FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FEB 25 2015

SECRETARY OF LABOR, MSHA on behalf of RALPH KEELE, Complainants, v. ENERGY WEST MINING COMPANY, Respondent.	DISCRIMINATION PROCEEDING Docket No. WEST 2013-0877-D DENV-CD 2013-13 Mine: Deer Creek Mine Mine ID: 42-00121

DECISION AND ORDER

Appearances: Tyler P. McLeod, Esq., U.S. Department of Labor, Office of the Solicitor, Denver, CO, for Complainants;

Willa B. Perlmutter, Esq., Crowell & Moring, Washington, D.C., for Respondent.

Before: Judge L. Zane Gill

This proceeding arises under Section 105(c) of the Federal Mine Safety and Health Act of 1977 ("Mine Act" or "Act"), 30 U.S.C. § 815(c) (1994). The parties presented testimony and documentary evidence at the hearing held in Price, Utah on April 8, 9, and 10, 2014.

By agreement, Ralph Keele ("Keele") was temporarily economically reinstated from March 7, 2013, the date he was suspended without pay with intent to terminate, under the same terms as if he had not been suspended. (Tr.1 at 127:18-20) [1] This agreement was approved by the Court on June 26, 2013. The temporary reinstatement will expire when Keele is no longer entitled to temporary reinstatement under Section 105(c) of the Act. 30 U.S.C. § 815(c).

Keele argues here that Energy West terminated his employment because he engaged in protected activity. The Respondent admits that Keele engaged in many instances of protected activity, but claims as an affirmative defense that Keele was terminated because he made a false statement against the mine manager which violated Respondent's Business Code and justified termination. Keele also claims that the Respondent failed to make full payment under the terms of the economic reinstatement agreement. The parties agreed that if the Respondent is found

[1] Tr.1 refers to the transcript for the first day of the hearing, Tr.2 for the second day, and Tr.3 for the third day.

liable for violating Section 105(c), they would submit additional evidence regarding Keele's economic reinstatement claim.

For the reasons that follow, I find that Keele engaged in protected activity and conclude that Energy West violated Section 105(c) of the Act by terminating him. I also conclude that Energy West's stated reasons for terminating Keele are pretextual. Therefore, Keele is entitled to reinstatement at the Deer Creek Mine, and in addition to any amount determined later to be due to Keele under the terms of the economic reinstatement, the Respondent shall pay a civil money penalty in the amount of $20,000.00.

I. Stipulations

The Parties' Pre-Hearing Report dated April 1, 2014, included fourteen stipulations:

1. The Administrative Law Judge has jurisdiction over this action pursuant to § 113 of the Mine Act, 30 U.S.C. § 823;

2. This action is brought by the Secretary pursuant to the authority granted by § 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2);

3. Energy West is the operator of Deer Creek Mine, Mine ID No. 42-00121, an underground coal mine located in Emery County, Utah;

4. At all relevant times, Energy West was an operator as the term is defined by § 3(d) of the Mine Act, 30 U.S.C. § 802(d);

5. Energy West produces products that enter commerce or has operations or products that affect commerce, all within the meaning of §§ 3(b), 3(h), and 4 of the Mine Act, 30 U.S.C. §§ 802(b), 802(h), 803;

6. At all relevant times, Energy West employed Complainant, Ralph Keele, as a diesel mechanic at the Deer Creek Mine;

7. At all relevant times, Mr. Keele was a miner within the meaning of § 3(g) of the Mine Act, 30 U.S.C. § 802(g);

8. Energy West is an operating division of Interwest Mining, which is a wholly owned subsidiary of PacifiCorp;

9. PacifiCorp is a wholly owned subsidiary of MidAmerican Energy Holdings Company;

10. Energy West employees are subject to the MidAmerican Energy Holdings Company's Code of Business Conduct;

11. On March 7, 2013, Mr. Keele was suspended from his employment at the Deer Creek Mine with intent to discharge. The reasons for Mr. Keele's suspension were included in a letter to Mr. Keele from Human Resources Manager, Don Childs, dated March 7, 2013;

12. As of March 7, 2013, Mr. Keele was rotating between day and afternoon shifts every two weeks. On the day shift he earned $25.65 per hour and on the afternoon shift he earned $26.05 per hour;

13. The proposed penalty will not affect Energy West's ability to remain in business;

14. The parties stipulate to the authenticity of those documentary exhibits that have been exchanged by the parties in discovery up to the date of the Pre-Hearing Report, but not to the relevance or truth of the matters asserted therein. The parties do not stipulate to the authenticity of any video footage that may be presented at hearing, but reserve the right to review such video footage prior to stipulating to authenticity.

II. Legal Principles

Section 105(c)(1) of the Mine Act provides that a miner cannot be discharged, discriminated against, or interfered with in the exercise of his statutory rights because he "has filed or made a complaint under or related to this Act, including a complaint notifying the operator [...] of an alleged danger or safety or health violation." 30 U.S.C. § 815(c).

In order to establish a *prima facie* case of discrimination under Section 105 (c)(1), Keele must show: (1) that he engaged in protected activity; and (2) that the adverse action he complains of was motivated, at least in part, by that activity. *Drissen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Sec'y of Labor on behalf of Robinette v. United Castle Coal, Co.*, 3 FMSHRC 803 (Apr. 1981); *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 (3d. Cir. 1981).

The Commission recently sharpened the focus on the appropriate quantum of proof needed to establish the *prima facie* case. *Turner v. National Cement Co. of California* reiterated the clear difference in the quantum of proof a claimant must provide to ultimately prevail in a discrimination case as opposed to the minimal showing required to establish the *prima facie* case. 33 FMSHRC 1059 (May 2011). "[T]o make out a prima facie case of discrimination, the [discriminatee] need only submit enough evidence so that the record *could* support an inference" that the termination resulted, at least in part, from protected safety complaints. *Id.* at 1066 (internal citations omitted) (emphasis in original).

The Commission has noted that "direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." *Sec'y of Labor ex rel. Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981) *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983). Circumstantial evidence may include: 1) coincidence in time between the protected activity and the adverse action; 2) knowledge of the protected activity; 3) hostility or animus toward the protected activity; and 4) disparate treatment. *Id.* The more that hostility or animus is specifically directed toward the protected activity, the more probative it is of discriminatory intent. *Id.* In *Bradley v. Belva Coal Co.*, with regard to the issue of motivation, the Commission found that "circumstantial evidence [...] and reasonable inferences drawn therefrom may be used to sustain a prima facie case." 4 FMSHRC 982, 992 (June 1982) (citing *Chacon*, 3 FMSHRC at 2510-12). "Furthermore, inferences drawn by judges are 'permissible provided they are

inherently reasonable and there is a logical and rational connection between the evidentiary facts and the ultimate fact inferred.'" *Colorado Lava, Inc.*, 24 FMSHRC 350, 354 (Apr. 2002) (citing *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984)).

Under Section 105(c), 30 U.S.C. § 815(c), the operator may rebut the miner's *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Pasula*, 2 FMSHRC at 2799-800. If the operator cannot rebut the *prima facie* case, it may nevertheless defend affirmatively by proving that it was motivated by the miner's unprotected activity. It is not enough under Section 105 (c) for the operator to show that the miner deserved to be fired for engaging in the unprotected activity. The operator must show that it did, in fact, consider the miner deserving of discipline for engaging in the unprotected activity alone and that it would have disciplined him in any event. *Id.* at 2800; *Robinette*, 3 FMSHRC at 817-18; *see also E. Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

In analyzing a mine operator's asserted justification for taking adverse action under the *Pasula-Robinette* framework, the inquiry is limited to whether the reasons are plausible, whether they actually motivated the operator's actions, and whether they would have led the operator to act even if the miner had not engaged in protected activity. The ALJ may not impose his own business judgment as to an operator's actions, *Chacon,* 3 FMSHRC at 2516-517, and he may not substitute his own justification for disciplining a miner over that offered by the operator. *Sec'y of Labor on behalf of McGill v. U.S. Steel Mining Co.*, 23 FMSHRC 981, 989 (Sep. 2001).

The Commission has explained, however, that "pretext may be found, for example, where the asserted justification is weak, implausible, or out of line with the operator's normal business practices." *Sec'y of Labor ex rel. Price v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1534 (Aug. 1990). Further, "[a] plaintiff may establish that an employer's explanation is not credible by demonstrating 'either (1) that the proffered reasons had no basis *in fact*, (2) that the proffered reasons did not *actually* motivate his discharge, or (3) that they were *insufficient* to motivate discharge.'" *Turner* 33 FMSHRC at 1073 (emphasis in original) (citations omitted). Additionally, "[a] company's failure to follow its own policies can be evidence of pretext." *Garza v. Hanson Aggregates, LLC*, 36 FMSHRC 974, 992 (Apr. 2014) (ALJ Gilbert); *See Rudin v. Lincoln Land Cmty. Coll.*, 420 F.3d 712, 727 (7th Cir. 2005) (failure to follow company's own procedures may be evidence of pretext); *see Giacoletto v. Amax Zinc Co.,* 954 F.2d 424, 427 (7th Cir. 1992) (determining that employer's proffered justification was pretextual when company failed to follow its own procedures.)

III. *Prima Facie* Discrimination

As part of his burden to make a *prima facie* showing of discriminatory intent, Keele must show that his termination was motivated, at least partially, by his making safety complaints. I must determine whether the evidence in total, including the inferential evidence, has sufficient circumstantial weight to satisfy his *prima facie* burden to show discrimination.

A. Keele Engaged In Protected Activity

To satisfy the first prong of the *Pasula-Robinette* test for a *prima facie* case of discrimination, Keele must show that he engaged in protected activity. *Drissen*, 20 FMSHRC at 328; *Robinette* 3 FMSHRC at 803; *Pasula*, 2 FMSHRC at 2786. Counsel for the Respondent conceded this point, by stating in her opening statement: "There is no doubt that Mr. Keele engaged in protected activity and lots of it [...]" (Tr.1 at 22:12-14) Thus, the primary issue is the "motivational nexus" between Keele's protected activity and the adverse actions. *See Pero v. Cyprus Plateau Mining Corp.*, 22 FMSHRC 1361, 1365 (Dec. 2000).

Protected activity under the Act has been found to include tagging out equipment because it may be unsafe, *see Consolidation Coal Co.*, 8 FMSHRC 1568 (Oct. 1986) (ALJ Lasher), making a complaint to an operator or its agent of "an alleged danger or safety or health violation," *see Sec'y of Labor ex rel. Davis v. Smasal Aggregates, LLC*, 28 FMSHRC 172, 175 (Mar.2006)(ALJ Lietinski), and reporting potential safety or health hazards to MSHA or an MSHA inspector, *see Sec'y of Labor ex rel. Chaparro v. Comunidad Agricola Bianchi, Inc.*, 2010 WL 1145197 at *4 (Feb. 2010)(ALJ Barbour). The language of the statute prohibits discrimination against a miner for filing complaints under §§ 105(c) or 103(g), which in and of itself qualifies as protected activity. 30 U.S.C. § 815(c)(1).

I find that between December 17, 2012, and March 6, 2013, the day he was terminated, Keele engaged in protected activity of which company management was aware at least ten times.

1. Background Facts[2]

At the time of trial, Keele had been employed at the Deer Creek Mine since 1981, approximately 33 years. (Tr.1 at 33:3) During that time, Keele had been the Vice President of the local union, Chairman of the Mine Committee, and was serving as the union's Safety Committee Chairman when he was terminated. (Tr.1 at 36:17-23) Keele was on the Safety Committee from approximately 1983 until 1994, and then again in 2013. (Tr.1 at 37:10-16)[3]

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[2] These findings of fact here and below are based on the record as a whole and my careful observation of the witnesses during their testimony. In resolving any conflicts in the testimony, I have taken into account the interests of the witnesses, or lack thereof, and consistencies, or inconsistencies in each witness's testimony and between the testimonies of other witnesses. In evaluating the testimony of each witness, I have also taken into account his or her demeanor. Any perceived failure to provide detail about any witness's testimony is not a failure on my part to consider it. The fact that some evidence is not discussed does not mean that it was not considered. *See Craig v. Apfel,* 212 F.3d 433, 436 (8th Cir. 2000) (administrative law judge is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered). I have also fully considered the contents of the official file, including the pre- and post-hearing submissions of the parties, and the exhibits admitted into evidence.

[3] The Safety Committee is an elected position. The committee consists of 12-13 people who conduct monthly or bimonthly inspections of the mine to address safety issues. (Tr.11 at 36:25 – 37:3)

During his mining career at Deer Creek, Keele worked mostly as a mechanic electrician until January, 2012, when he bid for and won a surface diesel mechanic position. (Tr.1 at 33:3-11; Tr.1 at 34:7-8) The new position required that Keele master new skills. (Tr.1 at 34:11-21)

Keele's predominant duty as a diesel mechanic was to perform permissibility inspections – weekly inspections that must be completed for every piece of diesel equipment at the mine. (Tr.1 at 35:16-23) Ordinarily, the mechanic shop superintendent would give the diesel mechanics work orders at the beginning of every shift. (Tr.1 at 39:5-7) Two mechanics would then inspect each piece of equipment for permissibility. (Tr.1 at 48:12-21) The mechanics were expected to complete a form describing any problems with equipment they inspected. (Tr.1 at 50:14-23) Diesel mechanics also performed repairs on mantrips, small trucks, and haulage equipment. *Id.* As a practice, if a problem with a piece of diesel equipment was easy to fix, the mechanics fixed it right away, if not, they tagged the equipment out of service. (Tr.1 at 50:3-7) There were two lifts or hoists in the shop where mechanics did routine equipment maintenance. (Tr.1 at 93:5-8)

2. Events Related to The Tagging Out Incident on December 17, 2012

Keele and Brian Lea[4] ("Lea") testified that Rudy Madrigal[5] instructed them to do permissibility inspections of the diesel mantrips on December 17, 2012. (Tr.1 at 47:7-14; Tr.1 at 46:8-12; Tr.2 at 34:21 – 35:2; Tr.2 at 36:6-12) Keele and Lea went to the diesel garage where all of the mantrips were parked along the wall. They went down the line, and did their permissibility inspections. (Tr.1 at 47:14-20) They ultimately found problems with and tagged out of service seven of the mantrips and one duster. (Tr.1 at 49:10-25; Tr.2 at 40:5-8; Ex. S-21)[6]

Keele and Lea began their inspection between 9:00-9:30am. (Tr.1 at 49:1-9) They tagged out four mantrips before their lunch break, which began around 11:00am and lasted about one hour. (Tr.1 at 165:10-16) After returning to work, they inspected the rest of the mantrips and tagged out an additional three, plus the duster. (Tr.1 at 166:1-3) Around 1:30-2:00pm, while Keele and Lea were finishing the duster examination, Darrel Bagley[7] came into the garage and told them to fix the mantrips that did not require a lot of work first so that they could be placed back into service. (Tr.1 at 53:4-16) Keele and Lea took two mantrips into the shop to start working on them. (Tr.1 at 54:3-7) Within minutes, Clayton Cox ("Cox"), the assistant mine manager, a position directly under mine manager, Rick Poulson ("Poulson"),[8] came into the shop

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[4] At the time of the hearing, Brian Lea had been working at the Deer Creek Mine for approximately 17 years and had been a diesel mechanic for nine months. (Tr.2 at 33:11-22)

[5] Rudy Madrigal was the diesel mechanic supervisor at the time of the incident. (Tr.1 at 46:8-12)

[6] Ex. S-21 contains Keele's handwritten notes on the mantrips they inspected, which were submitted to management. (Tr.1 at 52:4-9)

[7] At the time of the hearing, Darrel Bagley was Keele's immediate supervisor during the afternoon shifts. (Tr.1 at 38:17-19)

[8] Rick Poulson is the general manager at Energy West and Bridger Coal. (Tr.2 at 163:10-12) Rick Poulson worked for Energy West for 23 years, then went to work at three other coal companies for eight years, and then went back to Energy West in 2007 to the present and was

to find out what was going on with the mantrips. (Tr.1 at 55:7-15) Keele told Cox that there were problems with some of the mantrips, and because of that, they tagged them out. (Tr.1 at 55:20-25) Keele testified that Cox was "quite upset" that the mantrips were tagged out. (Tr.1 at 56:5) Lea also testified that Cox was irritated and upset. (Tr.2 at 41:19)

Both Keele and Lea testified that after Cox asked what was going on, he said he was going to conduct an investigation, that he was going to get to the bottom of what happened, and that he was going to make sure something was done about it. (Tr.1 at 56:8-13; Tr.2 41:8-17) Cox left the garage and called Don Childs[9] to inquire whether any disciplinary action could be taken against Keele and Lea for tagging out the mantrips. (Tr.2 at 225:4-7) Because of Cox's comments, both Keele and Lea believed they were going to get fired for tagging out the mantrips. (Tr.1 at 57:21-25; Tr.1 at 58:2-6; Tr.2 at 41:22 – 42:2) Lea felt the working environment was hostile after speaking with Cox. (Tr.2 at 43:2-7)[10]

Approximately ten minutes after Cox left, mine manager Rick Poulson came into the shop. (Tr.1 at 59:1-8) He came up to Keele while he was standing on a stool on one side of a mantrip and asked him what the issue was with the mantrip he was working on. *Id.* Keele told Poulson that he was working to try to figure it out and fix the problem. (Tr.1 at 59:8-11) Keele testified that Poulson then approached Lea and asked him the same question. (Tr.1 at 59:15-19) As Poulson was talking to Lea, Keele walked around to the other side of the mantrip to spray degreaser on the engine so that he could find leaks. *Id.* At this point, Keele was facing the surveillance camera and was partially blocked from the camera's view by the mantrip. (Ex. S-22; Ex. S-23)[11]

A short time later, Poulson came back to where Keele was working on the mantrip. *Id.* According to Keele, Poulson came up to him from behind, inserted his finger or an object into his buttocks, and said, "Good job, buddy. Way to go. Good Job." (Tr.1 at 59:20 – 60:3)[12] Keele testified that he told Poulson that he was just trying to do his job, and Poulson said, "Yeah, I bet you are." *Id.* Poulson then walked out of the garage. *Id.* Keele testified that Poulson's statements towards him were sarcastic. (Tr.1 at 60:10) Lea corroborated Keele's testimony by stating that as Poulson was walking away, he said, "Good job," sarcastically. (Tr.2 at 42:16-19)

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promoted to general manager over Energy West's two operations two months before trial. (Tr.2 at 163:14-20) Before that, he was the general manager at Deer Creek only. (Tr.2 at 163:21-23) Prior to being the general manager at Deer Creek for three years, he was maintenance superintendent for about four years. (Tr.2 at 164:7-11)

[9] At the time of the hearing, Don Childs was the Director of Human Resources with Energy West Mining Company. (Tr.2 at 206:18-25)

[10] There was, in fact, an investigation performed two days later, on December 19, 2012. This is discussed further below.

[11] Everyone who worked in the shop and all of the relevant management people knew there were cameras capturing everything that happened there. (Tr.1 at 60:13-20)

[12] Normally, a claim of sexual assault would not be central to a discrimination claim under 105(c), however, Respondent claims as an affirmative defense that Keele lied about the sexual assault, and because of his false statement, he was in violation of Respondent's Business Code, which justified his termination.

Poulson testified, however, that his "Good job" statements were not sarcastic, but in fact were intended to praise Keele for a job well done. (Tr.2 at 194:7-12) I find Poulson's testimony not credible and inconsistent with the evidence before me on this point.

It became apparent at trial that Cox and Poulson (management) were upset that Keele and Lea did not notify them earlier that so many mantrips had been tagged out because someone could have begun to work on the mantrips, and thus, returned them to service more quickly. (*See* Tr.1 at 165: 17-20; Tr. at 166:4-6; Tr.2 197:18 – 198:7) As a result of the way the equipment was tagged out of service, the mine was left with fewer mantrips than was needed to perform the shift change at 3:00pm. (Tr.2 at 198:1-3) This caused a disruption in production. (Tr.2 at 195:1-12) However, Keele testified that the standard practice when performing permissibility inspections was that at the end of the shift, mechanics submitted their paperwork outlining work performed to their supervisor. (Tr.1 at 58:10-15) Lea testified that as a rule they did not notify the supervisors about tagging out mantrips until the end of the shift when they turned the paperwork in. (Tr.1 at 45:17-20) Keele also testified that he was never told that he had to notify his supervisor when something was tagged out. (Tr.1 at 58:18-21) Poulson admitted at the hearing that there was no written policy requiring mechanics to inform management when equipment was tagged out during the shift. (Tr.2 at 104:22-24) Poulson also stated that Keele and Lea did not break any rules by failing to notify management about the tagged out equipment prior to their shift change. (Tr.2 at 105:16-18)

The surveillance video footage and the snapshot excerpts from it (Ex. S-22; Ex. S-23) show Poulson approaching Keele from behind, Poulson's left arm (away from the camera) extending from his side towards Keele as he approached, Poulson stepping forward toward Keele, Poulson's body is blocked from camera view by Keele and the mantrip, and Keele's head turning to the side in apparent recognition of something happening, before Keele turned back to the task he was performing. *Id.* The video and the snapshots were taken from an angle that does not explicitly confirm that Poulson pushed anything into Keele's buttocks, but I find it reasonable to conclude by a preponderance of the video and testimonial evidence that Rick Poulson made physical contact with Keele by physically prodding him from behind. This determination is based upon the context in which these events took place, the credibility of Keele's and Poulson's testimony, the video footage and the snapshots from the footage, and Keele's actions in response to the contact, which are discussed below.[13]

Within minutes of the contact, Keele told Lea about the incident, and that he was going to file a complaint about it and the mantrip issue. (Tr.1 at 75:1-9; Tr.2 at 43:11-14)[14] Lea agreed with Keele and thought they should both make a complaint based on Cox's and Poulson's actions before they were fired. (Tr.2 at 46:6-11) Keele also told several people around the shop that Poulson assaulted him, namely, Kevin Wilson, Gordon Manchester, Kip Allred, Forest

[13] Respondent made the argument that because Keele did not react more obviously to the contact, the contact did not occur. I find this argument unconvincing. It takes a split second to make a decision and to react to an action of another. It is reasonable to infer that Keele did not react more obviously because he was already apprehensive that he might lose his job and he was able to hold back any further reaction.

[14] Lea did not observe the physical contact. (Tr.2 at 44:1)

Addison, Kenny Rhodes, Monte Fillmore, Merrill Fillmore, Merrill Jukes, Don Larson, and Steve McNee. (*Id.*; Ex. S-30, at 27:9-17) Keele also told two union representatives, Lou Shelly and Sheldon Oviett. (Ex. S-30, at 28:1-5)

Keele testified that when he got home from work, he immediately called the Emery County Sherriff's office to initiate a complaint against Poulson for sexual assault. The Sherriff's office informed him that he would have to come in in person to file a complaint. (Tr.1 at 75:18-22)[15] Keele testified that he knew the shop had around-the-clock surveillance cameras in the garage, and that this did not dissuade him from filing a complaint with the Sheriff's office. (Tr.1 at 78:6-13)

The next day, December 18, 2012, Keele filed a complaint via the company's ethics hotline alleging that his job had been threatened by Cox, and that Poulson had assaulted him for tagging out the mantrips. (Tr. Tr.1 at 44:22 – 45:2) Later that day, Keele also filed a complaint with MSHA. (*Id.*; Tr.1 at 75:25 – 76:1) Paul Priest[16] received Keele's hotline complaint on December 18, 2012, and Rick Poulson, Don Childs, and Cindy Crane[17] were informed of it the same day. (Tr.2 at 213:17-25; Tr.2 at 252:12-17; Tr. At 256:1-6; Tr.3 at 16:22-25)[18]

On December 19, 2012, Keele spoke with two Sheriff's officers at the Deer Creek Mine and filled out the paperwork to initiate a criminal sexual assault complaint. (Tr.1 at 78:24 – 79:9) Keele provided a written sworn statement to the Sheriff, under penalty of perjury, that among other things, Rick Poulson had sexually assaulted him. (Tr.1 at 77:1-9; Ex. S-25)

That same day, as Keele was working in the shop, Carl Beckstead[19] told him that he needed to go to the mine office for a meeting because Keele had called the "1-800-squeal-pig number." (Tr.1 at 80:1-4) Keele challenged Beckstead about his knowledge that Keele had phoned in a complaint, since by company policy, all such matters were to be kept confidential. (Tr.1 at 79:24 – 80:10) Beckstead deflected this inquiry and told Keele that this statement was made by management. *Id.*

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[15] Lea knew Keele was going to call the Sheriff's office. (Tr.2 at 46:15-17)

[16] At the time of the trial, Paul Priest was Vice President of Safety and Labor Relations at MidAmerican Energy Holdings Company. (Tr.2 at 246:13-14)

[17] At the time of the hearing, Cindy Crane was Vice President of PacifiCorp for nine years. (Tr.3 at 6:14-15)

[18] Lea also filed a complaint which stated that his job was threatened for engaging in a protected activity. (Tr.2 at 46:13-14) Lea also called the Berkshire Hathaway toll-free number and the MSHA hotline on December 17, 2012. (Tr.2 at 46:1-4)

[19] At the time of the hearing, Carl Beckstead was the foreman over the in-service shop. (Tr.1 at 105:9-25) Beckstead's nickname is "Bummer." (Tr.2 at 86:16-19) He had been the surface foreman over all of the surface and the diesel for about six years. (Tr.2 at 87:15-15) He did not have hiring or firing authority at the mine. (Tr.2 at 89:15-17)

Keele and his union representative, Sheldon Oviett, went to the mine office. (Tr.1 at 80:12-21) Debra Stone ("Stone"),[20] Don Childs, and another union representative, Lou Shelley, also attended the meeting. (Tr.1 at 80:12-21) Stone had been hired by Paul Priest to investigate Keele's hotline complaint, and Priest had directed Stone to determine whether Keele's complaint was accurate. (Tr.1 at 79:15-18; Tr. 2 at 255:16-22; Tr. 2 at 274:20-23; Tr.2 at 257:2-6)

During this meeting, Keele told Stone about tagging out the mantrips and the assault that occurred on December 17, 2012. (Tr.1 at 81:1-15) Keele also informed Stone that there were at least three other miners he knew of who had been physically assaulted by Rick Poulson in the past: Gary Olson, Kenny Rhodes,[21] and Kelly Duke.[22] (Tr.1 at 81:1-15; Tr.1 at 86:19 – 90:8) Stone noted these incidents in her investigation report, but did not contact any of the miners to determine the accuracy of the allegations or whether Poulson had committed multiple prior assaults on miners. (Ex. S-31, p. 2) Don Childs and Paul Priest both testified that they did not follow up on these allegations, nor was Cindy Crane told of them. (Tr.2 at 225:14-21; Tr.2 at 275:11-18) Cindy Crane was responsible for making the ultimate decision to terminate Keele. (Tr.2 at 178:18 – 179:1)

On December 28, 2012, Keele prepared a narrative to be used with the §105(c) complaint he filed with MSHA on January 8, 2013. In it he alleged discrimination by Cox and Poulson related to tagging out the mantrips. (Tr.2 at 279:1-6; Tr.3 at 45:3-7; Ex. S-42, p. 3) He also stated that Poulson "belly bumped" and pushed him from behind against the mantrip he was working on, and "shoved something in my butt a couple of times and kept saying over and over 'Good job, Ralph. Way to go.'" (Ex. S-42, p. 3)

On January 8, 2013, Keele filed a §105(c) complaint with MSHA alleging discrimination by Cox and Rick Poulson for tagging out the mantrips. MSHA conducted an investigation, interviewing mine management and miners. Priest and Cindy Crane knew of the §105(c) complaint and the MSHA investigation. (Ex. S-42, p. 1-2; Tr.2 at 279:4-6; Tr.3 at 45:3-7)

On February 25, 2013, around 5:30pm, Keele's supervisor Darrel Bagely told him to go to the mine office for a meeting. (Tr.1 at 106:17-25) When Keele arrived at the mine office, Don Childs told him that he needed to speak with an attorney who was following up on the complaint that Stone had investigated. (Tr.1 at 106:17-25) Russ Archibald, Keele's union representative, Steve Ortiz ("Ortiz"), an attorney hired by the Respondent, and a court reporter were also in the room. (Tr.1 at 107:3-6) Keele declined to take an oath because he did not have his notes with him and he had not been given notice of an interrogation. (Ex. S-30, pgs. 4–5)[23]

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[20] At the time of the hearing, Debra Stone worked for Evolutionary HR and was hired to conduct an investigation into Keele's hotline complaint. (Tr.2 at 255:9-10; Tr.2 at 274:20-23)

[21] Kenny Rhodes testified at the hearing and confirmed that Poulson threatened him and stated: "Get out of here before I shove that windshield wiper up your ass."(Tr.2 at 78:1-25) Rhodes testified that Beckstead and two other miners were present during this exchange. *Id.*

[22] These past and arguably similar incidents are listed as examples of the inadequacy of Stone's investigation, which will be discussed further below.

[23] At the hearing, Keele confirmed under oath that he did not make any false statements during this interrogation. (Tr.1 at 45:6-16)

Attorney Ortiz told Keele he was following up on Stone's investigation and asked Keele questions about the incident on December 17, 2012. (Tr.1 at 107:19-25; Tr.2 at 11:14-21; Tr.2 at 12:7-13) Ortiz and Keele watched the surveillance video. *Id.* During the course of the interrogation, Keele gave Ortiz the same list of names of the other miners who allegedly had been physically assaulted by Poulson in the past.[24] (Tr.1 at 108:1-3) Again, management did not follow up on the allegations against Poulson. At the hearing, Russ Archibald testified that while viewing the surveillance video, one could see Rick Poulson's hand open up as he pressed into Keele from behind. (Tr.2 at 29:23-24)

The decision to terminate Keele was made on March 5, 2013. (Tr.3 at 39:20-22) Poulson testified that he participated in the discussion to fire Keele, but the ultimate decision was made by the Vice President of Operations, Cindy Crane. (Tr.2 at 178:18 – 179:1)

On March 7, 2013, Keele worked the day shift. As he was walking to the bathhouse, he noticed people standing at Kelly Mann's office window and in the hallway office window looking down at him. (Tr.1 at 40:5-19) When Keele walked into the bathhouse, Cox and Kevin Poulson asked him to come upstairs with them. (Tr.1 at 40:20- 24) When Keele went upstairs to Rick Poulson's office, Don Childs, Kelly Mann, and Sheldon Oviett, Keele's union representative, were there. (Tr.1 at 41:4-8) Keele asked for a second union rep, Tom Kay. *Id.*

Don Childs read Keele the letter of suspension with the intent to discharge. (Tr.1 at 41:24-25; Ex. S-20) Keele received no other reason for his suspension than Don Childs reading the letter. (Tr.1 at 42:17-20) The letter states, in pertinent part:

- On or about December 18, 2012, you called the company's ethics hotline and the Emery County Sheriff's office and reported you have been physically assaulted by the mine manager.
- You stated the mine manager pushed you against the man trip equipment and inserted something in your buttocks.
- On February 25, 2013, you were interviewed and asked to explain the above described incident. At this time you were shown a video of the event you described; however, this video shows your statements were false. When questioned, you offered no reasonable explanation for why the video is inconsistent with your statement.
- Making false statements to the company, and making false accusations that an employee committed a sexual assault is a very serious violation of company rules of conduct and will not be tolerated.

Ex. S-20

[24] These incidents are not used as evidence that Rick Poulson engaged in bullying behavior with other miners. They are, however, evidence of the inadequacy of Ortiz's investigation.

On March 11, 2013, Keele refiled his §105(c) complaint with MSHA, adding information about his termination. (Tr.1 at 123:13; Ex. S-42, p. 4-5)

3. Other Protected Activity

Keele was terminated because he accused mine manager Rick Poulson of assaulting him on December 17, 2012. Energy West does not contest that Keele engaged in protected activity on that date and on several other occasions. The following facts pertain to the events of December 17, 2012, summarized above, and other incidents of protected activity for which evidence was admitted at the hearing.

On February 6, 2013, Jason Marietti[25] asked Keele to examine a piece of Sandvik equipment. (Tr.1 at 100:5-6) Keele asked for the manufacturer's recommendations on how to fix the equipment. (Tr.1 at 100:3-6) As Keele read through the manufacturer's document, he found that in order to check the flame arrester, he needed a pin gauge. (Tr.1 at 100:22-25) Neither Keele nor anyone else at the mine had a pin gauge. (Tr. 1 at 101:1-18) Keele asked foreman Marietti what he should do. *Id.* Marietti spoke to management, and as a result, all five of the Sandviks were put out of service until the right pin gauges arrived. (Tr.1 at 101; Tr.2 at 108:22-109:15; Tr.2 at 151:19-25; Ex. S-40, pgs. 7, 25-26) The pin gauges took a week to arrive. (Tr.1 at 102:12-21) Marietti and Beckstead were aware of this report. (Tr.1 at 100:22-23; Tr.2 at 151:19-23).

On, February 6, 2013, some of the other mechanics told Keele, in his capacity as a member of the union's Safety Committee, of another problem on the Eimco 922 underground forklifts. (Tr.1. at 103:3-19) They reported that none of the swan piping on the Eimco 922s had been checked. Keele asked Beckstead about this and Beckstead told Keele that all of the Eimcos would be tagged out until they were inspected. Keele asked for the paperwork regarding the Eimcos, and Beckstead refused to give it to him. (Tr.1 at 102:22-25; Tr.1 at 103:33-25; Tr.1 at 104:1-7; Tr.2 at 111:20-22; Tr.2 at 153:2-23; Tr.3 at 67:6-8; Ex. S-40, pgs. 8, 27) Marietti and Beckstead were aware of this report as well. (Tr.1 at 103:16-19; Tr.2 at 111:20-22; Tr.2 at 153:15-18)

On February 6, 2013, Keele submitted a §103(g) complaint to MSHA alleging that the mine failed to maintain records of required quarterly examination of the swan piping on the 922 Eimco scoops. Keele's complaint resulted in an MSHA investigation and the issuance of two citations. (Tr. 1 at 104:11-19; Tr.2 at 113:16-20; Tr.2 at 154:6-12; Ex. S-40; Ex. S-29) Marietti and Beckstead were aware of this report and the MSHA investigation. (Tr.1 at 103:16-19; Tr.2 at 113:17-18; Tr.2 at 153:10-23; Tr.3 at 67:4-5; Ex. S-40, p.8). Beckstead later approached Keele and said, "What the company ought to do is fire you for making safety complaints and other complaints and that way everybody else would be scared to file complaints." (Tr.1 at 105:9-25)

On March 5, 2013, Keele was scheduled to do an escapeway walk (similar to a fire drill) intended to impress on everyone how to escape in the event of an emergency. (Tr.1 at 115:3-24) Keele and the group he was with did not complete the escapeway walk because one of the miners

[25] At the time of the hearing, Jason Marietti was Keele's immediate supervisor on the day shift. (Tr.1 at 38:15-16)

got sick. (Tr.1 at 117:4-9) If the escapeway walk is completed, the workers are expected to sign a log book confirming completion of the walk. Keele refused to sign the log book despite insistence by Marietti. (Tr.1 at 117:12-25) Keele also told Marietti that he should not turn in the sheet of paper confirming that the escapeway walk was completed when it was not. (Tr.1 at 116:11 – 118:4; Tr.2 at 157:5-25; Ex. S-40, p. 8) Keele reported to Marietti that the secondary escapeway was less than six feet in width and needed to be corrected. *Id.* Marietti reported this to Kevin Poulson, who ordered that the area be brought into compliance. *Id.*

On March 6, 2013, Keele reported a safety concern regarding the proper grooving of some eight inch pipes to Gary Christensen, a safety engineer at the Deer Creek Mine. (Tr. 118:13-20) Keele believed the pipe had not been properly grooved on the ends. (Tr.1 at 114:5-12) Gordon Manchester brought this safety concern to Keele's attention on the morning of March 5, 2013. (Tr.1 at 113:24 – 114:14) Gary Christensen did not know the proper grooving needed for the eight-inch pipes, so Keele and Christensen went across the hall to speak to Lou Tonc, an engineer. (Tr.1 at 119:1-8) Lou Tonc agreed that the pipe needed to be grooved, as Keele pointed out. *Id.* At some point Kevin Poulson[26] came into Lou Tonc's office and they all talked about the issue. (Tr.1 at 119:9-22) As they all went out into the hall, Keele testified that Rick Poulson came out of his office and started yelling at Keele. (Tr.1 at 120:1-16) Keele felt that Poulson's demeanor and tone were very abrasive and created a hostile working environment. (Tr.1 at 120:15-18) A couple of hours after the confrontation with Rick Poulson, Keele went to his boss, Marietti, and told him that he wanted to file a hostile work environment complaint with Don Childs. (Tr.1 at 120:20-25) Keele told Childs he wanted to complain that Rick Poulson had chastised him for raising a safety concern. (Tr.1 at 121:21-25) Later that day, Keele submitted a complaint over the company hotline that Rick Poulson had harassed him for raising a safety complaint about the eight-inch pipe. (Tr.1 at 121:21-24; Ex. S-35) Priest received the hotline complaint. He later drafted Keele's termination letter. (Tr. 2 at 254:4-5) Keele was terminated the next day, March 7, 2013. (Tr.1 at 123:8)

I find that beginning on December 17, 2012, and continuing until March 7, 2013, the day Keele was terminated, Keele repeatedly engaged in protected activity. As summarized below, and described in detail above, Keele engaged in ten instances of protected activity:

1. December 17, 2012 - Keele tagged out seven mantrips and one duster for safety reasons;

2. December 18, 2012 - Keele filed a complaint over the company's hotline alleging that his job had been threatened by Cox, and that Poulson had physically assaulted him for tagging out the mantrips;

3. January 8, 2013 - Keele filed a §105(c) complaint with MSHA alleging discrimination by Cox and Poulson for tagging out the mantrips. MSHA conducted an investigation, interviewing mine management and miners;

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[26] At the time of the hearing, Kevin Poulson had been the general mine foreman for approximately three years. (Tr.3 at 51:4-9)

4. February 6, 2013 - Keele reported to his superiors that the mine was not using the proper pin gauge to check the flame path on the Sandvik equipment, which resulted in the equipment being tagged out;

5. February 6, 2013 - Keele reported to his superiors that the swan piping on the Eimco 922 scoops was not checked;

6. February 6, 2013 - Keele submitted a §103(g) complaint to MSHA alleging that the mine failed to maintain records of required quarterly examination of the swan piping on the 922 Eimco scoops, which resulted in an MSHA investigation and the issuance of two citations (Tr. 1 at 104:11-19);

7. March 5, 2013 - Keele reported to Marietti that the secondary escapeway was less than six feet in width and needed to be corrected;

8. March 5, 2013 - Keele refused to sign a log book indicating that he had completed the quarterly escapeway walk and told Marietti he should not turn in the log book with signatures of those who did not complete the walk;

9. March 6, 2013 - Keele reported a safety concern regarding the proper grooving of eight inch pipes to Christensen. The discussion ultimately included Christensen, Rick Poulson, Kevin Poulson, Lou Tonc, and Marietti; and

10. March 6, 2013 - Keele submitted a complaint to the company hotline that Rick Poulson had harassed him because he raised the eight inch pipe safety concern.

B. Keele's Employment Was Terminated Because He Engaged In Protected Activity

The Commission has noted that "direct evidence of motivation [for termination] is rarely encountered; more typically, the only available evidence is indirect." *Chancon*, 3 FMSHRC at 2510. Circumstantial evidence may include: 1) coincidence in time between the protected activity and the adverse action; 2) knowledge of the protected activity; 3) hostility or animus toward the protected activity; and 4) disparate treatment. *Id.* The more that hostility or animus is specifically directed toward the protected activity, the more probative it is of discriminatory intent. *Id.*

1. Hostility or Animus – *Prima Facie* Case

The Commission has held that "[h]ostility towards protected activity – sometimes referred to as 'animus' – is another circumstantial factor pointing to discriminatory motivation. The more that the animus is specifically directed towards the alleged discriminatee's protected activity, the more probative weight it carrie[s]." *Chacon*, 3 FMSHRC at 2511. The Respondent argues that management at the Deer Creek mine welcomed safety complaints. (Tr.2 at 174:13 – 176:22; Tr.2 at 273:4-20; Tr.2 at 135:1-24; Tr.2 at 158:8-12; Tr.2 at 90:2) However, the events in this case occurred against a contentious labor/management backdrop. The Respondent's witnesses' testimony evidenced a perceptible animus towards the Union and its members,

including Keele. As discussed in more detail below, I have taken the Respondent's animus and hostility towards Keele into consideration when evaluating pretext.

2. Adverse Employment Action

The Commission has defined "adverse action" as:

> "[A]n action of commission or omission by the operator subjecting the affected miner to discipline or a detriment in his employment relationship." 601 F.3d at 428 (quoting *Sec'y on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842, 1847-48 (Aug. 1984)). [...] [T]he Commission has recognized that, while "discrimination may manifest itself in subtle or indirect forms of adverse action," at the same time "an adverse action 'does not mean any action which an employee does not like.'" *Hecla-Day Mines Corp.*, 6 FMSHRC at 1848 n.2 (quoting *Fucik v. United States*, 655 F.2d 1089, 1096 (Ct. Cl. 1981)). Consequently, where the action alleged to be adverse against the miner is not self-evidently so -- such as a discharge or suspension would be -- the Commission will closely examine the surrounding circumstances to determine the nature of the action. *Id.* at 1848. "Determinations as to whether an adverse action was taken must be made on a case-by-case basis." *Id.* at 1848 n.2.

Sec'y of Labor ex rel. Pendley v. Highland Mining Co., 34 FMSHRC 1919, 1930 (Aug. 2012)

The Commission has found that a discharge, demotion, or termination is an adverse employment action. *Pretty Good Sand Co., Inc.*, 36 FMSHRC 1177, 1186 (May 2014)(citing 30 USC § 815(c)(1); *see also Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475, 1478 (Aug. 1982), *aff'd*, 770 F.2d 168 (6th Cir. 1985). Additionally, the United States Supreme Court has held such action must be "material[ly] adverse action" and broadened the scope of the "adverse action" to include Title VII retaliation provisions such as actions by an employer that "could well dissuade a reasonable worker from making or supporting a charge of discrimination." *Burlington Northern & Santa Fe Railway Co. v. White*, 584 U.S. 53, 68 (2006).[27] Here, the correct analysis would be whether the alleged adverse action would have a chilling effect on a miner's desire to raise safety complaints.

In *Pendley*, the Commission discussed the fact that reassignment of job duties, even within the same job classification, can constitute an adverse employment action when such change is less desirable, arduous, or otherwise detrimental to the miner. 34 FMSHRC at 1931. Keele's job duties changed after December 17, 2012, when he was assigned to the lift and worked on changing oil, changing starters, and changing bearings on the diesel equipment. (Tr.1

[27] The Commission acknowledged the *Burlington Northern* concept of adverse action is applicable in § 105(c) cases in *Pendley*, 34 FMSHRC at 1932.

at 91:23-25; Tr.1 at 92:9-11; Tr.1 at 93:5-8) Keele was not allowed to go underground or learn to work on more difficult equipment. (Tr.1 at 196:1 – 198:23)[28]

The weekly equipment examination master list shows Keele's initials in connection with approximately 400 examinations of equipment from May 27, 2012, to January 26, 2013. (Ex. S-27; Tr.1 at 94:6 –96:25; Tr.1 at 99:19-22) The number of exams performed by Keele diminished significantly after December 17, 2013, when his permissibility examination duties were curtailed. (Tr.1 at 196:9-25) From January 20, 2013, until his termination on March 7, 2013, Keele only performed examinations on two pieces of equipment. (Ex. S-28; Tr.1 at 95:18-19; Tr.1 at 96:1-3)[29] Compared to the documented incidents when Keele performed equipment examinations prior to his demotion, this shows a dramatic curtailment of an essential component of Keele's job duties after December 17, 2012.

Not being allowed to go underground meant that Keele was no longer able to learn new skills while he was working on the lifts in the shop. (Tr.1 at 93:15) This also prevented him from working on the heavy underground equipment or learning finer points of the trade from more experienced mechanics. (Tr.1 at 194:1-25; Tr.2 at 160:10-14) The change of duties occurred despite the fact that Beckstead, Marietti, and Poulson all agreed that the reasons for tagging out the mantrips on December, 17, 2012, were legitimate. (Tr.1 at 195:20-21; Tr.2 at 105:16-18; Tr.2 at 140:4-5; Tr.2 at 144:20-21; Tr.2 at 195:7-9) Further, there is no written policy that states when a mechanic is supposed to inform management that a piece of equipment is tagged out. (Tr.2 at 141:3-6)

Don Larson, a fellow diesel mechanic, testified that when he complained about the change in job assignments, the foreman stated that his hands were tied and apologized that the job assignments were not fair. (Tr.1 at 197:5-24) Marietti told Larson that he could not assign Keele underground work because management did not want Keele causing problems underground, and assigning Keele to underground duty would put Marietti's job in jeopardy. *Id.* Marietti agreed that new mechanics such as Keele would not gain job-related knowledge unless they were assigned to tasks they had not completed before. (Tr.2 at 160:10-14).

The foregoing convinces me that management bore animus against Keele which extended beyond the tagging out incident on December 17, 2012. I conclude that the reassignment of job duties was an adverse act. Management took steps to minimize Keele's opportunities to make safety complaints, which adversely impacted his chances to improve his job skills. Even though Keele continued to work as a diesel mechanic, the restriction in his job duties interfered with and disrupted his ability to develop skills in his position as a diesel mechanic.

It also appears that management was willing to put pressure on lower-level foremen and supervisors (Marietti) to keep Keele in a position where he could not make more safety

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[28] After December 17, 2012, Lea was also assigned to the lifts and went underground only one more time. (Tr.2 at 50:6-7; Tr.2 at 48:11-16)

[29] Lea filed a discrimination case with MSHA when he felt his job was threatened. (Tr.2 at 56:16-17) Lea was not fired after December 17, 2012, and was not disciplined (other than being demoted). (Tr.2 at 63:7-11)

complaints. It is a matter of reasonable inference to conclude that the company took adverse action against Keele due, at least in part, to the frequency, number, and significance of Keele's safety complaints and due to his union status. As discussed further below, these adverse actions were animated by management's desire to punish Keele for engaging in protected activity and to dissuade him from engaging in further protected activity.

3. Coincidence In Time Between The Protected Activity And The Adverse Action

The Commission has accepted substantial gaps between the last protected activity and adverse employment action. *Pretty Good Sand Co., Inc.*, 36 FMSHRC at 1186 (citing *Cam Mining, LLC*, 31 FMSHRC at 1090 (three weeks); *Sec'y of Labor ex rel. Hyles v. All American Asphalt*, 21 FMSHRC 34 (Jan. 1999). Indeed, the Commission has stated "We 'appl[y] no hard and fast criteria in determining coincidence in time between protected activity and subsequent adverse action when assessing an illegal motive. Surrounding factors and circumstances may influence the effect to be given to such coincidence in time.'" *All American Asphalt*, 21 FMSHRC at 47 (quoting *Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 531 (Apr. 1991)). Here, there is a close proximity between Keele's protected activities and the adverse action taken against him, namely the change in job duties and his ultimate termination. As discussed above, the first relevant instance of protected activity began on December 17, 2012, and continued until March 6, 2013, the day before Keele was terminated. The series of events meets the time requirements to establish a temporal nexus.

For the foregoing reasons, I find that Keele presented a *prima facie* case of discrimination in that he proved by a preponderance of evidence that he engaged in protected activity and the record supports a reasonable inference that Keele was terminated for engaging in such activity. Indeed, there is a logical and rational connection between the evidentiary facts here and the inference that Keele was terminated for engaging in protected activity.

IV. Energy West's Affirmative Defense

The operator may rebut a *prima facie* case of discrimination by showing that the adverse action for which the miner seeks relief was not at all motivated by the miner's protected activity. *Pasula*, 2 FMSHRC at 2799-800. In analyzing a mine operator's asserted justification for taking adverse action under the *Pasula-Robinette* framework, the inquiry is limited to whether the reasons are plausible, whether they actually motivated the operator's actions, and whether they would have led the operator to act even if the miner had not engaged in protected activity. The ALJ may not impose his own business judgment as to an operator's actions, *Chacon*, 3 FMSHRC at 2516-517, and he may not substitute his own justification for disciplining a miner over that offered by the operator. *McGill*, 23 FMSHRC at 989. Respondent claims as an affirmative defense that Keele made a false statement that Rick Poulson sexually assaulted him, and because of his false statement, Keele violated Respondent's Business Code, which justified his termination.

Respondent offers two grounds for Keele's termination in the March 7, 2013 letter: (1) Keele made false statements to the hotline and the Sheriff that Poulson sexually assaulted him;

and, (2) On February 25, 2013, Keele offered no reasonable explanation to attorney Ortiz as to why the surveillance video footage was inconsistent with Keele's statement. (Ex. S-20) Respondent argues that Keele was terminated because he violated its Code of Business Conduct. The company's EEOC Policy states that "[i]f the company determines an individual has misused the process by intentionally filing a false charge of discrimination or harassment, he or she may be subject to discipline, up to and including termination of employment." (Ex. S-33, pg. 508)

Don Childs testified that Keele violated the company's rules of conduct because he felt Keele made a false accusation against Poulson pertaining to sexual assault. (Tr.2 at 217:13-19) Paul Priest testified that he also believed Keele intentionally fabricated his accusation that Rick Poulson sexually assaulted him based on the Ortiz transcript and the video. (Tr.2 at 265:8-13) Priest felt that Keele's accusations against Poulson amounted to a violation of Mid American's Business Code. (Tr.2 at 271:5-12) Cindy Crane testified that she believed Keele filed a false complaint with the intent of harming Rick Poulson. (Tr. 47:11-12)

V. Pretext

The Commission has explained that "pretext may be found, for example, where the asserted justification is weak, implausible, or out of line with the operator's normal business practices." *Price*, 12 FMSHRC at 1534. Further, "[a] plaintiff may establish that an employer's explanation is not credible by demonstrating 'either (1) that the proffered reasons had no basis *in fact*, (2) that the proffered reasons did not *actually* motivate his discharge, or (3) that they were *insufficient* to motivate discharge.'" *Turner*, 33 FMSHRC at 1073 (emphasis in original). Additionally, "[a] company's failure to follow its own policies can be evidence of pretext." *Garza*, 36 FMSHRC at 992. Another useful test to determine whether an employer's proffered justification for taking adverse action is pretext is to determine whether it is plainly credible and plausible. *Quakenbush v. Kentucky-Tennessee Clay,* 26 FMSHRC 913, 922-23 (Dec. 2004)(ALJ Feldman). In applying these standards, I have considered the credibility of the witnesses from both sides and the credibility of the process used to reach the decision to fire Keele.

A. Hostility or Animus Against Keele and the Union

Deer Creek is a United Mine Workers Union mine. (Tr.2 at 208:8-17) The labor contract between Energy West and the union expired in January, 2013, and Respondent and the union had been in negotiations over a new contract since November, 2012. (*Id.*; Tr.2 at 248:21 – 249:18) At the time of the trial, the parties were still conducting contract negotiations, but were continuing production under the old contract. (Tr.2 at 208:8-17)

Paul Priest testified that he observed an escalation in the tension between the union and company representatives because of the contract negotiations. (Tr.2 at 249:7-13) Priest also testified that there was an increased number of grievances, and an increase in the number of unfair labor practice charges filed during the time of contract negotiations. (Tr.2 at 249:22-24) Cindy Crane, the person who made the ultimate decision to terminate Keele, testified that there

was a contentious labor negotiation environment, and that she believed Keele exploited that environment to help the union's cause. (Tr.3 at 26:10-22)[30]

When Keele and Lea tagged out the seven mantrips on December 17, 2012, it was obvious to management (Clayton Cox and Rick Poulson) that they were not going to be able to accomplish the next shift change in time to avoid a disruption in coal production which, according to Rick Poulson, would cost the company upwards of $400.00 per minute. (Tr. 2 at 202:22 – 203:6) Although both Cox and Poulson claimed in their testimony that their angry encounters with Keele had nothing to do with the fact that Keele and Lea had tagged the mantrips out of service as they did, I am persuaded that their claims are false. Their angry and aggressive actions and language toward Keele and Lea were consistent with their being upset at the prospect of a costly disruption at the next shift change. Further, contrary to the evidence in the record, Cox and Poulson (as well as other management personnel) were convinced that Keele and Lea had staged the tagging out incident with the knowledge and intent that doing so, when and how they did, would cause a disruption at the shift change, and that this was somehow done as part of a concerted larger union plot to cause the company trouble during the rancorous labor contract negotiations. As tenuous as this sounds, it is apparent from the testimony of management witnesses that management acted towards Keele with this as their operating assumption.

From this I conclude that the company harbored animus towards the union in general, and Keele in particular. I find also that this animus permeated the investigation of Keele's allegation of assault, management's deliberations, and the ultimate decision to terminate Keele's employment. "Animus" is used in the broad sense to mean either a motivation to do something, or the presence of hostility or ill feeling. Animus is evident in the way the company investigated Keele's assault complaint against mine manager Rick Poulson and in the process used to reach the decision to fire Keele, in particular with regard to the way management applied the company's code of business conduct and equal employment opportunity, discrimination, and harassment policies. This animus calls into question the *bona fides* of the company's reaction to Keele's protected activity and related complaints. As discussed further below, I have taken the Respondent's animus into consideration in evaluating whether its claimed business justification for terminating Keele is credible and plausible.

B. Energy West's Code of Business Conduct and Equal Employment Opportunity, Discrimination and Harassment Policy

An evaluation of the credibility of Energy West's claim that it would have taken adverse action against Keele irrespective of the protected nature of his workplace complaints must include an analysis of its Code of Business Conduct and EEO, discrimination, and harassment policies and an assessment of the integrity of the company's interpretation and application of those policies. Respondent argued that the decision to terminate Keele was reached by applying the substance of the company's policy statements to the facts available to it. In doing so, it argued, its decision makers were careful to assess the evidence available to them and to apply the

[30] It is notable that at no point during Keele's testimony did he refer to the tension between the union and the company.

applicable policy statements in an even-handed manner. The company obligated itself through its policies to use good faith in applying its policies to the facts. The presence of animus justifies a careful evaluation of the good faith and credibility of the process the company applied to justify Keele's termination.

The court is keenly aware that it must not merely substitute its own sense of fairness for Energy West's business decision to terminate Keele. In order to keep the decisional analysis within the limits set by the legal principles outlined above, it helps to compare what Energy West actually did to what its policy statements lead Keele, other employees, and now this court by extension, to expect it to do. Identifying the deviations between what was promised and what was actually done helps the court assess whether Resondent's actions vis-à-vis Keele are credible and deserve to be left alone, or otherwise. Such a comparison is also an established method for evaluating whether the company's proffered justification for adverse action is a credible and allowable response to the employee's actions, or is more accurately seen as a pretext contrived by the company to cloak prohibited retaliation. It is important to consider not only the individual credibility of the decision makers and other players in this case, but also to weigh the believability of the process used by the decision makers to reach the decision to terminate Keele. I call this aspect of the analysis "process credibility." My conclusion is that the process used to fire Keele lacks credibility and was not applied in good faith. This conclusion is the result of weighing credibility, not just substituting judgment.

MidAmerican Energy Holdings Company's Code of Business Conduct and its Equal Employment Opportunity, Discrimination and Harassment Policy govern Energy West as well as its holding company.[31] (Ex. S-32; Ex. S-33) Among other things, these policies prohibit unwanted physical contact and actions that are intimidating or threatening. (Ex. S-32, pgs. 11-12). They also prohibit physical conduct that is sexual in nature, including same sex harassment, which creates an intimidating, hostile, or offensive work environment. (Ex. S-33, pgs. 3, 6) The EEO Policy also states that "[i]f the company determines an individual has misused the process by intentionally filing a false charge of discrimination or harassment, he or she may be subject to discipline, up to an including termination of employment." (Ex. S-33, p. 508)

Employees are also promised protection from retaliation for good faith reporting of ethical violations and violations of the code of business conduct. (Ex. S-32, p. 4; Ex. S-33, p. 9; Ex. S-34, p. 3) The Business Code states:

> You may report ethical violations in confidence without fear of retaliation. No retaliatory action of any kind will be permitted against anyone making such a report in good faith. In many instances, retaliation is against the law. *Good faith reporting of violations or possible violations will not result in adverse consequences to the person reporting them, even if perceived*

[31] Energy West is an operating division of Interwest Mining, a wholly owned subsidiary of PacifiCorp. PacifiCorp is a wholly owned subsidiary of MidAmerican Energy Holdings Company. Energy West employees are subject to the MidAmerican Energy Holdings Company's Code of Business Conduct. (Stipulations 8, 9, and 10)

> *violations are ultimately proven not to have occurred [...] However, if a report is made in bad faith – for instance, if a false or misleading report is made in a deliberate effort to get someone in trouble (as opposed to an honest mistake) – the person making the report may be subject to disciplinary action.*

Ex. S-32, p. 4 (emphasis added)

The EEO Policy states:

> Retaliation against any person who complains of or participated in the investigation of a harassment or discrimination complaint is prohibited. Where the company finds retaliation has occurred, individuals who engage in the retaliatory behavior may be subject to discipline, up to and including termination of employment, *regardless of whether the original complaint is substantiated.*

Ex. S-33, p. 9 (emphasis added)

MidAmerican's Ethical Standards and Performance Expectation's policy states:

> You may report violations of the company codes of business conduct, policies and the law without fear of retaliation. Good faith reporting of violations or possible violations will not result in adverse consequences to the person reporting them, *even if the perceived violations are ultimately proved not to have occurred.*

Ex. S-34, p. 3 (emphasis added)

The highlighted text in the Business Code above makes it clear that Energy West created a self-imposed obligation to determine if Keele's allegations of assault against Rick Poulson were made in bad faith, not merely whether they should be believed. If it had hewn to its own policies, Energy West would have taken steps to assure that the evidence it evaluated supported a conclusion that Keele's complaint was made in bad faith. However, it appears that it stopped far short of doing so, which along with the evidence of animus makes its retaliatory intent very clear.

The company's policies are clear; making an allegation such as Keele's in a manner that is merely unconvincing is specifically and unequivocally protected. "Good faith reporting of violations or possible violations will not result in adverse consequences to the person reporting them, even if perceived violations are ultimately proven not to have occurred [...]." *Id.* Moreover, the policy statement is internally consistent when it places the focus on the complaining party's perception of whether his complaint is factually accurate, not on the ultimate believability of the report. Energy West promised to evaluate Keele's assault allegations on the basis of <u>his</u> perception and intent, not on whether his version is ultimately provable or even believable.

Only when the complainer deliberately makes a false report with the intent to mislead, such as with intent to get someone in trouble, will the report be deemed to have been made in bad faith. Even then, whether a person who makes a bad faith report is subject to disciplinary action is equivocal, adverse action may or may not be taken in response. However whether a person who makes a subjectively good faith report is protected from disciplinary action is clear and unequivocal. Missing this distinction can be the result of either an honest misreading and misinterpretation of the policy or the deliberate misapplication of the policy. The former is an issue the court should not touch; the latter is consistent with, and proof of the larger issue of animus and is an important indicator of pretext.

The company's policy statements repeatedly promise to protect Keele against adverse action and retaliation if he makes a complaint that he subjectively believes to be true, even a complaint with criminal or sexual implications. This promise is guaranteed by a second commitment, i.e., that no adverse action will result even if his complaint cannot be determined to be factually true or cannot be believed, unless it is shown that he made the complaint knowing its substance to be false and with the intent to harm someone else. Here, the Respondent argues that Keele made the complaint with the knowledge that it was false and for the purpose of getting Poulson in trouble. Stone's investigative report concludes that Keele's "allegation of assault was not substantiated," (Ex. S-31, p. 5) but she did not find that Keele made his allegation in bad faith.

It is not for the court to decide whether it is prudent for an employer to make such promises to its employees, but when it does, and when it appears, as it does in this case, that it acted against the employee and against its published policies under the cloud of animus, the court must evaluate that action by weighing the evidence and concluding whether the company acted in good faith. The ultimate determination of pretext relies at least in part on an evaluation of the company's good faith. I conclude for the reasons that follow that Keele made his allegations of assault in good faith and that the way the company applied its policies in response was done in bad faith.

The operative wording in Respondent's Business Code is "intentionally filing a false charge." The company ignored all the consistent evidence that Keele made his complaint from a good faith belief and perception that he had been sexually assaulted. Aside from Keele's personal conviction that his complaint was made in good faith, the weight of the evidence is that the assault happened. The fact that the video does not show the sexual part of the claim or that the County Sheriff declined to prosecute does not prove that Keele complained in bad faith. Exhibit S-38, the letter from W. Brent Langston, Deputy Emery County Attorney, to Mr. McLeod reflects the view of the prosecuting authorities that "something may have happened" although, in their estimation, the video evidence they reviewed was not conclusive and would not support their requirement to prove the alleged assault beyond a reasonable doubt to attain a criminal conviction.[32] It appears that management seized on that information as being consistent with a desire to retaliate against Keele.

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[32] Prosecution was declined on January 22, 2013, just 37 days after Keele made his complaint. Keele was fired on March 7, 2013, forty-five days after Poulson was released from

C. Keele's Accusation Did Not Violate Energy West's Business and Ethics Codes

The record contains several items that weigh heavily against the proposition that Keele intentionally made a false claim of assault by Rick Poulson. Keele made consistent statements about the assault:

- To his coworkers within minutes of the event (December 17, 2012);
- Over the company's hotline (December 18, 2012, Ex. S-24);
- To the Emery County Sheriff's Office over the telephone (December 17, 2012);
- To the Sheriff's Office in writing, under oath, and subject to criminal sanctions under Utah law.[33] (December 19, 2012, Ex. S-25) Importantly, Keele provided a written sworn statement to the Sheriff under penalty of perjury that Rick Poulson had sexually assaulted him;
- To two interviewing Sheriff's deputies (December 19, 2012);
- To Debra Stone in an interview setting (December 19, 2012);
- To MSHA (December 28, 2012, and March 11, 2013, Ex. S-42);
- To Steven Ortiz (February 25, 2013, Ex. S-30); and
- To Utah Workforce Services (Ex. S-37) for unemployment purposes.

The consistency among all of Keele's statements about the circumstances of the assault: (1) supports the credibility of his claim of assault; (2) was available to the company to consider in reviewing whether Keele's statements were made in bad faith; and, (3) undercuts the credibility of the company's claim that its review was done in good faith and without pretext.

Additionally, the fact that Keele made his complaint to the prosecuting authorities under oath, subject to potential criminal penalties, and the fact that those prosecuting authorities did not even mention that dimension of Keele's complaint in the "no-prosecution" letter certainly does not support management's perception that the prosecutor's declination to file criminal charges against Poulson provided proof of Keele's having made a false statement. Management's eagerness to characterize Keele's allegations as false is weighty evidence of their intent to retaliate. The weight of the evidence underscores the consistency of Keele's various statements about what happened. I do not find any evidence in this case to support a finding of bad faith on Keele's part, especially considering the fact that he filed a sworn statement, subject to the penalties of perjury, with the Sheriff's Department regarding the assault.

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any criminal exposure. Cindy Crane testified that management "never got anything definitive saying, 'We're not doing this' or 'We are doing this,' but in verbal conversation Paul Priest was able to obtain [. . .] information" that the County Attorney was not going to prosecute. (Tr.3 at 20:1 –21:4.)

[33] Under § 76-8-504 of the Utah Code: "A person is guilty of a class B misdemeanor if (1) He makes a written false statement which he does not believe to be true on or pursuant to a form bearing a notification authorized by law to the effect that false statements made therein are punishable [...]" In Utah, a class B misdemeanor is punishable by up to six month in jail and up at a $1,000.00 fine. *See* Utah Code §76-3-204 and §76-3-301.

The second reason for termination, i.e., that Keele offered no reasonable explanation to attorney Ortiz why the surveillance video footage was inconsistent with Keele's statement, also fails to show Keele acted in bad faith, which is purportedly the standard created by the company against which to judge allegations such as Keele's. First, Ortiz's question does not square with the good faith statement standard set out in the company's policies. If the decision makers were concerned about fairly applying the policy statements relating to reporting of alleged assaults and the assurance of no reprisal in response to such reporting, they could have focused on whether Keele's allegations were made in good faith, not whether they were in agreement with their own decidedly self-protective interest in making this very messy allegation go away.

Second, it is questionable whether Keele could have answered the question Ortiz posed in a manner that would have satisfied the decision makers at all. Keele was fired for failing to convince the decision makers – a group that included the accused, Rick Poulson – that his assault accusation was consistent with their prior interpretation of the surveillance video. The structure of this inquiry (loaded question or complex question fallacy) is the equivalent of the famous joke question: "When did you stop beating your wife?" It presupposes a conclusion that is at least arguably at odds with most of the evidence, including the video itself. It is also posed in such a way that any response could be seen as a condemnation. The question attempts to limit any direct reply to be one that serves the questioner's agenda.[34] Since management had already reached the desired conclusion that Keele's story was inconsistent with the video evidence (Tr.3 37:14-25), Keele could not have provided any clarity to the inquiry without either agreeing with the pre-determined interpretation that the video did not show an assault or agreeing that his allegation of assault was false in the first place.

This is not merely a curious conundrum. It is evidence of pretext. It is evident that a decision had already been made to twist away from the company's policy statements about encouraging free reporting of prohibited behaviors and freedom from reprisal for making even an erroneous report in good faith. The process offered in evidence to show the *bona fides* of management's response to and handling of Keele's accusation was distorted and misapplied. Not only was the process unconvincing, it was used as a tactic to defend against Keele's accusation.

It must be noted that Respondent's entire argument rests on the surveillance video footage. Respondent claims that based on this alone, Keele was lying about his assault claim. This is simply not true. Respondent cannot base its argument solely on the fact that the video does not explicitly show a sexual assault. The angle of the camera does not allow viewers to explicitly see Poulson's actions because he was partially blocked by the mantrip. Thus, Respondent cannot claim with certainty that Rick Poulson did not assault Keele. I have, however, as discussed above, concluded that based upon a preponderance of evidence Rick Poulson did assault Keele.

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[34] Douglas N. Walton, *Informal logic: a handbook for critical argumentation* 36–37 (1989).

The company failed to consider any alternative interpretation of the video. There is no discussion of what other elements bear on their assessment of Keele's good faith in making his complaints. This "rush to judgment" seriously undercuts the credibility of the company's decision making process, which in turn supports a finding of pretext. Furthermore, the fact that the company consulted with Rick Poulson in deciding to fire Keele further erodes the process credibility. The company ignored its policy promise not to take action against an employee who lodges a good faith complaint by allowing Poulson to participate in the decision-making process.

The other pieces of evidence relating to the alleged assault are independently sufficient to at least give the Respondent reason to carefully evaluate and weigh Keele's allegations against the surrounding contextual facts, which they appear not to have done. Even independent of the context of the company's policy statements regarding freedom from assault and protection against retaliation for anyone making a good faith claim of assault in the workplace, Keele's unwavering adherence to his claim of assault and the evidence corroborating its elements strongly support a finding that an assault did happen and even more strongly support Keele's good faith in making the claim.

I conclude that the company's actions against Keele were not taken in good faith. They were a pretext. Management chose to ignore the company's policy promises and to ignore the preponderant evidence that Keele was telling the truth. This supports the further conclusion that the company's proffered justification for termination and the process by which it was done were neither credible nor plausible.

D. Inadequate Investigation into Keele's Complaint

An employer's insufficient investigation into an employee's complaint may be evidence of discriminatory motive or intent. *Sec'y of Labor ex rel. Lopez v. Sherwin Alumina*, 36 FMSHRC 730 (Mar. 2014)(ALJ Bulluck)(the investigation was a "sham" that amounted to a "witch hunt" designed to fire the miner, in particular where the employer had already decided to fire the miner before meeting with him as part of the investigation). I conclude that the decision to discipline Keele was the result of such an insufficient and questionable investigation.

Stone only interviewed Keele, Lea, and Cox. (Ex. S-31) She did not interview Rick Poulson because she was not permitted to speak to him because the company had hired him a criminal defense attorney (Tr.2 at 182:21 – 183:5), and he had been advised not to participate. (Tr.2 at 183:1-3; Tr.2 at 254:23-25; Tr.3 at 19:5-6) It is troubling that the company hired Poulson a criminal defense attorney before conducting an investigation into the events of December 17, 2012. It calls into question the company's *bona fides* in carrying out its published policies of soliciting good faith complaints from employees and honestly and competently investigating such complaints. It is astounding that, in addition to hiring Rick Poulson a criminal attorney, which had the effect of shielding him from an internal investigation, the company allowed Poulson to participate in the decision to fire Keele. Including Rick Poulson in the decision to terminate Keele severely impugns Respondent's process credibility.

The February 25, 2013 interrogation by Ortiz provided no additional information, as Keele's testimony was essentially the same as the report from Stone. Again, Keele gave Ortiz

details about other alleged incidents of bullying behavior on the part of Rick Poulson, however, Ortiz did not follow up on Keele's allegations. (Ex.S-30 at 45:2-47:17) Keele even told Ortiz that this incident was not the first time Poulson had threatened him. (Ex. S-30, at 47:1-22) Around the end of July or beginning of August, 2012, Poulson allegedly threatened Keele for making grievance complaints. *Id.* Surprisingly, no one from management, nor anyone hired by management to investigate the incident on December 17, 2012, looked into this. Russell Archibald, Keele's union representative was present during the Ortiz interview, and he corroborated the information about Poulson's past assault on at least one miner. (Ex. S-30, at 47:16-25) Additionally, both Don Childs and Paul Priest reviewed the Ortiz investigation transcript and failed to react to the additional allegations made against Rick Poulson. (Tr.2 at 220:17-19; Tr.2 at 263:3-11; Tr.2 265:8-13)

Cindy Crane made the ultimate decision to terminate Keele. However, she did not review anything other than the video footage. (Tr. 3 at 37:14-15) She did not review the hotline complaint, (Tr.3 at 38:15-23) or any reports or information from Stone or Ortiz, (Tr.3 at 33:11-20), or any of Keele's statements, including the sworn statement provided to the Sheriff. *Id.* Additionally, Crane had input and recommendations from Paul Priest, Don Childs, and Rick Poulson as to whether Keele should be terminated. (Resp. Brief at 17; Tr.2 at 263:1-16; Tr.3 at 15:5-8; Ex. S-40, p. 10)

I find that the insufficiency of the investigation is evidence of discriminatory intent against Keele. This lack of process credibility is proof of pretext.

VI. Conclusions of Law

From December 17, 2012, until March 7, 2013, the day Keele was terminated, he engaged in ten instances of protected activity. Respondent made an unconvincing "business judgment" argument for Keele's termination, namely that Keele falsely accused Poulson of sexually assaulted him, and thus violated the company's Business Code. Based on the weight of evidence submitted at the hearing, I am convinced that mine management had already made a determination to fire Keele, and they used Keele's assault allegation as a means to their preferred end. The weight of evidence and reasonable inferences drawn from it support the conclusion that Keele engaged in protected activity and that Respondent terminated him in response.

Respondent's proffered reasons for Keele's termination are unpersuasive. Management's claim that Keele fabricated the assault story to retaliate against management because of contract negotiations is unconvincing and far-fetched. Other than mine management's notably uniform opinion that Keele's tagging out the mantrips was an intentional attempt to disrupt mining operations motivated by his loyalty to the union, there is no evidence to support the idea that Keele had any motive related to the tensions surrounding the contract negotiations. It is noteworthy that all of the company's witnesses candidly expressed markedly similar suspicions that Keele and Lea were out to sabotage production, while at the same time uniformly denying any intent on their own part to retaliate in response. Management's perception that Keele's actions were related to increased tension is mere speculation. However, due to the lack of connection between Keele's complaint about the assault and the apparent degree to which management seems to have been motivated to act against him, it is reasonable to infer that

management's failure to competently, fairly, or thoroughly investigate all of the pertinent and obvious evidence Keele suggested in his various statements about the assault was consistent with: (1) an intent to retaliate against Keele; (2) their perception of union chicanery; and (3) their purpose to push back against it.

I can detect no modicum of honest effort by the Respondent to fully develop the facts and evaluate what happened here. The overriding impression I get from reviewing the evidence is that the Respondent used its business processes as a pretext to avoid fairly evaluating Keele's allegations. This is particularly significant because Keele's termination for engaging in protected activity has the potential of discouraging other minors from making safety complaints for fear of retaliation.

This is not a situation where the court disagrees with the company's decision. Management's decision results from a self-protective and perhaps vindictive interest in discrediting Keele. Objectively, the only thing that supports the company's assessment of Keele's lack of good faith is its interpretation of the video evidence. The failure to conduct a credible investigation and to credibly weigh all the evidence, and the immediate decision (ignoring preponderant and consistent evidence to the contrary) that Keele was lying justify the court's conclusion that management used the internal investigation process as a pretext to fire Keele.

In light of the evidence of discriminatory animus and the deviation from established company policy, I conclude that Keele has shown by a preponderance of the evidence that the proffered reason for the termination was a pretext.

VII. Penalty Amount

The principles governing the authority of Commission administrative law judges to assess civil penalties *de novo* for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges the "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). Under Section 110(i) of the Mine Act, the Commission is to consider the following when assessing a civil penalty: (1) the operator's history of previous violations; (2) the appropriateness of such penalty to the size of the business of the operator charged; (3) whether the operator was negligent; (4) the effect on the operator's ability to continue in business; (5) the gravity of the violation; and (6) the demonstrated good faith in abatement of the violative condition. 30 U.S.C § 820(i). Thus, the Commission alone is responsible for assessing final penalties. *See Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151-52 (7th Cir. 1984) ("[N]either the ALJ nor the Commission is bound by the Secretary's proposed penalties ... we find no basis upon which to conclude that [MSHA's Part 100 penalty regulations] also govern the Commission."); *see American Coal Co.*, 35 FMSHRC 1774, 1819 (July 2013)(ALJ).

The Commission has repeatedly held that substantial deviations from the Secretary's proposed assessments must be adequately explained using the section 110(i) criteria. *E.g., Sellersburg Stone Co.*, 5 FMSHRC at 293; *Hubb Corp.*, 22 FMSHRC 606, 612 (May 2000); *Cantera Green*, 22 FMSHRC 616, 620-21 (May 2000) (citations omitted). A judge need

not make exhaustive findings but must provide an adequate explanation of how the findings contributed to his or her penalty assessments. *Cantera Green*, 22 FMSHRC at 622.

Although all of the statutory penalty criteria must be considered, they need not be assigned equal weight. *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997). Generally speaking, the magnitude of the gravity of a violation and the degree of operator negligence are important factors, especially for more serious violations for which substantial penalties may be imposed. *Musser Engineering*, 32 FMSHRC at 1289 (judge justified in relying on utmost gravity and gross negligence in imposing substantial penalty); *Spartan Mining Co.*, 30 FMSHRC 699, 725 (Aug. 2008) (appropriate for judge to raise a penalty significantly based upon findings of extreme gravity and unwarrantable failure); *Lopke Quarries, Inc.*, 23 FMSHRC 705, 713 (July 2001) (judge did not abuse discretion by weighing the factors of negligence and gravity more heavily than the other four statutory criteria.). In addition, Commission ALJs are obligated to explain any substantial divergence between a penalty imposed and that proposed by the Secretary. *See Sellersburg Stone Co.*, 5 FMSHRC at 293.

The size of this operator and the controlling entity as of 2012 was 3,294,734 in annual tonnage. The number of violations per inspection day was 0.28. There was no history of 105(c) violations. Respondent stipulated that the proposed penalty will not affect Energy West's ability to remain in business.

As to gravity and negligence, Respondent's response and investigation into Keele's December 17, 2012, complaint was inadequate and motivated by animus. Keele's work duties were curtailed in response to his tagging out the mantrips. Management's actions could have a chilling effect on miners who wish to raise legitimate safety and health concerns. This is unacceptable when the Mine Act is written to protect miners who wish to alert mine management and MSHA of health and safety violations. Therefore, I conclude that the Respondent violated Sec. 105(c), and its negligence was high. Accordingly, the Secretary's penalty recommendation of $20,000.00 is reasonable and appropriate.

WHEREFORE, it is **ORDERED** that:

1. Keele is **REINSTATED** at the Deer Creek Mine to the same or equivalent position he held at the time of his suspension;
2. The Respondent must expunge Keele's employment record of any negative reference to these discrimination proceedings, and any negative statements or inferences regarding the Respondent's claim that Keele fabricated false statements;
3. Energy West must pay $20,000.00 in civil penalties;
4. Keele's temporary economic reinstatement is hereby **DISSOLVED**; and

5. Within 30 days of this Decision, the parties must send their post decision briefs regarding the narrow issue of Keele's claim that the Respondent failed to pay all that he was entitled to under the economic reinstatement agreement.

L. Zane Gill
Administrative Law Judge

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