167.

bumper was offset and contacted Bonds as a result. Tr. 74. According to Ortiz, Randy Werbig, Sinacola's head of safety, investigated the incident and thanked Ortiz for his honesty. Tr. 82.

Eric Kain, Sinacola's mine division manager,[8] testified that he was aware of friction between Ortiz and Bonds. Kain knew Ortiz felt that Bonds picked on Ortiz and was holding Ortiz back from getting raises and career development opportunities at the mine. Tr. 99-100. However, Kain also knew how much Ortiz was getting paid and testified that Ortiz received normal raises and was never prevented from getting a raise. Tr. 100-101. According to Kain, Ortiz never seemed satisfied with his job. Tr. 110. When asked about the incident where Ortiz struck Bonds' truck with loader, Kain testified he probably should have terminated Ortiz at that point but decided not to do so after Bonds "praised" Ortiz for reporting it. Tr. 103-104.

Tony Phillips, the vice president of human resources for Sinacola since 2019, testified that Ortiz "had a reputation of being a loudmouth, a troublemaker" and had allegedly circulated a petition with other coworkers to "get rid of" Bonds.[9] Tr. 144, 149. Phillips testified Ortiz's grievances were not about safety, but rather about other things like pay and what equipment he was required to operate. Tr. 149-150. Phillips testified that Ortiz's pay during the time he worked at the mine was "right in line general increases . . . [which are] looked at annually." Tr. 150. Phillips attributed the trouble caused and complaints lodged by Ortiz as being at least partially a result of a "personality difference[]." Tr. 149-150.

B. Conciliation Meeting

At some point in early 2021 Ortiz's growing frustration with Bonds prompted Ortiz to call Werbig to complain about Bonds threatening to fire Ortiz on several occasions and failing to wear a seatbelt at times.[10] Tr. 23-24, 27, 65. In response to the call, Werbig proposed a

[8] Kain has worked for Sinacola since 2004 and has been the mine division manager for over a decade. Tr. 85-86. As mine division manager he, among other things, oversaw the mine, supervised Bonds, and indirectly supervised Ortiz. Tr. 86.

[9] On cross-examination Ortiz denied the existence of the petition. Tr. 32. However, Kain confirmed he also had heard about Ortiz attempting to garner support from other miners for a petition to have Bonds removed from the mine. Tr. 102, 119.

[10] Ortiz testified he complained to management more than once about Bonds not wearing his seatbelt. Tr. 22, 27. Although Ortiz claimed that he saw Bonds not wearing a seatbelt at times, he also opined that Bonds was not wearing a seatbelt at other times based on Ortiz hearing a "ding" sound while on the radio with Bonds. Tr. 22, 68.

conciliation meeting.[11] Tr. 23-24.

On February 1, 2021, Ortiz, Bonds, Kain and Werbig met to discuss issues Ortiz was having with Bonds. Tr. 23, 91. Ortiz testified that during the meeting he voiced concerns about Bonds threatening to fire him, Bonds driving without a seatbelt, his belief that Bonds had purposefully caused damage to Ortiz's loader and blaming it on Ortiz, and Bonds forcing him to work with a hernia despite work restrictions. Tr. 23-24, 44, 65. During the meeting, Ortiz acknowledged that Bonds had never asked him to operate unsafe equipment or equipment he was not adequately trained on. Tr. 43. According to Ortiz, Bonds was given an opportunity to speak, after which Werbig and Kain left the room so that Ortiz and Bonds could forgive each other. Tr. 24-25. Ultimately, Ortiz and Bonds shook hands and embraced. Tr. 24-25. In addition to agreeing to improve their communications with each other, Ortiz affirmatively stated Bonds was his boss and had authority over him. Tr. 61.

Kain, who was present during the meeting in his role as a facilitator, did not recall a discussion of any safety complaints.[12] Tr. 92, 100; Ex. C1 pp. 5-12. He viewed the meeting as a means to address discord between Bonds and Ortiz that stemmed from Ortiz's perception that he was not being paid appropriately or given advancement opportunities. Tr. 100. Despite participating in the meeting, Kain believed Ortiz was someone who could not be satisfied and, as a result, was not optimistic that the agreement reached by Bonds and Ortiz would last. Tr. 101.

At the end of the meeting the parties agreed to take specific steps going forward, including having open communication channels and Ortiz affirmatively recognizing Bonds' supervisory authority over him. Tr. 159, Ex. C1 p. 11-12.

C. Events of April 20, 2021

According to Ortiz, while riding with Bonds in a truck on or about April 20, 2021, Bonds raised his voice, was hostile toward Ortiz, and criticized Ortiz for improper machine operation and not "keeping the grade." Tr. 20, 62-63. At some point Ortiz told Bonds to stop the truck so Ortiz could exit and walk. Tr. 20. Ortiz believed getting out of the truck was the best way to

[11] Werbig brought the idea of the conciliation meeting to Phillips. Tr. 149. According to Phillips, Werbig indicated Ortiz was causing trouble at the mine and Werbig believed the meeting could be an opportunity to "build a bridge" and get an understanding of Ortiz's complaints and figure out a way for Ortiz and Bonds to "work harmoniously." Tr. 149, 157. Despite the unusual request, Phillips was optimistic that the meeting could be beneficial and allowed Werbig to proceed. Tr. 157-158.

[12] Although Kain did not recall a discussion of any safety complaints, Werbig's notes from the meeting, which were entered into evidence at the hearing, include a brief mention of a statement made by Ortiz that "[s]ometimes when [Bonds] calls [Ortiz] on the radio [he] know[s Bonds] doesn't have his seatbelt on because [Ortiz] can hear it beeping when [Bonds is] in his truck." Ex. C1 p. 9. The notes include a response from "R," presumably Randy Werbig, stating "[c]ompany policy and MSHA regs. we all know if we are operating vehicles or equipment w/o seatbelts this is not acceptable. Anything else?" To which Ortiz responded "No." *Id*.

"diffuse the confrontation." Tr. 49. Instead, according to Ortiz, Bonds accelerated until the truck was moving too fast for Ortiz to get out. Tr. 20.

Following the incident in the truck, Ortiz called Kain to complain about Bonds. Tr 25. Ortiz and Kain offered conflicting accounts of what was said on the call. Ortiz testified he called Kain to complain about the truck incident involving Bonds, but never got to explain what happened. Tr. 19-21. According to Ortiz, at some point during the call Kain cut off Ortiz and said something to the effect of "how do we know that you're not a problem, how do we know it's Harry, Harry Bonds, and not you." Tr. 19, 49. To which Ortiz allegedly responded, "if I would have been a problem I would have called MSHA a long time ago." Tr. 19. At hearing, Ortiz agreed that he was telling Kain that "[he] believed that [he] had good excuses to call MSHA in the past and . . . [he] didn't" try to contact MSHA. According to Ortiz, Kain did not ask what Ortiz could have contacted MSHA about, and instead again cut off Ortiz, said he would not be threatened and terminated Ortiz. Tr. 19, 23.

Kain offered a different account of the phone call. Kain testified that Ortiz called to complain about Bonds' refusal to stop a truck so Ortiz could exit the truck and walk back to the yard along the road.[13] Tr. 89-90. Kain testified it would have been "completely unsafe" for Bonds to let Ortiz walk along the road given all the equipment traveling there. Tr. 89. In response to Ortiz's statement, Kain offered Ortiz the opportunity to transfer to another job within the company where Ortiz would have a different supervisor.[14] Tr. 90, 111. However, Ortiz immediately refused the offer and instead demanded that Kain remove Bonds from the mine. Tr. 90, 102-103, 112. Ortiz then stated he could have contacted MSHA in the past but did not state what exactly he could have contacted MSHA about. Tr. 88, 102, 123. Kain responded by saying Ortiz had the right to contact MSHA at any time and Kain was not going to "be coerced into moving Harry Bonds off the mine site[.]" Tr. 91. Kain, who understood Ortiz's rejection of the transfer offer to be final, terminated Ortiz over the phone. Tr. 86-87, 91, 102-103. According to Kain, he never asked what Ortiz could have contacted MSHA about. Tr 88.

Notably, during direct examination, Ortiz did not mention Kain's offer to transfer Ortiz to another of Sinacola's worksites. Tr. 31. However, on cross-examination, Ortiz acknowledged an offer was made.[15] On cross-examination Ortiz also denied that he ever made a statement that he wanted Bonds removed from the mine. Tr. 67. Following the telephone call with Kain, Ortiz immediately contacted MSHA. Tr. 21, 26.

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[13] When asked at hearing if Kain spoke with Bonds about the events in the truck, Kain stated that he did not, but said that the previous day Bonds had mentioned that Ortiz was upset about the loader he was operating and that Ortiz wanted to be trained to operate a dozer. Tr. 90.

[14] Phillips testified that Sinacola needed equipment operators and transfers were not unusual. Tr. 151. Had Ortiz accepted Kain's transfer offer, Phillips would have signed off on it. Tr. 151. According to Kain, on April 19 he spoke to a superintendent about the possibility of transferring Ortiz to another location. Tr. 122.

[15] Ortiz testified he could not work at the alternate location for personal reasons because of the longer commute. Tr. 31, 32, 49.

D. Proffered Reasons for Termination and Additional Background

Kain testified he had no plans to terminate Ortiz prior to the April 20 call, but he considered Ortiz's demand to remove Bonds from the mine an act of insubordination and agreed it was violation of the conciliation agreement which required Ortiz to follow the directions of his supervisor. Tr. 109, 122. Kain testified he had never had an employee demand that the employee's supervisor be terminated. Tr. 109. It was Kain's opinion that Ortiz could not work at the mine if he could not accept that Bonds was his boss. Tr. 110. Although Kain agreed insubordination was a longstanding issue with Ortiz and that Ortiz could have been written up in the past, he acknowledged that Ortiz had never been written up for insubordination. Tr. 118.

Phillips testified it was his understanding Kain terminated Ortiz because Ortiz demanded that Kain terminate Bonds. Tr. 147. He explained that such a demand is unacceptable because if employees can threaten supervisors, then management has no control over the business. Tr. 147-148.

It was never clear to Phillips what exactly Ortiz's statement regarding MSHA was about. Tr. 148. According to Phillips and Kain, it is "extremely easy" for a Sinacola miner to make a complaint. Tr. 99. Information on how to contact MSHA is posted on the bulletin board at the mine office, and miners are trained when they are hired and throughout their employment. Tr. 99, 148-149. Additionally, Sinacola employees have access to a complaint hotline and can speak directly with their safety representative. Tr. 148-149.

Phillips testified that Ortiz was a problem from a human resources standpoint given his history. Tr. 152. Phillips, who did not join Sinacola until 2019, opined that had he been with Sinacola in 2014 when Ortiz got into the fight or when Ortiz hit Bonds' truck with the loader, Ortiz would not have been employed with Sinacola after those incidents. Tr. 152

Ortiz testified generally that he was trained to only contact MSHA as a "very last resort." Tr. 83. However, he conceded Sinacola trained him on miners' rights, how to make a complaint to MSHA, and was not discouraged from going to MSHA or making a complaint. Tr. 34, 47, 83. Moreover, Ortiz acknowledged he could have gone to MSHA in the past but chose not to do so. Tr. 83.

At hearing, Mark Shearer, MSHA's special investigator assigned to investigate the case, testified that Ortiz claimed to have made multiple safety complaints and was ultimately terminated after telling Kain he would have called MSHA if he wanted to start trouble. Tr. 127-128. Based on his investigation, Shearer determined Ortiz was fired for asserting his right to contact MSHA. 131. On cross-examination Shearer agreed that context matters when conducting an investigation and that it takes more than a mere mention of the word "MSHA" for a statement to be considered protected activity. Tr. 132, 138. Nevertheless, he acknowledged that during his investigation he did not speak to anyone with Sinacola and relied entirely on Sinacola's position statement for context. Tr. 132-133, 142. According to Shearer, he believed Ortiz was credible because Shearer did not "catch[] him in any . . . lies or any mistruth" during the investigation. Tr. 141.

## III. DISCUSSION AND ANALYSIS OF THE ISSUES

A. Credibility and Resolution of Critical Disputes of Fact

My decision in this matter hinges to a large degree on credibility determinations and resolution of critical disputes of fact. My findings of fact are based on the record as a whole and the court's careful observation of the witnesses during their testimony. In resolving any conflicts in the testimony, the court has taken into consideration the interests of the witnesses, or lack thereof, and consistencies, or inconsistencies, in each witness's testimony and between the testimony of the witnesses. In evaluating the testimony of each witness, I have also relied upon the witness's demeanor. Any failure to provide detail as to each witness's testimony is not to be deemed a failure on the undersigned's part to have fully considered it. The fact that some evidence is not discussed does not indicate that it was not considered. *See Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000).

As an initial matter, I find both Kain and Bonds to be credible witnesses. Both Kain and Bonds had knowledge of key facts and provided testimony that was internally consistent as well as consistent with other credible testimony. Moreover, both displayed a sincere and forthright demeanor when testifying. Consequently, as a general matter, I find that the veracity of their testimony is not in question.

Sinacola attacked Ortiz's credibility for a number of reasons but relied heavily upon his alleged failure to disclose his extensive criminal background on his employment application and his lack of candor and inconsistencies when discussing this background at the deposition and the hearing. Although I find that Ortiz's testimony concerning his prior felonies was inconsistent, I primarily reach my conclusion that Ortiz lacks credibility for the reasons discussed below.

Ortiz's testimony regarding what occurred during the April 20 call defies logic and is self-serving. At hearing, Ortiz claimed he called Kain to complain about Bonds speaking in a hostile voice while criticizing Ortiz and then preventing Ortiz from getting out of a moving truck. Although Ortiz testified the intent of his call was to discuss this incident, he also claimed he never had an opportunity to do so before Kain terminated him. Moreover, Ortiz claimed that during the call he did not make a demand that Bonds be terminated. Nevertheless, Ortiz asserted Kain made a comment during the call along the lines of "how do we know that you're not the problem, how do we know its Harry, Harry Bonds, and not you." Tr. 19. It is unlikely that Kain would make a comment like this if Ortiz had not described the incident and/or made a demand that Bonds be removed from the mine. In addition, Ortiz's recollection of the call on direct examination included no mention of Kain offering a potential transfer to another Sinacola site, and instead characterized the call as one in which Kain repeatedly cut-off Ortiz before immediately firing Ortiz after he made a comment about contacting MSHA. However, on cross-examination Ortiz conceded a transfer offer was made. I find that Ortiz's evasiveness on the issue of the transfer offer, and illogical recollection of what was said on the call, significantly damages his credibility.

Conversely, I find Kain's testimony regarding what occurred on the call consistent, logical, and credible. Kain testified Ortiz called to complain about the incident in the truck and

described the incident to Kain. In response, Kain offered to transfer Ortiz to another job within Sinacola. Ortiz declined the transfer offer, demanded that Bonds be removed from the mine, and said he could have previously contacted MSHA. In response, Kain told Ortiz he could call MSHA at any time and that he would not be coerced into removing Bonds. Kain then terminated Ortiz.

I credit Kain's testimony regarding what was discussed on the April 20 call. Specifically, I find that Ortiz called to complain about the incident in the truck and that Ortiz described the incident to Kain. I further find that Kain, in an effort to diffuse the personality conflict between Ortiz and Bonds, offered Ortiz the opportunity to transfer to another Sinacola site. Furthermore, I find that Ortiz declined the offer and instead demanded that Bonds be removed from the mine.

Finally, I find that although Ortiz did state he could have[16] called MSHA in the past, the statement was not made in isolation and cannot be analyzed that way. Rather the statement was inextricably tied to Ortiz's demand that Bonds be removed from the mine. The statement and demand, when looked at together, were an attempt to leverage a veiled threat about contacting MSHA to achieve Ortiz's goal of having Bonds removed. This finding is critical to my analysis of the issues below. I further find that Kain perceived the MSHA statement and demand to remove Bonds the same way as I have, i.e., a veiled threat unrelated to safety but one Ortiz believed, or at least hoped, could manipulate management into removing Bonds from the mine.

In addition to his testimony surrounding the events of April 20, I also find that Ortiz's testimony regarding Sinacola discouraging miners from contacting MSHA is not credible. On one hand, Ortiz testified that Sinacola trained him to only contact MSHA as a "last resort." However, almost immediately after that testimony, Ortiz conceded that no one discouraged him from going to MSHA. Moreover, he acknowledged that he was trained multiple times on miner's rights and how to make a complaint and had in the past made his own choice to not contact MSHA about potential safety complaints. Although Ortiz attempted to paint a picture that Sinacola was averse to MSHA involvement in safety matters and miner's rights, his own testimony, as well as the testimony of Kain and Phillips, painted a different picture. Given these inconsistencies, I decline to credit Ortiz's testimony on this issue.

B. Discrimination Claim

Section 105(c) of the Mine Act prohibits discrimination against a miner for exercising a right established under the Mine Act. 30 U.S.C. § 815(c)(1). In order to establish a prima facie

[16] At hearing and in the briefs, much was made about whether Ortiz said he "could have" contacted MSHA, or "would have" contacted MSHA. Ortiz testified that he stated, "if I would have been a problem I would have called MSHA a long time ago." Counsel and other witnesses used the phrase "could have" in place of "would have." In stating that he "would have" called MSHA if he wanted to be a problem, one can infer that Ortiz's mindset was that he was not a problem but, rather, Bonds was the problem. Although I decline to read too much into the choice of words, it is clear Ortiz saw himself as a victim of unfair treatment in the supervisor/subordinate relationship with Bonds

case of discrimination the Complainant must prove by a preponderance of the evidence that (1) he engaged in a protected activity and (2) that the adverse action was motivated in any part by the protected activity.[17] *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds, sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981).

The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was not motivated in any part by the protected activity. *Driessen v. Nev. Goldfields, Inc.*, 20 FMSHRC 324, 328-29 (Apr. 1998); *Robinette* at 818 n. 20. In addition, the operator may defend affirmatively by proving that the adverse action was in part motivated by unprotected activity and that it would have taken the adverse action based on the unprotected activity alone. *Driessen*, 20 FMSHRC at 328-29.

For Ortiz to succeed in establishing a prima facie case, he must prove by a preponderance of the evidence that he engaged in protected activity and that his termination was motived in any part by the protected activity. For reasons set forth below, I find that Ortiz failed to prove by a preponderance of the evidence that he engaged in protected activity. Moreover, assuming arguendo that Ortiz engaged in protected activity, I would nevertheless dismiss his claim because Sinacola succeeded in proving its affirmative defense.

**i. Protected Activity**

***What is the alleged protected activity at issue?***

The parties disagree what should be considered protected activity for purposes of establishing a prima facie case in this matter. On one hand, the Secretary, in his brief, asserts Ortiz engaged in protected activity when he complained to management about multiple incidents involving Bonds, as well as when Ortiz asserted his right to contact MSHA during the call on which he was terminated. Sec'y Br. 6-8. On the other hand, Sinacola asserts "Ortiz's statement that he 'could have called MSHA a long time ago' if he were a problem – is the only alleged protected activity at issue." Sinacola Reply Br. 4 (emphasis removed). In making its argument, Sinacola asserts the Secretary is bound by a stipulation limiting the time in which alleged potential protected activities occurred. I agree with Sinacola about the stipulation but my decision in this case would be the same if the stipulation had not been offered by the Secretary.

There is no dispute that during Ortiz's deposition the Secretary stipulated that "[f]or the purposes of this proceeding, the Secretary is not seeking redress for anything more than 60 days prior to the date Mr. Ortiz complained to MSHA." Sec'y Reply Br. 1; Sinacola Reply Br. 3.

[17] Sinacola argues that the court should apply the "but-for causation" standard recently endorsed by the Court of Appeals for the Ninth Circuit in *Thomas v. CalPortland*, 993 F.3d 1204 (9th Cir. 2021). However, because Sinacola's operation is not located within the Ninth Circuit, that standard is not binding on the Commission. Accordingly, I have applied the Commission's longstanding *Pasula-Robinette* test. Nevertheless, I find that applying the "but-for causation" standard would lead to the same conclusion.

Although the Secretary qualified the stipulation by stating that additional alleged instances of protected activity could be considered for "background purposes," it is clear the Secretary represented to Respondent that only those activities that occurred within 60 days prior to Ortiz's complaint to MSHA were to be considered for purposes of establishing that protected activity occurred which could have motivated Ortiz's termination.

Ortiz filed his complaint with MSHA on April 20, 2021, i.e., the same day he was terminated. February 19, 2021, marks 60 days prior to April 20, 2021. Accordingly, I will not consider whether activities occurring before February 19, 2021, amounted to protected activity, except to provide context to the events that followed.[18]

The only potential protected activity in the subject time period was Ortiz's April 20 comment to Kain about contacting MSHA. All other potential protected activity referenced in the Secretary's brief occurred prior to February 19, 2021.[19]

***Did Ortiz engage in protected activity?***

The Secretary asserts Ortiz engaged in protected activity by asserting his right to contact MSHA during the April 20 call with Kain. As support, the Secretary cites multiple decisions, including one of this court, in which Commission judges found that asserting one's right to contact MSHA was protected activity. Conversely, Sinacola argues Ortiz's comment did not constitute protected activity. Sinacola asserts Congress intended the discrimination provisions of the Mine Act to encourage miner participation in enforcement, and courts should limit the definition of protected activity to protect only those employees who act in furtherance of MSHA's purpose. Here, protected activity cannot be expanded "to include every alleged safety violation that Ortiz 'could have' reported." Sinacola Br. 15. By saying that he "could have"

[18] Sinacola, in its reply brief, understandably stated that it relied on the Secretary's stipulation "during Ortiz's deposition, in preparation for hearing, during the hearing, and in" Sinacola's post hearing brief. Sinacola Reply Br. 5. I agree with Sinacola that it would be "wholly unfair" to allow the Secretary to renege on the stipulation. *Id*.

[19] Even if I were to consider events that occurred before the stipulated time period, I find that the Secretary did not establish that those events were protected or that they played any role in Ortiz's termination. First, Ortiz's complaint about having to work with a hernia occurred too far back in time to be relevant. Second, the Secretary failed to establish that Ortiz's alleged complaint that Bonds required Ortiz to keep his cell phone on was related to the safe operation of the loader. Finally, although Ortiz did briefly raise the seatbelt issue at the conciliation meeting, I find that the Secretary failed to establish that Ortiz raised the issue at any other time. Ortiz's testimony regarding alleged other instances he raised the seatbelt issue was not clear regarding when those complaints were made or to whom they were made. Moreover, even if I were to consider Ortiz raising the seatbelt issue at the conciliation meeting, I would find that it played no role in his termination. Specifically, and as set forth more fully below, I find that Kain did not recall and, in turn, did not consider any mention of the seatbelt issue during the conciliation meeting when deciding whether to terminate Ortiz.

contacted MSHA, but did not, Ortiz was doing the opposite of what Congress intended and was not participating in enforcement.

Section 105(c)(1) does not include the term "protected activity," but it does identify certain activities that are protected.[20] Although asserting one's right to contact MSHA is not explicitly listed among those activities, this court and others have determined that certain threats to contact MSHA are protected activity.[21] Had Ortiz's statement that he "could have" contacted MSHA been made in a vacuum, an argument could be made that the statement was protected activity. However, as discussed above, Ortiz's statement was not made in a vacuum. Rather, the statement that he "could have" contacted MSHA was coupled with a demand that Bonds be removed from the mine.

[20] A miner engages in protected activity if (1) he "has filed or made a complaint under or related to this Act, including a complaint … of an alleged danger or safety or health violation[;]", (2) he "is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101[;]", (3) he "has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding[;]", or (4) he has exercised "on behalf of himself or others … any statutory right afforded by this Act." 30 U.S.C. § 815(c)(1).

[21] The Secretary, in his brief, cites four Commission ALJ decisions and argues that asserting one's right to contact MSHA is a protected activity. However, I find the facts of those cases distinguishable from the case at hand. In each of those cases the miner was asserting their right to contact MSHA in the future about allegedly unsafe conditions. In *Sec'y of Labor on behalf of Coffee v. Txoma Mining, LLC*, 40 FMSHRC 615 (Mar. 2018) (ALJ), I found, in the context of a temporary reinstatement proceeding, that a miner had alleged that they engaged in protected activity when they threatened to contact MSHA because mine management refused to purchase needed safety equipment. In *Sec'y of Labor on behalf of Williamson v. CAM Mining,* LLC, 33 FMSHRC 1980 (Aug. 2011) (ALJ), Judge Paez found that a miner engaged in protected activity when the miner made a statement that was "tantamount to stating he was going to make a safety complaint" to MSHA. In *Metz v. Wimpey Minerals and Tarmac America, Inc.*, 18 FMSHRC 1087 (June. 1996) (ALJ), former Judge Melick found that a miner engaged protected activity when he stated he would contact MSHA if certain allegedly unsafe equipment was allowed to continue to operate. Finally, *in Adams v. J.L. Owens III, Contracting a/k/a J.L. Owens III, a/k/a Eastern Aggregates, Inc.*, 7 FMSHRC 299 (Feb. 1985 (ALJ), former Chief Judge Merlin found that a miner engaged in protected activity when the miner threatened to call MSHA about unsafe electrical wiring. Here, unlike those cases, Ortiz's comment was not a threat to contact MSHA in the future, but rather a veiled threat that he "could have" contacted MSHA about past safety complaints. Moreover, although each of the cases cited by the Secretary involves a situation in which the miner threatened to contact MSHA because the miner had safety concerns that were not being addressed, I have already found that the intent of Ortiz's comment had nothing to do with safety and, rather, was an attempt to leverage a veiled threat in order to have Bonds removed from the mine.

In *Collins v. FMSHRC*, 42 F.3d 1388, 1994 WL 683938 at *5 (6th Cir. 1994) (unpublished per curiam decision), the Sixth Circuit held that although Congress intended courts to interpret "protected activity" broadly, the term should not be interpreted "in a way which would foil the [Mine] Act's aim." In *Collins* a miner kept a record of safety hazards for the sole purpose of protecting his job. There the court, in finding that the miner had not engaged in protected activity, stated that Congress intended the discrimination provision to "encourage miner participation in the enforcement of the Act" and that "[t]he congressional objective of eliminating unsafe mining practices is hardly promoted by rewarding a miner for committing and then recording safety violations that he neither reports nor intends to report." 1994 WL 683938 at *4.

As the court in *Collins* made clear, context matters when analyzing whether something is protected activity.[22] Shearer, the MSHA special investigator who investigated Ortiz's complaint, confirmed as much during his testimony when he implied that it takes more than a mere mention of "MSHA" for a statement to be considered protected activity. Here, the context of Ortiz's statement that he could have contacted MSHA was that it was made in conjunction with a demand to have Bonds removed from the mine. Ortiz acknowledged that he could have gone to MSHA in the past about safety complaints but chose not to do so. Instead, Ortiz sat on those potential complaints until he believed they could benefit him in the form of leverage to get Bonds removed from the mine. Moreover, Kain credibly testified he had no idea what the MSHA comment was in reference to and he immediately told Ortiz could contact MSHA any time Ortiz wanted to do so. [23] Ortiz's desire to remove Bonds from the mine had nothing to do with safety and everything to do with the conflicting personalities and styles of work.

If Ortiz believed that his alleged safety complaints were being ignored by management, he should have complained to MSHA. Rewarding Ortiz for sitting on potential safety complaints

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[22] While Sinacola's operation is not located in the Sixth Circuit where *Collins* was decided, I find the court's reasoning persuasive.

[23] Based on the record evidence, I find Kain's testimony on this point both reasonable and credible. Although Werbig's notes from the conciliation meeting briefly mention Ortiz's concern about Bonds not wearing his seatbelt, I credit Kain's testimony that he did not recall a discussion of any safety complaints. In reaching this conclusion, I am particularly mindful of the conclusory nature of Ortiz's statement on the seatbelt issue during the meeting, as well as the cursory and superficial way in which the issue was raised. Ortiz's statement was not that he had witnessed Bonds failing to wear a seatbelt, but rather that when speaking to Bonds over the radio Ortiz could hear a beeping sound, which indicated to Ortiz that Bonds was not wearing a seatbelt. Ex. C1 p. 9. Moreover, the issue was only very briefly mentioned during the meeting, as evidenced by only a short exchange between Ortiz and Werbig in the meeting notes. Kain's testimony, as well as the notes, confirm that the purpose of the meeting was to diffuse the ongoing personality conflicts between Ortiz and Bonds. Absent other credible evidence and, given Kain's demonstrated credibility, I decline to infer that Kain had knowledge of any of the safety complaints allegedly raised by Ortiz. Accordingly, I find that the Secretary failed to establish that Kain, who made the decision to terminate Ortiz, had knowledge of, or considered, any safety complaints when making that decision.

until those complaints could be used as leverage to have Bonds removed from the mine would frustrate the purpose of the Act's discrimination provision, which is meant to encourage miner participation in enforcement. Accordingly, like the court in *Collins*, which found that a miner did not engage in protected activity when he maintained a record of safety hazards for the sole purpose of protecting his job, I find that Ortiz did not engage in protected activity when he made a veiled threat that he could have contacted MSHA for the sole purpose of creating leverage to have Bonds removed from the mine.

I conclude that Ortiz did not engage in protected activity. As a result, a prima facie case of discrimination was not established. Consequently, I find that Ortiz's discrimination complaint must be denied. Nevertheless, for the sake of completeness, and assuming arguendo that Ortiz's claimed statement to Kain that "if [he] would have been a problem [he] would have called MSHA a long time ago[,]" was protected activity, I have also analyzed whether his termination was motivated by that statement in any part.

**ii. Adverse Action and Motivation**

The Commission has recognized that although direct evidence of discriminatory intent or motivation is rarely available, a nexus between the protected activity and adverse action may be inferred where indicia of discriminatory intent exists, including (1) knowledge of protected activity; (2) hostility or animus toward the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the miner. *Sec'y of Labor on behalf of Lige Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085, 1089 (Oct. 2009); *see also Secretary 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).

Here, the Secretary asserts that both direct and circumstantial evidence establish that Ortiz's termination was motivated by his protected activity. First the Secretary argues that direct evidence of discriminatory motive exists because, even if Sinacola's version of events is accepted, "Ortiz's assertion to contact MSHA prompted the termination." Sec'y Br. 8. Second, the Secretary argues discriminatory intent can be inferred because Sinacola had knowledge of Ortiz's protected activity, Sinacola management demonstrated animus toward Ortiz, there was a temporal nexus because Ortiz was terminated immediately after making the comment about contacting MSHA, and Ortiz suffered disparate treatment since he was the only employee disciplined or terminated for his alleged involvement in the petition to have Bonds removed.

If I assume for the sake of this analysis that Ortiz's statements were protected activity, I must determine whether his termination was motivated in some part by that protected activity. For the reasons set forth below, I find that the Secretary did not establish by a preponderance of the evidence that Ortiz's termination was motivated in any part by protected activity.

*Direct Evidence of Discriminatory Intent*

The Secretary argues that Kain's and Phillip's characterization of Ortiz's MSHA comment as a "threat" are direct evidence of discriminatory intent. I disagree. Although both individuals referenced a threat in their respective testimony, I find that the Secretary

misinterprets their testimony. It is clear from the testimony that those individuals did not consider Ortiz's comment about contacting MSHA as *the* threat. Rather, a review of their testimony reveals that Kain and Phillips saw the "threat" not as a complaint about safety at the mine but as a tactic that Ortiz was trying to use to demand that Bonds be removed from the mine.

First, the Secretary cites Kain's testimony on page 122 of the hearing transcript as support. The pertinent part of that page includes the following exchange:

> Q: Mr. Kain, you said it wasn't the mere mention of MSHA that was threatening. What was the threatening coercive part of that conversation for you?
> A: He – I felt like Moses was using, I'm going to call it MHSA or else. He's free to call MSHA any time he'd like.

Tr. 122.

Although the Secretary focuses on the "MSHA" part of the statement as being the threat that prompted the termination, he does so at the expense of ignoring the "or else" portion. Here, when looked at in the context of Kain's other testimony, I interpret the phrase "or else" to be in reference to the demand to remove Bonds from the mine.[24] As discussed above, the statement and demand must be considered together. Here, I find that Kain perceived the demand, and not the statement about contacting MSHA, as the coercive and threatening part of the conversation with Bonds.

Second, the Secretary cites Phillip's testimony on page 159 of the hearing transcript as support. The pertinent part of that page includes the following exchange:

> Q: Is – what part of that conciliation agreement is the part where he was going against?
> A: Well, I think that he was supposed to recognize the authority and supervision of – of Harry Bonds. And – and I—and there was also one of those points to really open up the communication channels, and it does not seem to – you know, his – his call to Eric Kain and making a threat is not – it seems to fly in the face of that.

Tr. 159. Even though Phillips used the term "threat," it is clear that the threat he referenced was not Ortiz's comment about contacting MSHA. Rather, Phillips answer was given in the context of a discussion about Ortiz's non-safety related conflicts with Bonds and how, despite the

[24] Notably, Kain, when asked if he felt that Ortiz mentioning MSHA was a threat, responded "No." Tr. 121.

conciliation meeting and agreement, Ortiz was still complaining about Bonds. Although Phillips did not explicitly state that, it is clear that this is what he meant.[25]

While Kain and Phillips may have characterized Ortiz's statements as a "threat," it is clear from their testimony that the threat they perceived and referenced was Ortiz's effort to get Bonds removed from the mine. Moreover, simply characterizing a statement as a "threat" does not by itself establish discriminatory motive in context of the Mine Act. Accordingly, I find that the Secretary's argument regarding direct evidence lacks merit. I now turn my attention to whether sufficient circumstantial evidence exists such that I can infer discriminatory intent or motivation.

*Knowledge of Protected Activity*

The Commission has held that "an operator's knowledge of a miner's protected activity is probably the single most important aspect of a circumstantial case." *Sec'y of Labor on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (Sept. 1999) (quoting *Chacon*, 3 FMSHRC at 2510).

The Secretary argues Sinacola had knowledge of Ortiz's protected activity because Ortiz asserted his right to contact MSHA directly to Kain, the mine division manager.[26] Although I have already found that Ortiz's statement was not protected activity, for purposes of this analysis I agree, and Sinacola does not dispute, that the statement was made directly to Kain and, therefore, Sinacola had knowledge. Consequently, had the statement been protected activity, this factor would weigh in favor of Ortiz's claim that Sinacola had knowledge of this activity.

*Animus or Hostility Toward the Protected Activity*

The Secretary argues that statements made at hearing by Kain and Phillips describing Ortiz as "difficult," a "loudmouth," and "troublemaker" demonstrate animus toward Ortiz. Meanwhile, Sinacola argues that Ortiz's reputation was well-earned and had nothing to do with safety related activity.

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[25] Phillips was not present during the call during which Kain terminated Ortiz. As a result, his testimony regarding motivation is mostly second-hand. Accordingly, I accord it less weight than Kain's testimony on this point.

[26] Although the Secretary attempts to link other potential protected activities to the knowledge element of this analysis, those other instances of potential protected activity occurred outside of the timeframe stipulated to by the Secretary and relied upon by Sinacola. Moreover, aside from Ortiz's conclusory allegation during the conciliation meeting that he believed Bonds drove without a seatbelt because Ortiz could hear a beeping sound over the radio, there is no credible evidence that would allow me to infer Kain, who terminated Ortiz, had any knowledge concerning Ortiz's purported complaints. However, for reasons discussed above, I have already credited Kain's testimony that he did not recall any discussion of safety complaints during the conciliation meeting.

The statements by Kain and Phillips certainly demonstrate frustration with Ortiz. However, I find that their frustration was unrelated to any protected activity and was instead related to, among other things, Ortiz constantly voicing lack of satisfaction with his job and his personality and other non-safety related conflicts with Bonds.

Kain testified that Ortiz was never satisfied and repeatedly complained about pay and what equipment he was ordered to operate. However, both Kain and Phillips credibly testified that the complaints about pay were unfounded, with Phillips stating that Ortiz's pay was "right in line general increases . . . [which are] looked at annually[,]" and Kain confirming that Ortiz received normal raises and was never prevented from getting a raise. Tr. 100-101, 150. Moreover, Ortiz had a history of complaining about what equipment he was tasked with operating and had complained just prior to his termination about the loader he was assigned to operate and wanting to be trained on a dozer. However, Ortiz's job title was "loader operator" and his complaints about equipment assignments were unrelated to safety, as evidenced by his agreement both during the conciliation meeting and at hearing that he was *never* asked to operate unsafe equipment or equipment that he was not trained on. Ex. C1 p. 7; Tr. 43.

Further, both Kain and Phillips were frustrated by the persistent personality conflict between Ortiz and Bonds.[27] Notably, Phillips' testimony that "Ortiz had a reputation of being a loudmouth, a troublemaker," which the Secretary's cites as evidence of animus, was a response to a question asked about whether Phillips knew what caused Werbig to propose the conciliation meeting. The meeting, as I have already found, was aimed at diffusing the personality conflict and almost devoid of discussion related to safety.[28] If Phillips and Kain had animus toward anything, it was the persistent conflict that existed between Ortiz and Bonds and not protected activity. The conflict was such a problem that Phillips agreed to dedicate significant staff resources and time toward trying to resolve it via the conciliation meeting, which he described as

[27] The personality conflict was quite evident at hearing. Among other things, Bonds voiced his frustration with Ortiz failing to recognize the supervisor/subordinate relationship, and Ortiz complained about the tone Bonds would use when speaking to Ortiz. One illustrative example of how the conflict played out at the mine can be seen in the conflicting testimony the two offered regarding how a loader Ortiz was operating became damaged. At hearing, Ortiz accused Bonds of intentionally placing a rock in an area where Ortiz would run over it with his loader. Bonds, on the other hand, testified he could not have moved the rock in the area. Rather, Bonds attributed the damage to Ortiz's failure to use his loader to keep the work area clean. I find Ortiz's testimony on this incident unsupported and farfetched. I credit Bonds' testimony on this issue. Accusing one's boss of sabotage, without support, is the type of conduct that poisons a relationship.

[28] Although Ortiz testified that he raised multiple safety complaints during that meeting, I decline to credit that testimony and instead find, relying on Kain's testimony and the notes Werbig took during the meeting, that the only discussion of a potential safety complaint was Ortiz's conclusory statement that Bonds must not have been wearing a seatbelt at times when on the radio with Ortiz because Ortiz could hear a beeping sound. Ex. C1 p. 9.

an "unusual" method. Given that the conciliation meeting clearly did not resolve the conflict, I find their frustration reasonable.

Additionally, both Kain and Phillips credibly testified regarding general awareness of the rumor that Ortiz was involved with a petition to have Bonds removed from the mine. Moreover, it was no secret Ortiz had been in a physical altercation at the mine and had damaged both a loader and his supervisor's truck.

Although Kain's and Phillip's statements certainly demonstrate frustration with Ortiz, that frustration was warranted for reasons unrelated to protected activity. With this information in mind and given the lack of relevant evidence of a connection between their testimony and the alleged protected activity at issue in this proceeding, I find that the Secretary failed to establish that Sinacola exhibited animus toward any protected activity.

*Coincidence in Time*

The Secretary argues that there was a coincidence in time between the protected activity and adverse action because Ortiz was terminated immediately after he asserted his right to call MSHA. There is no dispute that Ortiz was terminated almost immediately after he stated he would have contacted MSHA if he wanted to cause trouble. Clearly, there was a coincidence in time.

*Disparate Treatment*

The Secretary argues that Sinacola treated Ortiz differently from miners who did not make safety complaints. Specifically, the Secretary asserts there is no evidence to show that any other miners were disciplined or terminated for alleged involvement in the petition to have Bonds removed from the mine. Moreover, the Secretary asserts that Phillips' testimony that Ortiz was the only person making complaints at the mine indicates Ortiz was treated differently for making those complaints.

Both of the Secretary's arguments on this factor lack merit. First, Ortiz was not terminated or disciplined because of his involvement in the rumored petition. Although Kain and Phillips were aware of the alleged rumor, no credible evidence was presented at hearing regarding action taken against Ortiz or any other miner for their alleged involvement in the petition. In fact, up until near the end of the April 20 call, Kain had not even considered disciplining or terminating Ortiz for anything. Rather, as evidenced by the transfer offer extended to Ortiz during the call, Kain was instead interested in attempting to find a solution to the persistent conflict between Bonds and Ortiz.

Second, although Phillips did testify that the "only complaint out of the mine in my time at the company" came from Ortiz, that statement lacks context. Tr. 150. Immediately prior to that statement, Phillips, when asked what the cause of the tension was between Ortiz and Bonds, testified that "it's more than just personality. It was – you know, I had heard since I started with Sinacola that, you know, [Ortiz] wasn't happy with his pay, he wasn't happy with the piece of equipment that he was on. It – it seemed to always be something." Tr. 150. Given the context

in which the statement was made, Phillips was not talking about safety complaints. Consequently, I find the Secretary failed to establish that Ortiz was the subject of disparate treatment. The situation with Ortiz was unique. Accordingly, it is not strange that there are no similar situations involving other employees to compare it with.

Taking into consideration each of the items discussed above and, again, assuming that Ortiz's statement to Kain was protected activity, I find that the Secretary did not establish by a preponderance of the evidence that Ortiz's termination was motivated in any part by protected activity. However, again, for the sake of completeness, and assuming arguendo that Ortiz engaged in protected activity and that his termination was motivated in some part by that protected activity, I now turn my attention to whether Sinacola established an affirmative defense.

**iii. Affirmative Defense**

The Commission has explained that an operator may establish an affirmative defense by proving that the adverse action was motivated by unprotected activity and it would have taken the action based solely on the unprotected activity. *Pasula* at 2799-2800. "An operator can attempt to demonstrate this by showing, for example, past discipline consistent with that meted out to the alleged discriminatee, the miner's unsatisfactory past work record, prior warnings to the miner, or personnel rules or practices forbidding the conduct in question." *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 993 (June 1982). The defense should not be "examined superficially or be approved automatically once offered." *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1938 (Nov. 1982). Nor should the judge "substitute his business judgment or sense of 'industrial justice' for that of the operator." *Id*. In reviewing the defense, the judge should determine whether the justification is credible and, if so, whether the operator would have been motivated as claimed. *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 993 (June 1982). The Complainant may demonstrate that the alleged non-discriminatory reason is mere pretext for the adverse action by showing that the "asserted justification is weak, implausible, or out of line with the operator's normal business practices." *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1534 (Aug. 1990).

Sinacola argues that, even if the Secretary can establish a prima facie case, Ortiz was terminated for reasons other than his MSHA comment. Specifically, Sinacola argues Ortiz was terminated because he refused a to accept an offer to be transferred to a different Sinacola facility, made an inappropriate demand of management to terminate Bonds, had a history of conflict with other employees, and refused to follow the directions of his supervisor.

The Secretary argues Sinacola failed to establish it would have terminated Ortiz for unprotected activities alone. The Secretary points to a lack of evidence regarding prior consistent discipline for similar infractions and Ortiz's limited disciplinary history. The Secretary asserts that despite testimony that Ortiz was a "troublemaker" and insubordinate, there is no documentation of this alleged insubordination, and no disciplinary action was taken against Ortiz based on management's belief that Ortiz had started a petition to have Bonds terminated. Here, Ortiz was not terminated until he mentioned MSHA. The other reasons cited by Sinacola are merely pretext for firing Ortiz after he asserted his right to contact MSHA.

Even if I assume that Ortiz established a prima facie case of discrimination, I nevertheless find Sinacola provided a valid affirmative defense. As discussed previously, I credit Kain's testimony regarding what was said on the April 20 telephone call. Kain credibly testified Ortiz refused Kain's offer of a transfer, demanded that Bonds be removed from the mine, and stated he "could have" contacted MSHA. Even though the exact context regarding what Ortiz "could have" contacted MSHA about was unknown by Kain, Ortiz was clearly attempting to leverage that statement to get what he wanted, i.e., Bonds removed from the mine. As far as Ortiz was concerned, if anyone should be transferred to a different facility it should be Bonds. Kain's response to Ortiz's veiled threat is telling. Rather than take the bait and immediately terminate Ortiz for a perceived threat about contacting MSHA, Kain instead told Ortiz he could contact MSHA at any time. In the court's opinion, Kain paid no attention to the statement that Ortiz could have contacted MSHA and instead based his termination decision on Ortiz's demand to have Bonds removed from the mine. Demanding that one's supervisor be removed because of a personality conflict is not protected activity.

I accept Kain's explanation that he viewed Ortiz's demand to remove Bonds as an act of insubordination. Kain credibly testified he had never experienced an employee directly demand that their supervisor be fired or transferred. I agree with Kain that Ortiz's demand to remove Bonds was patently unreasonable.[29] Tr. 115. As Phillips credibly explained, if employees can demand that their supervisors be fired because they do not like them, then management has no control over the organization. Here, I find that Kain correctly perceived Ortiz's demand as stemming from his personality conflict and inability to work with Bonds in a supervisor/subordinate relationship.

I further find that Kain reasonably believed he had no other option than to terminate Ortiz at that time. When Ortiz refused the transfer offer and demanded that Bonds be removed from the mine, he eliminated other options that may have otherwise been available to Kain. Given Ortiz's persistent personality conflict with Bonds, I find that Kain reasonably believed Ortiz and Bonds could never work together again after Ortiz demanded that Bonds be removed. With transfer not an option, and having no legitimate reason to terminate Bonds, I accept Kain's explanation and agree that he had no other choice but to terminate Ortiz.[30]

It should come as no surprise that Sinacola was unable to offer much in the way of evidence of prior consistent discipline for such an unusual act, i.e., demanding that one's supervisor be removed because of significant non-safety related conflicts. However, I find that

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[29] Although Ortiz may have believed his complaint about Bonds' tone and the refusal to allow him to get out of the truck along a mine road warranted Bonds' removal, Kain disagreed. In fact, Kain opined that, it would have been incredibly unsafe for Bonds to let Ortiz out of the truck to walk the route back to the yard.

[30] Even if alternative means of discipline existed, the Commission has stated that its judges should not substitute their views of what is good business practice for that of the operator with regard to whether the adverse action was "'just' or 'wise.'" *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2517 (Nov. 1981).

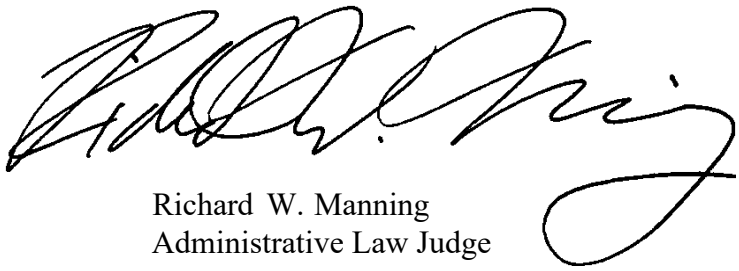
Ortiz's past work record as well as the informal warning about insubordination he received during the conciliation meeting are additional evidence that demonstrates Sinacola would have terminated Ortiz for unprotected activity alone. Specifically, I find that Sinacola warned Ortiz about insubordination during the February conciliation meeting, even if the word insubordination was not used during the meeting. Werbig's meeting notes clearly indicate Bonds' expressed concern about Ortiz not listening to Bonds' direction and Ortiz "push[ing] back when asked to do things." Ex. C1 p. 9. Notably, at the end of the meeting, the first item the participants agreed to was to "follow supervisors direction[.]" *Id*. at 11. The meeting was clearly an attempt by management to, among other things, diffuse the conflict and ensure Ortiz acknowledged he was the subordinate of Bonds. In addition, Ortiz's disciplinary record, while not lengthy, was far from spotless and included documented instances of Ortiz damaging company equipment as well as his involvement in a physical fight with another employee. Although Sinacola did not present evidence of any formal personnel rules or practices forbidding employees from engaging in insubordination like what occurred here, common sense dictates that such conduct is entirely inappropriate.

Finally, I find that Sinacola's justification for terminating Ortiz was not pretextual. Ortiz's demand to remove Bonds was unreasonable and inappropriate. As discussed above, with transfer not an option, and having no legitimate reason to terminate Bonds, Kain's options were at best extremely limited. In *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1937 (Nov. 1982), the Commission stated that both it and "its judges have neither the statutory charter nor the specialized expertise to sit as a super grievance or arbitration board meting out industrial equity. Once it appears that a proffered business justification is not plainly incredible or implausible, a finding of pretext is inappropriate." Here, Kain made a rational business decision, based on the information available at that time, to terminate Ortiz. That decision was both plausible and expected given the options available.

Based on the above discussion, I find that Sinacola has proven its affirmative defense, and that the reasons given for Ortiz's termination were not pretextual.

## IV. ORDER

For the reasons set forth above, the complaint of discrimination brought by the Secretary of Labor on behalf of Moses Ortiz is **DENIED** and this proceeding is **DISMISSED**.[31]



Richard W. Manning
Administrative Law Judge

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[31] My August 24, 2021, Decision Approving Settlement and Order of Temporary Economic Reinstatement in CENT 2021-0184 remains in effect until this decision on the merits of the discrimination complaint becomes a final decision of the Commission. *Sec'y on behalf of Bernardyn v. Reading Anthracite Co.*, 21 FMSHRC 947 (Sept. 1999). Section 113(d)(1) of the Act states "[t]he decision of the administrative law judge … shall become the final decision of the Commission 40 days after its issuance unless within such period the Commission has directed that such decision shall be reviewed …." 30 U.S.C. § 823(d)(1).